ENVIRONMENTAL PROTECTION

WATER RESOURCE MANAGEMENT

DIVISION OF WATER QUALITY

Standards for Individual Subsurface Sewage Disposal Systems

Proposed Amendments: N.J.A.C. 7:9A-2.1 and 8.3

Authorized By: Shawn M. LaTourette, Commissioner, Department of Environmental Protection.

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.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

DEP Docket Number: 06-24-05.

Proposal Number: PRN 2024-081.

Submit written comments by close of business August 30, 2024, electronically at www.nj.gov/dep/rules/comments. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

The Department of Environmental Protection (Department) encourages electronic submittal of comments. In the alternative, comments may be submitted on paper to:

Stephanie J. Press, Esq.

Attention: DEP Docket Number 06-24-05

Office of Legal Affairs

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The rule proposal may be viewed or downloaded from the Department's website at www.nj.gov/dep/rules.

The agency proposal follows:

Summary

As the Department of Environmental Protection has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

The Department is proposing to amend the Standards for Individual Subsurface Sewage Disposal Systems, N.J.A.C. 7:9A (the Standards), following its grant of a rulemaking petition. Pursuant to existing N.J.A.C. 7:9A-2.1 and 8.3, only advanced wastewater pretreatment devices which are certified to the National Sanitation Foundation International (NSF) Standard 40 and/or Standard 245 by NSF are considered for inclusion on the Department's list of pretreatment devices applicable pursuant to N.J.A.C. 7:9A-8.3. The Department is proposing to amend existing N.J.A.C. 7:9A-8.3 to enable the Department to accept Standard 40 and/or Standard 245 certifications from other accredited organizations in addition to NSF. The proposed amendments are consistent with the Department's determination in response to a petition for rulemaking, described below. (See also 55 N.J.R. 2026(a); 2279(a); 2360(a)).

The Petition

AquaKlear, Inc., AquaKlear of New Jersey, and Gulf Coast Testing (petitioners) filed a petition on August 3, 2023, requesting the Department amend N.J.A.C. 7:9A-8.3 to accept certifications of advanced wastewater pretreatment systems from all American National Standards

Institute- (ANSI) accredited organizations, of which NSF is one, so long as the system is certified to NSF/ANSI Standard 40 and/or Standard 245 by those ANSI-accredited organizations. In support of the petition, the petitioners stated that by accepting NSF certification only, the Department's rules at N.J.A.C. 7:9A-8.3 cause a "negative economic impact," leading to less competition and higher costs. The petitioners asserted that other ANSI-accredited organizations can certify advanced wastewater pretreatment components in the same manner and to the same standards as NSF. The petitioners additionally note that only one other state in the country "limit[s] the certification of advanced treatment units to only one vendor," and that other adjacent states, such as New York, Pennsylvania, and Delaware, "allow other ANSI accredited companies to certify the wastewater systems." The proposed amendment would, according to the petitioners, have a positive economic impact by increasing competition and driving down costs and benefiting human health and the environment.

In accordance with the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-4, and the implementing Rules for Agency Rulemaking, N.J.A.C. 1:30, on October 24, 2023, the Department filed a notice of action with the Office of Administrative Law for publication in the New Jersey Register and sent a copy of the notice of action to the petitioners (See 55 N.J.R. 2360(a)). The Department additionally posted the notice of action on its website. The notice indicated that the Department negotiated and reached an agreement with the petitioners for an extension, until June 1, 2024, of the deadline established at N.J.A.C. 1:30-4.2(a)3, which requires the Department to initiate rulemaking within 90 days upon the conclusion of further deliberations. Initial notice of receipt of the petition was published in the September 18, 2023 New Jersey Register and a notice of action referring the petition for further deliberation was published in the November 6, 2023 New Jersey Register. (See 55 N.J.R. 2026(a); 2279(a)).

Discussion of Proposed Amendments

The Standards govern individual subsurface sewage disposal systems, commonly known as "septic systems." The Standards were first adopted in 1989, effective August 21, 1989, and existing N.J.A.C. 7:9A-8.3 was adopted as a new rule effective April 2, 2012. Existing N.J.A.C. 7:9A-8.3 has not been amended since adoption.

