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ENVIRONMENTAL PROTECTION

WATER RESOURCE MANAGEMENT

DIVISION OF WATER QUALITY

Standards for Individual Subsurface Sewage Disposal Systems

Adopted Amendment: N.J.A.C. 7:9A-3.17

Proposed: June 15, 2020, at 52 N.J.R. 1261(a) (see also 52 N.J.R. 1548(a)).

Adopted: June 1, 2021, by Shawn M. LaTourette, Acting Commissioner, Department of Environmental Protection.

Filed: June 7, 2021, as R.2021 d.068, **without change**.

Authority: N.J.S.A. 13:1D-1 et seq.; 26:3A2-21 et seq.; 58:10A-1 et seq., including 58:10A-16; and 58:11-23 et seq.

DEP Docket Number: 02-20-05.

Effective Date: July 6, 2021.

Expiration Date: February 4, 2026.

This rule adoption may be viewed or downloaded from the Department of Environmental Protection's (Department) website at <http://www.nj.gov/dep/rules/adoptions.html>.

Summary

The Department is adopting an amendment to the Standards for Individual Subsurface Sewage Disposal Systems (Standards), N.J.A.C. 7:9A-3.17(a), to remove the requirement that an authorized installer of proprietary technologies possess a National Environmental Health

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Association (NEHA) Certified Installer of Onsite Wastewater Treatment Systems (CIOWTS) Advanced Level certification.

Prior to this adoption, an authorized installer was required to possess a NEHA CIOWTS Advanced Level certification for the installation of advanced wastewater pretreatment devices, products in lieu of laterals, products in lieu of filter material and drip dispersal at N.J.A.C. 7:9A-8.3, 9.8, and 10.8, respectively.

On July 13, 2017, P.L. 2017, c. 112 was enacted. This legislation invalidated the requirement at N.J.A.C. 7:9A-9.8 that installers possess the NEHA CIOWTS Advanced Level certification in order to install products in lieu of laterals and/or filter material. Additionally, effective December 2017, the NEHA Board of Directors' Credentialing Committee discontinued offering the CIOWTS examination.

This amendment will create consistency with State law and eliminate a regulatory requirement that can no longer be satisfied by new installers seeking to install advanced wastewater pretreatment devices, products in lieu of laterals, products in lieu of filter material, and drip dispersal systems in New Jersey.

Summary of Hearing Office's Recommendation and Agency Response:

The period for submission of written comments to the Department's Office of Legal Affairs regarding the proposed amendments ended on September 14, 2020. The Department received written comments from one commenter. After reviewing the written comments, the hearing officer recommended that the Department proceed with adoption of the amendments without change.

Summary of Public Comments and Agency Responses:

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The Department accepted comments on the notice of proposal through September 14, 2020. Mark Miller submitted written comments on the notice of proposal. The comments received and the Department's responses are summarized below.

1. COMMENT: The Department should repropose the rulemaking due to the lack of transparency and discussion provided in the notice of proposal to fully address the issue. While it is true that the legislation enacted on July 13, 2017, P.L. 2017, c. 112, invalidated the requirement at N.J.A.C. 7:9A-9.8 that installers possess the National Environmental Health Association (NEHA) Certified Installer of Onsite Wastewater Treatment Systems (CIOWTS) Advanced Level certification in order to install products in lieu of laterals and/or filter material, the Department provides no discussion on the rest of that legislation, specifically the provision that invalidates that provision once the Department establishes a credential for all onsite system installers. The Department has known about this provision since that time, yet there is no discussion about what actions the Department has taken regarding credentialing installers of these systems, the only major utility serving realty improvements that needs no credential to install by the Department issuing the rules overseeing that activity.

While something needs to be done regarding NEHA and its discontinuation of its CIOWTS testing program, further reason to repropose the rulemaking is the lack of discussion in the notice of proposal of New Jersey's and other state's efforts to license or otherwise credential onsite system installers. According to the NEHA CIOWTS website, it is clear that the State of Iowa continues to use the credential and offers its own testing program. The Department should identify what steps it has taken to follow that path or another option toward credentialing onsite system installers since

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the enactment of P.L. 2017, c. 112. The Department should also discuss why it doesn't pursue a program similar to other existing Department credentials, like the licensed well driller program. Was reciprocity with other state agency programs considered? In the 2012 rule adoption, there is a discussion regarding a lack of statutory authority for such a program; however, P.L. 2017, c. 112 clearly creates an opportunity to create a program by acknowledging the ability of the Department to create a credential for all system installers. The rulemaking should identify what efforts have been made since the 2012 adoption by the Department to bring this issue to the Legislature's and Governor's attention and its steps towards developing a credential for all onsite system installers.

