

Technical Guidance Committee

Meeting Minutes

Wednesday, September 16, 2020

9:30 a.m.

Conference Room C

Department of Environmental Quality

1410 N Hilton, Boise, ID

The meeting accommodated remote participation via Zoom telephone and web conferencing.

TGC ATTENDEES:

Peter Adams – Onsite Wastewater Analyst, DEQ (TGC Chair)

Joe Canning, P.E. – B&A Engineers, Inc.

Mike Reno, REHS – Environmental Health Supervisor, CDHD

Kellye Johnson, REHS – Director of Environmental Health, EIPH

Jason Peppin, REHS – Environmental Health Program Manager, PHD

Kendall Unruh – WEB, inc. dba/Western Septic & Excavation (joined later in the meeting, but didn't announce himself until the end)

GUESTS:

Mary Anne Nelson – Surface & Wastewater Division Administrator, DEQ

Lisa O'Hara – Office of Attorney General, DEQ

Larry Waters – Wastewater Engineering Bureau Chief, DEQ

Lori Flook – Administrative Assistant, DEQ

CALL TO ORDER AND ROLL CALL

Meeting was called to order at 9:35 a.m.

Introductions were made by the committee members and guests attending.

Public Comment Period:

Meeting was opened up to public comment at 9:37 a.m. Prior to the meeting, Kendall Unruh submitted a public comment in the form of a letter titled "RE: Septic system easements" (**Appendix A**), but he had not yet joined the meeting so was unable to comment on his submittal.

APPENDIX B

Action Item – August 27, 2020 Draft TGC Meeting Minutes

No comments or edits were made

Motion: Mike Reno

Second: Jason Peppin

Verbal Vote: Unanimously passed. Minutes are approved and will be posted to DEQ's website within 30 days.

OLD BUSINESS

APPENDIX C

Action Item – TGM Section 1.8 Easements

Proposed edits were reviewed in order to adhere to the recent judgement by the Idaho Supreme Court (Fitzpatrick v. Kent, Docket No. 46797) regarding the validity of an easement. Peter

reminded committee members that these edits are a result of feedback and research done by DEQ and the Attorney General's Office following the August 27, 2020 TGC meeting and reiterated that the TGM is a guidance document and must therefore adhere to Idaho Rule. Peter shared the following:

It is outside of DEQ's scope of authority to require a "Notice of Title" because:

1. No rule or statute authorizes such filings, and it is not listed as an action DEQ (and by delegation, the health districts) can take.
2. A county recorder may refuse to file such a notice. Idaho Code §31-2402 specifies which documents a county recorder is required to file upon payment of a filing fee and a deed notation is not listed. I.C. 31-2402(2) provides that a county recorder may refuse to record any document not authorized by law.
3. Nothing prevents a homeowner from petitioning for removal of the notice from the deed records, which could be done unilaterally, without notice to DEQ or the health districts.
4. Filing a deed notation could subject the person filing it to litigation. If the notice/deed notation adversely affects the value of the property or impedes a sale, a claim could be filed against the person/entity who filed the notice.

In response to the previous suggestions that we deny permits for systems spanning two properties under common ownership:

1. Nowhere in the Rule does it state that the entirety of the system has to be on one parcel.
2. The reasons for permit denial are clearly stated in 58.01.03.004.05, and having a system on multiple parcels is not a listed reason.
3. Citing "potential for loss of access" is unfortunately not a valid reason for permit denial.
4. If the HD's deny permits for this reason, that would open them to litigation.

In response to the previous suggestions that we completely delete the easement section from the TGM:

1. The common ownership issue will still be present and we will not have any guidance for what steps to take after loss of access
2. We still need to provide guidance for separate owners seeking access agreements.

Peter then turned the time over to Mary Anne Nelson to discuss the Governor's order on "Zero-Based Regulation", meaning no *additional* rules may be proposed to legislature at this time. The Subsurface rules, because of the controversy they usually stir up, are not on the docket to be presented until 2024. Mary Anne stated she is not opposed to changing some of the subsurface rules down the road. Peter then stressed the importance of putting into place new guidance to comply with the new Supreme Court ruling to protect both DEQ and the Health Districts.

The edits are presented in the attached *Appendix C*. The only additional proposed edit was suggested by Jason in the "Properties under Separate Ownership" section, line item 2a. He suggested removing "realtor" as an option and leaving only "attorney". This change was made during the meeting. Kellye asked Lisa O'Hara if it would be possible to add a disclaimer or notation to the permits upon issuance that releases the health districts from any liability. Lisa said she will check into the legality of being able to do that. Mike then asked for a memorandum to be sent, from DEQ, if/when the language was determined for the health districts' records.

Peter suggested preliminarily approving the edits and posting them for public comment.

Motion: Mike Reno

Second: Kendall Unruh

Verbal Vote: Unanimously passed. Edits to Section 1.8 will be posted to DEQ's website for a 30-day public comment period.

