

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

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)	
YOUNG’S SEPTIC SERVICE,)	
)	
Petitioner,)	Docket No. 0115-03-17
)	
v.)	
)	
IDAHO DEPARTMENT OF)	FINAL ORDER ON PETITION
ENVIRONMENTAL QUALITY,)	FOR REVIEW
)	
Respondent.)	
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I. INTRODUCTION

Young’s Septic Service (Young’s) brings this contested case challenging the Idaho Department of Environmental Quality’s (Department’s) disapproval of the location and method proposed by Young’s in its application for renewal of a permit to land-apply domestic septage. On December 17, 2003, Young’s filed a *Petition* [for contested case hearing] asserting the following claims against the Department: (1) the application should be considered on the basis of federal law only; (2) the Department violated its statutory authority by enforcing State regulations in a manner more stringent than federal law; and (3) the disapproval was arbitrary and capricious because the Department’s action was based on improper motive and affected Young’s property rights.

On June 3, 2004, the Hearing Officer issued *Findings of Fact, Conclusions of Law, and Preliminary Order on Motions for Summary Judgment (Preliminary Order)* granting the Department’s *Motion for Summary Judgment* and denying Young’s *Motion for Summary Judgment*. On June 17, 2004, Young’s filed a *Petition for Review of Preliminary Order*

before the Board of Environmental Quality (Board). On July 7, 2004, the Department filed a response.

On August 5, 2004, the Board, after fully considering the record and the oral and written arguments of the parties, unanimously voted to adopt the Hearing Officer's *Preliminary Order* as a final order pursuant to IDAPA 58.01.23.730.02.

II. REGULATORY BACKGROUND

In 1993, pursuant to the 1987 Clean Water Act Amendments, the U.S. Environmental Protection Agency (EPA) developed regulations governing the use and disposal of sewage sludge. *See* 58 Fed. Reg. 9248 (February 19, 1993). These regulations, commonly referred to as the 503 rules, define sewage sludge as “solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works.” 40 C.F.R. § 503.9(w) (2003). Included within the definition of sewage sludge is domestic septage defined as “either liquid or solid material removed from a septic tank, cesspool, portable toilet, . . . or similar treatment works that receives only domestic septage.” 40 C.F.R. § 503.9(f). Proper disposal of sewage sludge, including domestic septage, is important because contaminated or improperly handled septage can result in pollutants entering the environment leading to the contamination of land, air, surface or ground water and risks to human health. 58 Fed. Reg. at 9250. Nutrients in the septage, such as nitrates, can contaminate ground and surface water supplies if the septage is not appropriately managed. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, DOMESTIC SEPTAGE REGULATORY GUIDANCE: A GUIDE TO THE EPA 503 RULE (September 1993) (Federal Guidance) at 22. Additionally, septage may attract rodents, flies, and other disease carrying organisms if safeguards are not implemented, and pathogens in the septage may pose direct risks to human health. Federal Guidance at 17.

The 503 rules outline certain requirements for the disposal of domestic septage; one acceptable method is land application. 40 C.F.R. § 503.10-18. Applied properly, the nutrients, trace fertilizer elements, and organic matter in domestic septage can improve the condition and nutrient content of agricultural land. Land application is the spraying or spreading of sewage sludge onto the land surface, the injection of sewage sludge below the land surface, or the incorporation of sewage sludge into the land. 58 Fed. Reg. at 9329-30. The 503 rules include requirements as to the land application rate limit; pathogen and vector controls; crop restrictions; use and access restrictions; and monitoring, recordkeeping, and reporting. 40 C.F.R. § 503 *et seq.*

Idaho governs the disposal of domestic septage through rules adopted by the Board pursuant to its authority under the Environmental Protection and Health Act (EPHA). Idaho Code §§ 39-107 and 39-115; Rules Governing the Cleaning of Septic Tanks, IDAPA 58.01.15. (Idaho Rules). The Idaho Rules state that “[a]ll persons operating septic tank pumping equipment shall obtain a permit from [the Department] for the operation of such equipment. Permits shall be renewed annually. Applications for renewal of permits shall be made on or before March 1 of each year.” IDAPA 58.01.15.004. The Idaho Rules also govern the method and location of septage disposal.