RESPONSE: The Department has been transparent throughout the rulemaking process and followed the procedures set forth in the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq., and the Rules for Agency Rulemaking at N.J.A.C. 1:30. The notice of proposal provided sufficient information outlining the nature of the proposed rule change to enable informed comment. Specifically, the notice of proposal clearly identified the change that was being proposed (removal of the requirement that a certification that was no longer available be held for certain installations) and the basis for that change. The notice of proposal identified the primary purpose of the NEHA CIOWTS certification and identified that, while the NEHA CIOWTS certification covered basic installation knowledge, it was never intended to ensure that the installer had sufficient knowledge to install specific proprietary technologies. The notice of proposal detailed that N.J.A.C. 7:9A-3.17 limited the requirement for the NEHA CIOWTS Advanced Level Certification to installers of specific proprietary technologies. Also, the notice of proposal explained the legislative and practical events, including the discontinuance of this certification by the NEHA, that led to the Department's proposed action.

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In addition to providing a description of the proposed amendment and the rationale behind the action the Department was proposing to take, the Department fully complied with notice and comment requirements of the Administrative Procedure Act to ensure that there was sufficient opportunity for those affected and the public at large to provide input on the changes the Department proposed. Indeed, subsequent to publication of the notice of proposal on June 15, 2020, the Department extended the expiration date of the initially provided 60-day comment period from August 14, 2020, until September 14, 2020, providing further time beyond that required by the Administrative Procedure Act and its implementing rules during which the notice of proposal could be reviewed and commented on by all interested parties.

The process followed by the Department in this rulemaking was fully compliant with the APA and there is no basis for reproposal; the APA does not require that the agency proposing to amend its rules fully describe alternative changes that could have been proposed, only that it describe and explain the changes it has chosen to pursue.

As more fully explained in the notice of proposal, before this rulemaking, the NEHA CIOWTS credential for onsite system installers was required only for the installation of advanced wastewater pretreatment devices pursuant to N.J.A.C. 7:9A-8.3, products in lieu of laterals and filter material pursuant to N.J.A.C. 7:9A-9.8, and drip dispersal pursuant to N.J.A.C. 7:9A-10.8.

Subsequent to this requirement being incorporated into the rules, a manufacturer of products in lieu of laterals, and filter material systems raised a complaint that the rule was inequitable as the CIOWTS certification requirement only applied to certain types of systems. The manufacturer requested that this certification requirement be removed, and that any future certification requirement be enacted only if it applied to installers of all systems. In response, the

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Legislature passed P.L. 2017, c. 112, on July 13, 2017, which invalidated portions of N.J.A.C. 7:9A, by removing the credential requirement for the installation of products in lieu of laterals and filter material pursuant to N.J.A.C. 7:9A-9.8. The certification requirement remained applicable to the installers of advanced wastewater pretreatment devices and drip dispersal.

After the passage of P.L. 2017, c. 112, NEHA discontinued their CIOWTS advanced level certification program. Since this certification cannot be provided to all system installers and because new system installers lack the ability to obtain this certification, the Department determined that it is necessary to remove the requirement for the NEHA CIOWTS advanced level certification from the current rules.

The establishment of any credentialing program for all septic installers is outside the scope of this rulemaking. Although P.L. 2017, c. 112 subsection b states that subsection a of that law will become inoperative upon the adoption of a credentialing requirement for all installers of individual subsurface sewage disposal systems, it does not create the obligation to create this program and the Department does not intend to create such a program at this time. Since NEHA ceased offering its CIOWTS advanced level certification program, installers are being adversely impacted by their inability to receive the certification, and it is important that the Department not limit the availability of installers in the marketplace. Developing a separate certification program would require time, creating a new obstacle to qualifying installers.