Motion: Jason Peppin motioned to adjourn meeting

Second: Mike Reno

Verbal Vote: Unanimously passed and meeting was adjourned at 10:22 a.m. until Nov 5, 2020.

DRAFT

Appendix A

Letter from Kendall Unruh submitted for public comment
“RE: Septic System Easements”

DRAFT



9/4/2020

Peter Adams
Department of Environmental Quality
RE: Septic system easements

Peter,

Regarding the issue of septic system easements that has been discussed in a couple of the most recent Technical Guidance Committee meetings; I would like to strongly encourage the DEQ to pursue a rule change to adequately address this issue. While pursuing this rule change, I would highly recommend taking a broader look at some of the issues we see with regards to septic systems and the transfer of real estate, and try to address as many issues as possible while the legislation is on the table. I feel we need to make our legislators aware of the issues that keep cropping up and close as many loopholes as we can at one time. I realize that this type of rulemaking process does not happen overnight, but so far none of the proposed solutions that have been presented seem to truly solve the problem. We can and should add or modify guidance in the Technical Guidance Manual to hopefully provide a temporary stopgap measure to the best of our ability, but the real solution appears to be at the legislative level in my view.

I think we all agree that, at a bare minimum, both property owners and/or potential buyers need to be made aware that a septic system crosses a property line any time one of the subject properties changes hands. The obvious conundrum is how to ensure that the parties are duly notified. As I have mentioned in recent meetings, from my perspective as a septic pumper, this topic of easements highlights, but is only one part of, a much larger issue with regards to septic systems and the transfer of properties. It is my belief that a rule change should be pursued that addresses the broader scope of septic systems at the time when properties are sold or transferred.

Currently, Idaho has no requirement for septic system inspections when properties change hands. However, most mortgage lenders are now requiring some sort of "inspection." Without any sort of standardized inspection procedure that defines what should be inspected and how, it is completely at the discretion of the pumper what he thinks the inspection should entail. This creates a lot of very sticky and uncomfortable situations and opens pumpers up to a lot of potential liability or litigation. When we see potential issues at the time of our inspection, we are faced with the choice of noting them on the report, which often jeopardizes the closing and forces the seller to spend money, or gloss over what appear to be non-critical issues and risk a phone call a year down the road saying we "passed" the system and now it is failing, sometimes with threats of legal action. Without any regulatory support from the state, these are no-win situations for pumpers. No matter how diplomatic we are, no matter how detailed and transparent or vague we are, we still end up looking bad to either the seller or the buyer because the bottom line is that whatever we tell them is only our opinion and we have nothing to fall back on to legally justify our findings. Our reputations and businesses are on the line. I recently was forced to replace an old collapsing septic tank with a brand new one, on my dime, to avoid litigation from an upset buyer in one of these scenarios. I feel more could be done to protect us, and I feel now is a good time to pursue it, given the issue of easements currently under review. Not only would it provide some protection for us, but also for the real estate agents and the thousands of people who buy and sell real estate every year in our state.

Many states require septic inspections any time a property changes ownership. They have a standardized form that must be completed, and the pumpers are trained and certified on the proper procedures and protocols for performing these inspections. Inspections commonly include, among other things, some or all of the following items:

- Note structural condition of septic tank (walls, bottom, lid, access cover)
- Note condition of baffles
- Note liquid level in tank (high, low, normal)
- Note any indications of high levels (black soil around access cover, scum deposits high in the riser, etc.)
- Note any indications of broken or settled pipes at the inlet and outlet of the septic tank
- Note liquid levels in distributions box or observation ports
- Map with dimensional measurements to the location of all septic components
- Distance of septic components to features of concern, such as wells, property lines, surface water, foundations
- Flow test to determine whether the drainfield is accepting water at an acceptable rate

The point I'm making here is that, with a standardized, state-mandated time-of-sale inspection, the issue that is currently at the forefront of the discussion, septic systems on adjoining properties, would certainly then be duly noted and appropriately handled, along with a host of other common problems which also should be addressed. Such a requirement would dramatically decrease the number of failing systems in the state over the course of 5-10 years. Obviously, as we see in other states, the inspection can be as simple or as comprehensive as we want it to be, but anything would be better than what we have now.

As a side note, including a requirement for septic tank risers and inspection ports in drainfields would make these inspections much easier and less costly, would be insignificant in cost to install, and would provide a permanent visual reminder of the location of the septic tank and drainfield lines.

I have spoken with numerous EHS's as well as Realtors who share my views on this issue. As we see a massive influx of people moving into Idaho from other states, often coming from states that require certified septic inspections, many of these people are expecting more than they are getting with regards to these inspections. These issues are not going to go away, either. Rather, we will undoubtedly see a continued increase in the need for comprehensive, certified septic inspections in the future. I hope the DEQ is willing to take a serious look at this issue so it can be adequately addressed at this time.

Sincerely,



Kendall Unruh
Owner /President

Appendix C

TGM Section 1.8
Easements
(Markup version)

DRAFT

1.8 Property Access & Use (Easements)

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 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~~ 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.

3. 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 a 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 blackwaste 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.