

1.8 Property Access & Use (Easements)

Easement

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The “Individual/Subsurface Sewage Disposal Rules” (IDAPA 58.01.03) provide that every owner of real property is responsible for storing, treating, and disposing of wastewater generated on that property. This responsibility includes obtaining necessary permits and approvals for installing an individual subsurface sewage disposal system. Often the storage, treatment, and disposal of wastewater remain solely on the real property from which it was generated. However, sometimes other real property is needed for the storage, treatment, or disposal of that wastewater. In this case, an easement agreement for access (e.g., an easement) ~~is~~may be required as part of the permit application. ~~The real property from which the wastewater is generated is known as the dominant estate because it is entitled to the benefit of the easement. The other real property needed for storage, treatment, or disposal is known as the servient estate. The servient estate is the real property subject to the easement.~~

~~Therefore, a~~A real property owner wishing to install an individual subsurface sewage disposal system must obtain a permit under IDAPA 58.01.03 and any other necessary approval for installing the system, including any authorization needed to install the system on other real property that does not contain the wastewater-generating structure. The owner of the dominant estate may also own the servient estate, or the servient estate may be owned by another individual. Consistent with this requirement, IDAPA 58.01.03.005.04.1 requires a permit applicant to include in the application copies of legal documents relating to access to the entire system and all system components. The permit applicant should consult with an attorney about what type of legal document (e.g., easement, access agreement) is most appropriate for securing long-term access to the entire system and ensuring access for future property owners in the event of a sale of either property.

Properties under Common Ownership

Properties under common ownership where the wastewater generating structure is located on a property separate from portions of the wastewater disposal system pose a unique challenge. The doctrine of merger prevents an individual or property owner from granting an easement to themselves. However, it is critical that that property owner adequately demonstrate that the wastewater generating structure will have access to the associated wastewater disposal system. In order to prevent such properties from inadvertently divesting the structure from the wastewater disposal system, if any portion of a system is proposed to be installed on a combination of two properties/parcels under common ownership at the time of permit issuance, the following will be required:

1. The installation permit will state that the system is installed on a combination of two properties/parcels, and state that the owner should notify the health district prior to the sale of either property.
2. Prior to a sale, the owner must ensure that the waste-generating property retains access to and use of the property where the wastewater is treated, stored or disposed of (e.g., the drainfield) and provide this documentation to the health district. It is recommended the owner/seller consult an attorney to determine the most appropriate legal document for

ensuring this future access and use (e.g., an easement).

Properties under Separate Ownership

This section provides guidance regarding the circumstances when the health district should permit a system when the system is located on two properties/parcels owned by different property owners. In that case, an easement or other legal document must be included in or with an application for such a system.

1. The health district will consider allowing an owner to install a subsurface sewage disposal system on another person's property. However, this option should be considered only when other practical solutions for subsurface sewage disposal are not available on the property where the wastewater is generated. In addition, the entire site (i.e., the area for both the primary and replacement drainfield) must be reviewed by the health district, and all sites must meet all requirements of IDAPA 58.01.03.
2. The placement of an individual subsurface sewage disposal system on another person's property requires a valid legal agreement (e.g., an easement or access agreement) to be in place before subsurface sewage disposal permit issuance. Valid legal agreements (e.g., easements) are required anytime any portion of a subsurface sewage disposal system is proposed on another's property. If a legal agreement or easement is submitted, it is the applicant's responsibility to ensure that the document:
 - a. Is prepared by an attorney;
 - a.b. Contains a sufficient description of the access area (i.e., the area where the portion of the subsurface sewage disposal system is located on another's property) and of the applicant's property where the wastewater is generated;
 - c. Contains language ensuring that the property with the access area can be used for the applicant's system;
 - b.d. Contains language ensuring that the applicant, or subsequent owner of the applicant's property, has the ability to access the other property to make repairs or perform routine maintenance until the system is abandoned. The language must ensure that use and access is maintained when either property is sold or otherwise transferred;
 - e.e. Contains language that restricts the access area from uses that may have an adverse effect on the system functioning properly;
 - f. Includes a survey, including monumenting the corners of the entire access area, to supply an accurate legal description of the access area for both the primary and replacement drainfield areas and allows the health district to properly evaluate the site. The survey and monumenting of the access area must be performed by an Idaho-licensed professional land surveyor; and
 - d.g. If the document is an easement, it is recorded in the county with jurisdiction.
3. The applicant must submit the valid legal agreement described in 2.a-g to the health district along with the permit application. It is not the duty of the health district to determine the legal adequacy of the document, and the issuance of a permit does not in any way represent or warrant that access has been properly created. The health district will evaluate whether the document: has been prepared by an attorney; includes a survey described in 2.f, and if it is an easement, evidence that it has been recorded in the county with jurisdiction. If these criteria are met, the health district may issue the permit. It is the responsibility of the applicant for ensuring that the document is legally sufficient and

satisfies the requirements in item 2 above.

Easement Property Access & Use Restrictions

1. If ~~easements~~ agreements for access for drainfields ~~under separate ownership~~ result in more than 2,500 GPD of effluent being disposed of on the same property, the drainfields must be designed as a large soil absorption system and undergo a nutrient-pathogen (NP) evaluation.
2. ~~Easement~~ Access area boundaries that are not adjacent to the applicant's property line must meet the separation distance of 5 feet between the drainfield and/or septic tank and the ~~easement~~ access area boundary.

Loss of Access

If for any reason access to any portion of the subsurface sewage disposal system is lost and the system can no longer receive blackwater and wastewater, the system may be considered failing (IDAPA 58.01.03.003.13). The owner of the waste-generating property must establish a new easement or other legal agreement that grants access to the property where the wastewater is treated, stored or disposed of.

If no legal access agreement can be reached, the owner of the waste-generating property must obtain a permit to repair or replace the failing system (IDAPA 58.01.03.004.05).

In the event the failing system cannot be repaired or replaced in a way that meets the current rules and regulations, the health district may issue a nonconforming permit if the health district can determine that the public's health is not at risk (IDAPA 58.01.03.008.12). – Otherwise, once all other options have been exhausted, the waste-generating property may be denied a subsurface sewage disposal permit.