As indicated in the notice of proposal Summary, while the credentialing program provided the installer with additional training for advanced wastewater pretreatment devices, products in lieu of laterals and/or filter material, and drip dispersal, removal of the requirement for the

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advanced level certification from NEHA will have a minimal negative effect because the installers will still need to be certified by the specific manufacturers to install the proprietary products. The existing regulatory requirements for the location, design, construction, installation, alteration, repair, and operation of septic systems remain unchanged. It is important to note that the amendment does not affect the requirement that ensures the installers are qualified to install proprietary technologies in accordance with the standards, nor does it affect the statutory and regulatory inspection requirements discussed in the Response to Comment 2 that ensure that the installation was completed properly.

2. COMMENT: The Department asserts in its notice of proposal that the requirement that authorized installers provide proof from the device manufacturer that they have been certified to install the proprietary technology will remain and that this will continue to ensure that any potential risk to the environment as a result of improper system installations will continue to be minimal. This could be interpreted that proprietary technology manufacturers are now responsible for installation of all components of the onsite system. However, there is no added rule text to reflect the responsibility of the manufacturers with regard to the system installation. The existing rule text only applies to a manufacturer's proprietary components. The Department should repropose the rulemaking based on this statement to reflect this requirement. Further, no data is provided to support this claim. The Department should provide the analysis performed that demonstrates improper system installations continue to be minimal and what standard the Department has set to define what minimal improper system installation rates should be.

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RESPONSE: The commenter's interpretation that proprietary technology manufacturers are now responsible for installation of all components of the onsite system is incorrect. The requirement that an authorized installer shall, upon request, provide the Department or the administrative authority with written evidence from those manufacturers and/or system integrators certifying that the installer has sufficient knowledge to install the proprietary technologies in accordance with all manufacturer specifications remains, unchanged, in the rules at N.J.A.C. 7:9-3.17(b). It remains the responsibility of the manufacturer and/or system integrators to certify that the installer has sufficient knowledge to install the specific proprietary product they are proposing to incorporate into a system design. Since these technologies are proprietary, their incorporation into a system design requires sufficient knowledge of their specifications and functioning to assure they will work, as certified, for a particular application. Further, N.J.S.A. 58:11-33 and N.J.A.C. 7:9A-3.13 require that the local administrative authority inspect the installation of individual subsurface sewage disposal systems prior to covering, to ensure that the installation was completed properly.

The Department has determined that the requirement for manufacturer certification in combination with inspection by local authorities should ensure that installers have sufficient knowledge and adequately protect against improper system installation. Therefore, further analysis is not necessary at this time.

3. COMMENT: N.J.S.A. 58:11-35 requires a biennially assembled advisory committee to draft and recommend standards for these systems. The Department should identify the dates of those committee meetings, who encompassed the membership and their recommendations on this issue.

RESPONSE: As indicated at N.J.S.A. 58:11-35, the membership of the advisory committee is made up of a broad spectrum of representatives of various interest groups and representatives of

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appropriate State departments. The advisory committee is tasked with drafting and recommending standards for the construction of water supply systems and sewerage facilities for realty improvements in order to ensure their safety, adequacy, and propriety for the purposes for which they are to be installed and is consulted for amendments to such construction standards. The last meeting of the advisory committee occurred on January 28, 2014. The advisory committee has not provided recommendations on the amendment adopted at this time as the amendment to remove the NEHA CIOWTS credential requirements for installers does not change the construction standards upon which the onsite systems are designed or installed.

Federal Standards Statement

N.J.S.A. 52:14B-1 et seq. requires State agencies which adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis.

There are no Federal standards or regulations for the location, design, construction, installation, alteration, repair, or operation of septic systems. Thus, there are no Federal standards against which such analysis could be conducted.

Full text of the adoption follows:

SUBCHAPTER 3. ADMINISTRATION

7:9A-3.17 System professionals

(a) An authorized installer shall, upon request, provide the Department or the administrative authority with written evidence from those manufacturers and/or system integrators certifying

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that the installer has sufficient knowledge to install the proprietary technologies in accordance with all manufacturer specifications and this chapter pursuant to N.J.A.C. 7:9A-8.3, 9.8, and 10.8, as applicable.

(b)-(c) (No change)