

## The Repair/Replacement of Residential Onsite Systems in Floodplains

Question: Can a local board of health permit the repair or replacement of a failed residential onsite sewage system in a floodplain?

### Relevant law:

The law relevant to this question is 410 IAC 6-8.1, *Residential Sewage Disposal Systems*, effective December 21, 1990. This rule was preceded by 410 IAC 6-8, *Residential Sewage Disposal Systems*, effective December 18, 1977, and repealed on December 21, 1990. Prior to 410 IAC 6-8, there was no statewide law; residential onsite sewage disposal systems were governed by individual county ordinances.

### Relevant sections of 410 IAC 6-8.1:

410 IAC 6-8.1-30(a): "This rule shall be administered by the local boards of health through their health officer and his authorized representatives."

410 IAC 6-8.1-31(a): "No person shall throw, run, drain, seep, or otherwise dispose into any of the surface waters or ground waters of this state, or cause, permit, or suffer to be thrown, run, drained, allowed to seep, or otherwise disposed into such waters, any organic or inorganic matter from a dwelling or residential sewage disposal system that would cause or contribute to a health hazard or water pollution."

Rule 410 IAC 6-8.1-31(b): "The design, construction, installation, location, maintenance and operation of residential sewage disposal systems shall comply with the provisions of this rule."

410 IAC 6-8.1-33(a): "The owner or agent of the owner shall obtain a written permit, signed by the health officer, for construction of a residential sewage disposal system prior to:

- (1) Construction of a residence or placement of a mobile home which will not be connected to a sanitary sewerage system.
- (2) Any replacement, reconstruction of, expansion or remodeling of a residence which may increase the number of bedrooms.
- (3) Any addition to, alteration of, or repair of an existing residential sewage disposal system.

The application for such a permit shall be made on a form approved by the commissioner, which application shall contain information outlined in section 48 of this rule, the profile analysis of all the soils in which the system is to be constructed, and any other information deemed necessary by the health officer. Other than the approval referenced in subsection (c), the approval of a site by the local plan commission or the county recorder does not constitute approval by the local health officer. The provisions of this rule relating to system design and installation shall not apply where alterations become necessary due to system defect, failure, or malfunction. Such alterations shall be made in accordance with the best judgment of the local board of health except that such alterations shall not be contrary to section 31(a) of this rule and no portion of a soil

absorption system shall be constructed to a depth greater than forty-eight (48) inches below the ground surface.”

410 IAC 6-8.1-48(g): “Soil absorption systems shall not be constructed below the floodway elevation of any flood having a peak discharge equaled or exceeded on the average of once in any one hundred (100) year period.”

Discussion:

As can be noted from the pertinent sections of the rule, the local board of health is the administrative authority for the state rule; in other words, the implementation and enforcement of the rule lies with the local board of health. Local boards of health may not take actions contrary to, or in conflict with, the provisions of the state rule.

The rule stipulates that the design, construction, installation, location, maintenance and operation of residential sewage disposal systems must comply with all of its provisions. The mechanism in the rule for this compliance is through permit issuance by the local health officer [(Sec. 33(a)]. One of the requirements of Sec. 33(a) is that the homeowner obtain a permit signed by local health officer prior engaging in any of the three activities listed in that section of the rule. The third activity listed is the addition to, alteration of, or repair of an existing residential sewage disposal system.

Section 48(g) prevents the construction of a soil absorption system below the 100 year floodway elevation (which is the 100 year floodplain). This section, on its own, prohibits the issuance of a permit by the local health officer for any soil absorption system which would be constructed below the 100 year flood elevation; to issue such a permit would be contrary to the provisions of the rule.

However, Section 33(a) states that the provisions of the rule relating to system design and installation shall not apply where alterations become necessary due to system defect, failure, or malfunction. Such alterations shall be made in accordance with the best judgment of the local board of health except that such alterations shall not be contrary to section 31(a) of this rule and no portion of a soil absorption system shall be constructed to a depth greater than forty-eight (48) inches below the ground surface. [Section 31(a) is the prohibition against installation of any system which discharges to the surface waters of the state.]

There are many existing residences in Indiana where the repair or replacement of a failing onsite sewage system in full compliance with current code would be impossible. Therefore, the local board of health has been granted the ability to use professional judgment in permitting the repair or replacement of these systems. Therefore, this section of the rule can be interpreted that the local board of health can use its professional judgment to determine the appropriateness of permitting the repair or replacement of a failing onsite sewage system below the 100 year flood elevation, just as it can use its professional judgment in permitting the repair or replacement of any other failing onsite sewage system where the repair or replacement cannot fully meet the rule.

However, there is one qualification which must be considered with this approach: The legal status of the system which the applicant wishes to repair or replace. Section 33(a) of the rule requires the owner to obtain a permit signed by the health officer for an onsite

system prior to the construction of a home or placement of a mobile home which will not be connected to a sanitary sewerage system. If a home or mobile home with its associated onsite sewage system was constructed in a floodplain after the effective date of this rule and without a permit from the local health officer, the local board of health is under no obligation to issue a permit for repair or replacement of the onsite sewage system. In fact, the local board of health has every legal right to turn the matter over to its legal counsel for full enforcement of the provisions of section 33 (failure to get a permit) and section 38(g) (construction of an onsite system below the 100 year flood elevation.)

Conclusions and recommendations:

The rule is clear that the construction of soil absorption systems below the 100 year flood elevation is prohibited for new construction. Therefore, issuance of a permit by the health officer for such construction would be contrary to the provisions of the rule.

As discussed, the local board of health may consider each application for repair or replacement of an onsite system on its own merit; however, the local board of health may differentiate between those properties which were legally occupied prior to the effective date of rules prohibiting such new construction, and those properties that were occupied in violation of such rules.

Finally, each local board of health should adopt policies and procedures by which the local health officer and health department staff shall operate concerning the issuance of permits for the repair or replacement of failing onsite sewage systems. These policies and procedures should be reviewed and supported by the board's legal counsel prior to implementation by the local health officer. These policies and procedures should then be published locally so that builders, realtors, system installers, and the public will be informed as to the requirements and procedures.

Such action by the local board of health will reduce confusion and misunderstanding on the part of the public that it serves and the staff that it oversees. It will also promote uniformity and consistency in the actions by the health department staff and reduce liability for the county.