The Standards were established to protect public health, as required by the Realty Improvement Sewerage and Facilities Act, N.J.S.A. 58:11-23 et seq., and to prevent water pollution, as required pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq. These acts are implemented, in part, through the Standards, which provide the "standards for the proper location, design, construction, installation, alteration, repair and operation of individual subsurface sewage disposal systems." N.J.A.C. 7:9A-1.1(a)2. In large part, administration and enforcement of the Standards is delegated to the local "administrative authority," (that is, the local health department) with the Department retaining oversight and administration of more complex matters.

Subchapter 8 of the Standards addresses requirements for septic system pretreatment components. N.J.A.C. 7:9A-8.3 addresses the use of advanced wastewater pretreatment devices. These pretreatment devices achieve treatment by microbes that oxidize and decompose the organic compounds in the presence of oxygen. They treat the sewage to a higher quality and lower strength effluent than is produced by a septic tank alone and are typically installed after a septic tank and before the disposal field. Such devices include, but are not limited to, peat biofilters, tricking filters, and sequencing batch reactors. Existing N.J.A.C. 7:9A-2.1 defines an "advanced wastewater pretreatment device" as:

> an NSF International (NSF) Standard 40 or Standard 245 certified technology, which may be incorporated as a part of an onsite

> wastewater treatment system, which bears the NSF mark and is designed, installed, operated, monitored and maintained in accordance with that certification and this chapter. This definition also includes those technologies that are authorized for use in the Pinelands Area through the Pinelands Advanced Wastewater Treatment Systems Pilot Program at N.J.A.C. 7:50-10.23.

N.J.A.C. 7:9A-8.3(a) permits the use of a pretreatment device at the discretion of the Department or administrative authority, as applicable. When permitted, only pretreatment devices that meet the requirements of the Standards may be installed. To facilitate the use of pretreatment devices and assist the public in identifying compliant technologies, N.J.A.C. 7:9A-8.3(a) requires the Department maintain a list of pretreatment devices that meet the threshold requirements of the Standards. Inclusion on the list is not an approval, certification, or determination of the effectiveness of the technology; it remains the responsibility of the system designer to design a system that will function properly.

An advanced wastewater pretreatment device manufacturer that wishes to have its pretreatment device included on the Department's list must submit a written request to the Department with the information required at N.J.A.C. 7:9A-8.3. If the requirements at N.J.A.C. 7:9A-8.3 are satisfied, the Department will include the pretreatment device on the list. Relevant to the proposed amendments, for a pretreatment device to be included on the Department’s list, it “shall have obtained an NSF Standard 40 and/or Standard 245 certification” and “bear the mark of NSF.” N.J.A.C. 7:9A-8.3(a). Thus, pursuant to existing N.J.A.C. 7:9A-2.1 and 8.3, for a

pretreatment device to be included on the Department's list, it must be certified by NSF to meet NSF Standard 40 and/or Standard 245 treatment criteria.

In the compliance field, NSF plays a dual role; NSF both develops compliance standards and tests, and certifies products to those and other similar standards. In its capacity as a standards development organization, NSF, together with the American National Standards Institute, develops various types of widely used compliance standards across multiple industries. ANSI is not a standards-developing organization, but rather acts as a guide, providing a framework for standards development and assessment. Two such standards developed by NSF within the ANSI framework are NSF/ANSI Standards 40 and 245. Standards 40 and 245 are nationally recognized standards for on-site residential wastewater treatment systems. A device that carries a certification to one or both standards provides assurance to consumers and regulators that the device meets certain minimum qualifications for function, health, and safety. To be certified to Standard 40 and/or Standard 245, devices must meet minimum requirements for effluent quality, structural integrity, leakage, flow design, and electrical certification, among other things. Standard 245 meets all requirements of Standard 40, but also requires the device to produce a certain reduction of total nitrogen in the wastewater.

In its capacity as a third-party certifier, NSF certifies products to the NSF/ANSI standards, including Standards 40 and 245, and other compliance standards. NSF is one of many organizations that certifies products to the NSF/ANSI standards. ANSI, through its subsidiary, the ANSI National Accreditation Board, vets and issues accreditations third-party certification bodies that wish to certify products in accordance with the NSF/ANSI standards. One such ANSI-accredited organization is NSF acting in its capacity as a third-party certifier.