IDAPA 58.01.15.003.03(a)-(d) provides :

.03 Disposal Methods. Disposal of excrement from septic tanks shall be by the following methods only:

- a. Discharging to a public sewer;
- b. Discharging to a sewage treatment plant;
- c. Burying under earth in a location and by a method approved by the Department of Environmental Quality;

d. Drying in a location and by a method approved by the Department of Environmental Quality

The State septage rules were first promulgated in 1960, prior to the adoption of the federal rules in 1993. In 1994, the Department developed an agency guidance document (Idaho Guidance) to provide for the consistent application of the federal and state rules and to assist agency staff and licensed septic tank pumpers with locating domestic land application sites. The Idaho Guidance includes *The Domestic Septage (40 C.F.R. § 503) Fact Sheet* and *Septage Land Application Design Fact Sheet*. The Idaho Guidance includes the nutrient uptake for selected crops and recommended set-back distances from areas of concern such as surface and ground water supplies, county roads, and neighboring residences. Criteria for consideration include whether the incorporation into the soil is deep or shallow, whether the septage has been stabilized with lime, and soil characteristics. The Idaho Guidance also details the information that must be submitted for site approval.

Although the Department had been responsible for approving the location and method for application of domestic septage since the Idaho Rules were promulgated in 1960, authority for site approval was delegated to the local health districts until February 2000.¹ Through a Memorandum of Understanding with the Public Health Districts (2000 MOU) the Department defined new roles for each agency in the administration of the program for disposal of domestic septage. Pursuant to the 2000 MOU, the Department is now directly responsible for approving sites and facilities for the application and treatment of domestic septage and for providing the districts a statewide list of permitted septic tank pumpers. The health districts are responsible for approving operational plans and conducting inspections at approved domestic septage sites and issuing permits that must be renewed annually.

III. YOUNG'S PERMIT

From 1979 through 2000, Young's land-applied domestic septage under annual permits issued by the health district. In 2001, Young's submitted an application for renewal of its permit to the health district. The initial application proposed to dispose of 606,000 gallons of septage on a four acre tract of land located near Blackfoot, Idaho during the course of one year.

On December 11, 2001, the Department advised Young's by letter that the application was incomplete and that site approval had been denied. The Department determined the application was incomplete because it did not contain a site map documenting the distances between the disposal site and domestic water supply wells and did not include a comprehensive description of the proposed site plan. In addition, Young's had not submitted information about the soil composition of the proposed site.

On December 17, 2001, the health district advised Young's by letter that further information should be submitted to complete the application. On January 10, 2002, the health district advised Young's by letter that the Department was disapproving the location of the proposed site but would allow Young's to continue disposing on the site until February 28, 2002. The Department approved the disposal site on a temporary basis until February 28th because it had received assurance by the City of Blackfoot's Water Pollution Control Department that the City would have a pretreatment facility to accommodate loads of septage from Young's by that date.

Neighboring homes, surface and ground water supplies, domestic wells and a county road are located adjacent to the proposed disposal site. The evaluation of the application

¹ Idaho Code § 39-414 authorizes the Directors of the Departments of Health and Welfare and Environmental Quality to delegate responsibilities to the district boards of health.

considered, among other things, the set-back criteria provided in the Idaho Guidance. After considering the applicable set-back criteria for raw untreated septage, the Department determined the area available for disposal on Young's site was insufficient. However, the Department did advise that lime stabilization would reduce the set-back criteria.² Young's declined to incorporate lime stabilization in its operation and on or about February 28, 2002, Young's ceased use of the site named in its application and began delivering septage to the City of Blackfoot's wastewater treatment facility or to Idaho Fall's facility.

