

permit requirement must meet the current intent of the rules (IDAPA 58.01.03.004.01). This may require the installation of an alternative system to meet separation distances or effective soil depths to features of interest or concern as described in IDAPA 58.01.03.007.17 and IDAPA 58.01.03.008.02.c-d.

A nonconforming system is a system that does not fully comply with all of the requirements of IDAPA 58.01.03. Nonconforming systems are typically existing systems or older approved systems that were installed after changes to IDAPA 58.01.03. For property owners to retain their existing or approved system rights in a nonconforming system, the system cannot be considered abandoned as described in section 1.7.3. All nonconforming systems must be brought into compliance with the intent of IDAPA 58.01.03 upon the repair, replacement, or enlargement of the system (IDAPA 58.01.03.004). The intent of the rules is best met by fully complying with the current requirements of IDAPA 58.01.03 at the time of permit issuance (IDAPA 58.01.03.004.02).

Some existing or approved systems may be located on properties that are no longer capable of meeting the requirements of IDAPA 58.01.03 due to changes in the rule requirements over time. If the property owner has maintained their existing or approved system right for the use, repair, or replacement of the system, they have the right to obtain a nonconforming repair or replacement permit for their property. All nonconforming permits shall be issued as described in the DEQ memorandum “Failing Subsurface Sewage Disposal System,” dated July 26, 1993, contained within the *Idaho Subsurface Sewage Disposal Standard Operating Procedures*. Issuance of a nonconforming permit shall only be for the original use and wastewater flow for the structure located on the property and neighboring features of interest (e.g., wells and water lines) shall take priority in separation distance requirements.

When issuing a nonconforming repair or replacement permit, an emphasis shall be placed on meeting the intent of IDAPA 58.01.03.004.01.d, preserving the existing or potential beneficial uses of the waters of the state. This emphasis arises out of the direction of Idaho’s legislative bodies as stated in Idaho’s water quality policy (Idaho Code §39-3601) and policy on environmental protection (Idaho Code §39-102).

1.8 Easement

Revision: February 4, 2016

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 or 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 is 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 real property owner wishing to install an individual or 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 system.

This section provides guidance regarding the circumstances under which the health district should permit a system when there is both a dominant estate and a servient estate and the legal documents that 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 other 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) on the servient estate must be reviewed by the health district, and the site must meet all requirements of IDAPA 58.01.03.
2. The placement of an individual subsurface sewage disposal system on other property requires that an easement is in place before subsurface sewage disposal permit issuance. Easements are required anytime a subsurface sewage disposal system is proposed on another property regardless of property ownership. With one exception, easements must be obtained for any real property upon which any portion of the subsurface sewage disposal system is proposed to be installed. Easements are not necessary for any portion of the system located on the dominant estate for which the application is submitted. It is the applicant's responsibility to include an easement that prepared by an attorney and:
 - a. Contains a sufficient description of the easement area and of the dominant estate (the real property of the applicant where wastewater is generated).
 - b. Contains language ensuring that the servient estate can be used for the system, and that the applicant or a subsequent purchaser of the dominant estate has access to make repairs or perform routine maintenance until the system is abandoned. The language must ensure such use and access even when the dominant or servient estate is sold or otherwise transferred.
 - c. Contains language that restricts the use of the easement area in a manner that may have an adverse effect on the system functioning properly.
 - d. Is surveyed, including monumenting the corners of the entire easement area, to supply an accurate legal description of the easement area for both the primary and replacement drainfield areas and enable the health district to properly evaluate the site. The survey and monumenting of the easement area must be performed by an Idaho-licensed professional land surveyor.
3. The applicant is responsible for ensuring that a legally sufficient document is prepared to establish the necessary easement. The applicant must submit the easement to the health district with the permit application. However, the health district does not have the expertise, nor is it the duty of the health district, to determine the legal adequacy of the easement document, and the issuance of a permit does not in any way represent or warrant that an easement has been properly created. To issue a permit that includes a servient estate, the health district evaluates whether the easement document included with the application:

- a. Has been prepared by an attorney.
- b. Includes a survey that was prepared and monumented by an Idaho-licensed professional land surveyor.
- c. Has been recorded in the county with jurisdiction. Evidence that the document has been recorded must be provided to the health district.

If the easement document meets the criteria described in 3.a–3.c, the health district may issue a permit. It is not the health district’s responsibility to ensure the easement document meets the requirements in item 2 above. The applicant and the applicant’s attorney are responsible for ensuring that the easement is legally sufficient and will meet the requirements in item 2 above.

Easement Restrictions

1. If easements 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 boundaries that are not adjacent to the dominant estate’s property line must meet the separation distance of 5 feet between the drainfield and/or septic tank and the easement boundary.