On May 3, 2003, Young's submitted to the Department additional information to supplement its original 2001 permit application and requested that the application be reconsidered. In the same correspondence, Young's requested variances from the recommended set-back distances. Young's asserted that the proposed location and methods were in compliance with the federal rules and that the federal rules were "the key requirements in this situation." On June 2, 2003, the Department determined that it was unable to approve the proposed location and method of drying septage based on a lack of information. The Department also explained that approval of the proposed set-back variances required demonstration of how such variances would be protective of ground and surface waters and public health. The additional information requested included site specific studies related to the protection of ground and surface water and best management plans for odor and vector³ control, pathogen⁴ reduction methods, and methods to interrupt disease transmission pathways. Young's declined to submit site specific studies and plans, stating

² Lime stabilization refers to a vector attraction reduction method by which hydrated lime or quicklime is added to the septage to raise the pH of the septage.

³ Vectors include flies, rodents, and other disease carrying organisms.

⁴ Pathogens are disease-causing organisms.

that the recommended methods for preventing adverse environmental effects were cost prohibitive and unnecessary.

On November 19, 2003, the Department advised Young's that the application was incomplete and detailed the information omitted. The Department again advised that a variance in the set-back requirement could be granted upon an adequate demonstration that such variance would not endanger human health or the environment.

On December 17, 2003, Young's initiated this contested case proceeding. Attached to the *Petition*, was a letter dated December 5, 2003, seeking reconsideration of its application and informing the agency that the amount of septage to be land applied had been reduced from 606,000 to 450,000 gallons per year.

The record also indicates that beginning in July 2000, the Department received a number of complaints regarding Young's operations. Most of the complaints were filed by the new owners of an adjacent residence. The Department's investigations did not result in notice of violations or other legal action.

IV. ANALYSIS AND CONCLUSIONS OF LAW

Young's contend that: (1) the Department applied the Idaho Guidance in a manner contrary to law; (2) Young's annual permit should not be subject to the set-back restrictions because the disposal site was in existence and permitted prior to issuance of the Idaho Guidance; and (3) the site disapproval was arbitrary and capricious because the agency action resulted from improper motive and affects Young's property interest in the proposed site location. Young's also asserts that the Hearing Officer based his conclusions of law upon a significant error of fact relative to the annual application rate and the acreage available for septage disposal.

A. Standard of Review.

The Department's contested case rules provide that motions for summary judgment shall be governed by the Idaho Rules of Civil Procedure. IDAPA 58.01.23.213.01. Idaho Rule of Civil Procedure 56 states that a motion for summary judgment shall be granted when the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The moving party has the initial burden of establishing the absence of a genuine issue of material fact. Thompson v. Idaho Ins. Agency, Inc., 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). Once this is established, the burden shifts to the opposing party to establish that there is a genuine issue for trial. Sanders v. Kuna Joint School Dist., 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

In making a determination on a motion for summary judgment, all allegations of fact in the record, and all reasonable inferences from the record, are construed in the light most favorable to the party opposing the motion. Thomson v. City of Lewiston, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002). However, the opposing party "must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. . . . '[A] mere scintilla of evidence or only slight doubt as to the facts' is not sufficient to create a genuine issue of material fact for purposes of summary judgment." Northwest Bec-Corp. v. Home Living Serv., 136 Idaho 835, 839, 41 P.3d 263, 267 (2002) (quoting Samuel v. Hepworth, Nungester & Lezamiz, Inc., 134 Idaho 84, 87, 996 P.2d 303, 306 (2000)). If the opposing party does not raise a material issue of fact, nor defeat the moving party's legal claim, summary judgment must be granted. Sanders v. Kuna Joint School Dist., 125 Idaho 872, 874 (Ct. App. 1994).

With these standards in mind, we first address the argument that only federal rules should apply to the proposed application site.

B. Federal and State Law Apply to Land Application of Domestic Septage.

The argument that only the federal rules should apply to the proposed disposal site ignores explicit language in federal regulations and guidance documents that clearly contemplates the application of both federal and state rules and requirements to the land application of domestic septage. 40 C.F.R. § 503.5; Federal Guidance at 3, 4, 11, 12, 15, 16, 19, 46, 47, 48, 49, 51, 52 and Appendix E; 58 Fed. Reg. 9324. For example, the Federal Guidance states, in relevant part, “[t]he Federal Part 503 Regulation does not replace existing State regulations.” Federal Guidance at 11. “[A]pppliers of domestic septage to non-public contact sites must meet requirements of both state and federal septage regulations.” Federal Guidance at 48.

When proposing the 503 rules, the EPA anticipated that state programs would or could include additional protections, including set-back criteria. The EPA considered the need to impose set-backs as part of the federal rules but opted not to in light of extensive state regulation. 58 Fed. Reg. at 9311; *see generally* Federal Guidance (including Appendix E that includes various examples of state-program set-back criteria). Thus, the federal program relies on states to address public concerns regarding set-back protections. 58 Fed. Reg. at 9311. Numerous states have developed and implemented programs for the disposal of domestic septage within their jurisdictions. Federal Guidance at 52 and Appendix E. Several of these state programs include set-back requirements to provide protections between domestic septage site operations and surface and ground water sources as well as neighboring residences. Id.

Young's assertion that only federal law should govern the disposal site also ignores the Idaho Legislature's direction to the Board to adopt and implement rules protecting the public health and environment, including rules that protect surface and ground water supplies. Idaho Code §§ 39-101-130. Guidance documents are essentially reference tools for agency staff who must carry out Department policies and implement statutes and regulations. Accordingly, the Idaho Guidance describes safeguards for septage disposal, including recommended set-back distances, and thereby provides assistance to the public and agency staff in implementing federal and State programs.

C. The Department's Rules and Guidance Relating to Domestic Septage Disposal Are Not Subject to Idaho Code § 39-107D.

Young's contends that the enactment of Idaho Code § 39-107D has the effect of limiting the Department to the application of only federal standards because the guidance document allegedly contains more stringent requirements than the federal 503 rules.

Idaho Code § 39-107D became effective in July 2002, 42 years after the Idaho Rules became effective and nine years after the Idaho Guidance was developed. *See* Idaho Sess. Law. 2002, ch. 144, § 1, p. 405; *See* IDAPA 58.01.15 (indicating date of adoption as March 1, 1960). Idaho Code § 39-107D requires that "any rule formulated and recommended by the department . . . which is broader in scope or more stringent than federal law or regulations, or proposes to regulate an activity not regulated by the federal government, is subject to [additional requirements in regards to rulemaking]." The statute requires enhanced notice to the Board and the Legislature that a proposed rule is thought to be more stringent or broader in scope than relevant federal rules. Thus, section 39-107D imposes procedural requirements on the Department and the Board in the promulgation of rules. Because it is, essentially, a procedural statute, Section 39-107D, in and of itself, does not prohibit more stringent rules.

Whether a statute operates retroactively or prospectively is a question of legislative intent. Idaho Code § 73-101 provides, “[n]o part of these compiled laws is retroactive, unless expressly so declared.” Thus, under Idaho law, “a statute is not applied retroactively unless there is ‘clear legislative intent to that effect.’” Idaho Code § 73-101; Gailey v. Jerome County, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987) (citations omitted). Idaho Code § 39-107D contains no such express declaration.

Moreover, the language of Idaho Code § 39-107D clearly indicates legislative intent to apply the statute to future rulemaking procedures. Specifically, the statutory language requires that “proposed” rules undergo additional rulemaking requirements if they are found to be more stringent than federal law or regulation. Furthermore, the statute applies to “rules formulated and recommended by the department to the board.” Idaho Code § 39-107D. The use of the term “proposed” indicates that the Legislature intended the statute to apply only to future rulemaking procedures; previously adopted rules are no longer “proposals” and existing rules have already been recommended and approved by the Board.

If the Legislature intended the statute to apply retroactively it would have complied with Idaho Code § 73-101 and expressly so stated. *Compare* Idaho Code §§ 39-105(3)(g)(v), 39-118B, 39-3601, 39-4404, 39-6205, 39-7210 and 39-7404. At the time Idaho Code § 39-107D was enacted, the Legislature presumably knew of existing Department rules and guidance documents and, had it intended for the Department to undergo the procedural requirements of § 39-107D, and the massive undertaking of re-promulgating such rules, the Legislature would have expressly so stated.

D. The Department Acted Within Its Discretion in Applying the State Guidance to Young's Proposed Application Site.

Relying on Idaho Code § 67-5250(2), Young's contends that the Hearing Officer incorrectly approved the Department's use of guidance as having "the force of precedent or regulation under state law." *Petition for Review of Preliminary Order*, ¶ 1. This reading mischaracterizes the *Preliminary Order*.

The *Preliminary Order* concludes that reliance on Idaho Code § 67-5250(2) is misplaced. This section of the Idaho Administrative Procedures Act recognizes the use of agency guidance documents and explicitly states that this type of document, even when indexed, does not have "the force and effect of law or other precedential authority." Thus, Idaho Code § 67-5250(2) contemplates the adoption and use of guidance materials to assist in the implementation of rules, and to avoid ambiguity, clearly states that they are neither rules nor orders.

We also disagree with the assertion that Department staff applied the Idaho Guidance as if it were a rule. As the Hearing Officer noted, the Department used discretion in applying the Idaho Guidance to the facts of this case. The purpose of the guidance is to assist the public and agency personal in applying Idaho Code §§ 39-101-130 and IDAPA 58.01.15.003 in an effective and internally consistent manner. IDAPA 58.01.15.003.03 states that "[d]isposal of excrement from septic tanks shall be by one of the following methods [including] [d]rying in a location and by a method approved by the Department" The rule clearly authorizes the Department to approve the method and location of the disposal of human excrement from septic tanks. The set-back criteria address concerns about the potential for adverse effects on public health and the environment from pollutants in domestic septage. The recommended set-back distances vary depending on the method of

septage disposal which may include shallow incorporation, deep incorporation, or lime stabilization. Shallow incorporation carries with it the greatest recommended set-back distances and lime stabilization the shortest distances. For example, in relation to dwellings, the recommended set-back distance for shallow incorporation is 1,000 feet; where lime stabilization is used, the set-back is 300 feet.

In the present case, the Department was asked to approve a site application proposal with considerably shorter set-back distances from those recommended. The applicant did not submit technical or scientific information about site specific conditions demonstrating how shorter distances would adequately protect the public health and the environment. In an attempt to provide for some flexibility in operations, the Department advised Young's that the set-back distances could be reduced by using lime in the application process. Young's declined to implement the recommended procedures.

The record indicates that the agency did not strictly apply the criteria but instead attempted to gather enough information to justify the potential risk of reducing the set-backs. However, the applicant was unwilling to submit additional information for the Department's consideration or consider alternative application methods. Accordingly, the Hearing Officer correctly found that the Department was not applying the guidance as having the force of law, but instead, was using it as setting forth criteria for the Department to consider when determining the appropriateness of the septage disposal site.

E. The Department Disapproval of the Application Site and Method Was Not Arbitrary, Capricious, or an Abuse of Discretion.

Young's advances two arguments to support the assertion that the disapproval was arbitrary and capricious. First, Young's argues that it is arbitrary and capricious for the Department to deny its application "based upon set-back restrictions that, if followed, would

result in [Young's] inability to use its property any longer for its business purposes.” *Petition* ¶ 7.d. Second, Young’s asserts that the site disapproval was the result of improper motive, that is, a wish to appease individuals who had submitted complaints about Young’s operations.

A court may set aside the decision of an administrative agency if the court concludes that its findings, inferences, conclusions or decisions are arbitrary, capricious or an abuse of discretion. Idaho Code § 67-5279(3)(e). “While the scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency, the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action. In reviewing that explanation, a court must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment.” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins., 103 S. Ct. 2856, 2860-61 (1983); *see also* Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 95 S. Ct. 438, 440 (1974); Arizona Cattle Growers’ Ass’n v. U.S. Bureau of Fish and Wildlife, 273 F.3d 1229, 1243 (9th Cir. 2001).

The inquiry here is whether the Department, in disapproving the site, “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 105-106 (1983) (citations omitted); *See also generally* Viveros v. State Dep’t of Health & Welfare, 126 Idaho 714, 889 P.2d 1104 (1995).

The application sought permission to land-apply septage to an approximately four-acre parcel of land located immediately adjacent to a county road, domestic water supplies, and neighboring family residences. Originally, Young’s sought approval to apply 606,000

gallons on the four-acre tract, then subsequently reduced the proposed amount to 450,000 gallons. In light of the significant quantity of septage Young's proposed to spread on a relatively small parcel of land, and the fact that the site was within a few feet of a road and neighboring family homes, agency technical staff took into consideration recommended set-back criteria in evaluating potential pollution risks.

The application requested set-backs that differed from those contained in the Idaho Guidance, but did not provide site specific test results or other documentation to scientifically support a reduced set-back distance. If Young's had submitted the requested information, staff would have been able to evaluate whether the requested variance could result in adverse environmental and health effects.

The record indicates that technical staff carefully reviewed all of the collected information and applied their reasoned judgment to evaluate that information. The Department expressed concern about the proposed set-backs and potential risks to ground and surface water supplies. Staff were also concerned that the applicant develop an adequate plan for vector control and odor management. In reaching its decision, the Department articulated a rational connection between the need for set-backs and use of the criteria outlined in the Idaho Guidance.

The Department's decision to disapprove Young's application site for raw septage disposal was based on all relevant facts before the Department as well as federal and State rules and guidance. The fact that complaints were submitted when Young's application was under consideration does not translate into an improper motive on the part of the agency. The mere allegation of improper motive is not enough to dispute the numerous documents in

the record that established the Department's legitimate concerns about the proposed method of application.

Finally, we conclude by addressing the assertion that Young's should be permitted to continue operating without any consideration of current Department guidance because disapproval will result in an inability to use the property for business purposes. There were no documents or affidavits submitted to support a legitimate inference that the permit denial rendered Young's land useless for any business purpose. As the Hearing Officer noted, even the sole affidavit submitted by Young's fails to provide any support for this claim. Therefore, we find that the Hearing Officer correctly concluded that the agency action at issue here was not arbitrary and capricious or an abuse of discretion.

F. The *Preliminary Order* Was Not Based on a Significant Error of Fact.

Young's argues that the Hearing Officer incorrectly determined that the proposed septage land application would not be in compliance with the federal rules and as a result, incorrectly concluded that Young's could not comply with the State rules. This assertion ignores the applicable set-back distances in the Idaho Guidance that effectively reduce the area actually available for septage disposal. In complying with the set-back distance criteria, Young's proposed operations would be in excess of the annual application rates in the State and federal guidelines. As discussed previously, both federal and State rules apply to land application of domestic septage; compliance or noncompliance with one set of rules does not necessarily result in compliance or noncompliance with the other set of rules. We, therefore, conclude that the *Preliminary Order* was not based on a miscalculation of the actual available acreage available for disposal.

V. CONCLUSION

In consideration of the foregoing, we adopt the Hearing Officer’s *Preliminary Order* in full. Accordingly, IDEQ’s motion for summary judgment is GRANTED and Petitioner’s motion for summary judgment is DENIED.

This is a final order of the Board. Pursuant to Idaho Code §§ 67-5270, -5272, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which (i) a hearing was held; (ii) the final agency action was taken; (iii) the party seeking review of the order resides, or operates its principal place of business in Idaho; or (iv) the real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days of the service date of this final order. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. DATED THIS 30th day of September 2004.

BOARD OF ENVIRONMENTAL QUALITY

Paul C. Agidius

Donald J. Chisholm

Dr. Joan Cloonan

Craig D. Harlen

Dr. J. Randy MacMillan

Nick Purdy