While ANSI issues accreditations for a wide variety of industry-specific conformity assessment structures, certification of advanced wastewater pretreatment devices falls within ANSI's Product Certification Accreditation Program. The Product Certification Accreditation Program, including the application process, is defined by International Organization for Standardization/International Electrotechnical Commission (ISO/IEC) Conformity Assessment 17065:2012. To become accredited by ANSI pursuant to its Product Certification Accreditation Program, and, thus, accredited to certify advanced wastewater pretreatment devices to Standard 40 and/or Standard 245, an organization must go through a comprehensive application process with the aim of the organization demonstrating it is competent to perform necessary reviews and certifications. This process includes formation of a dedicated assessment team to review the application, a formal on-site assessment of the applicant's facility, witness assessments, and the opportunity for public comments on the application. The assessment team then drafts a report and submits it to an evaluation task group, which conducts a detailed review of the application and assessment report and may take additional steps, as necessary, to ensure the applicant is competent. The evaluation task group then makes a recommendation to the larger accreditation committee, which decides to grant or deny accreditation through a vote.

Accreditation is retained for the period specified in the accreditation certificate and renewed, as necessary, typically every two years. To continue to hold accreditation status by ANSI, continuing accreditation assessment activities are conducted annually, at a minimum. Continuing assessment activities may include site visits, witness assessments, and assessment of the accredited organization's operations to ensure continued conformity with ANSI policies and procedures.

As noted above, NSF is not the only ANSI-accredited organization that can certify advanced wastewater pretreatment devices to NSF/ANSI Standard 40 and/or Standard 245. In fact,

there are many other ANSI-accredited organizations that must meet the same accreditation standard as NSF, ISO/IEC 17065:2012. It was only after existing N.J.A.C. 7:9A-2.1 and 8.3 were adopted in 2012 that ISO/IEC 17065:2012 was published. (See 43 N.J.R. 478(a); 44 N.J.R. 1047(a)). With ISO/IEC 17065:2012 and ANSI's overall accreditation program, the Department has concluded that amending the standards to broaden the scope of accepted third-party certifiers to all third-party certification bodies accredited by ANSI to certify advanced wastewater pretreatment devices to Standard 40 and/or Standard 245 is appropriate.

As the primary purpose of the Standards is to protect human health, it is imperative to ensure that the devices included on the Department's list meet rigorous public and environmental health and safety standards. Therefore, the Department has determined that it is appropriate to follow ANSI's accreditation program. Relying on a third-party certification program necessitates oversight to ensure devices are adequate, and the Department believes that following ANSI, a nationally recognized accreditation organization, will meet the purposes of the Standards. The Department anticipates that following ANSI's exacting accreditation program will result in testing and certifications being completed by qualified and competent organizations. The Department believes that with proper installation, operation, and maintenance, consumers can be confident that pretreatment devices will provide sufficient treatment of wastewater and protection of groundwaters. Further, the Department believes that broadening the scope of permitted certifiers will encourage a diverse and healthy marketplace for these devices, ideally leading to greater cost benefits to consumers and the continued development of technological enhancements.

The Department believes that existing N.J.A.C. 7:9A-2.1 and 8.3 are unnecessarily restrictive in confining acceptable certifications only to those issued by NSF. As such, the Department is proposing to amend existing N.J.A.C. 7:9A-2.1 and 8.3 to accept Standard 40 and

Standard 245 certifications performed by any organization accredited by ANSI to test and certify to Standard 40 or Standard 245. For the reasons discussed above and in consideration of ANSI's exacting accreditation program, the Department believes accepting NSF/ANSI Standard 40 and Standard 245 certifications from any organization accredited by ANSI will continue to ensure devices included on the Department's list will meet rigorous public and environmental health and safety standards while also opening the New Jersey market.

To alert the public and persons evaluating or maintaining the pretreatment device that the device is in compliance with NSF/ANSI Standard 40 and/or Standard 245, the Department is maintaining the requirement that the device bear a certification mark or seal. Consistent with existing N.J.A.C. 7:9A-2.1 and 8.3, the Department is not proposing to require pretreatment devices with capacities of over 2,000 gallons per day bear a certification mark or seal. This is because N.J.A.C. 7:9A deals with systems in excess of 2,000 gallons per day and NSF/ANSI Standard 40 and Standard 245 are limited to systems with capacities of less than 1,500 gallons per day. As described in the original notice of proposal for N.J.A.C. 7:9A-8.3 (43 N.J.R. 478(a)), this issue is addressed by requiring additional, site-specific certifications from the manufacturer to identify that its technology has been certified by NSF for smaller systems and an analysis demonstrating that the intended wastewater influent to the system will be adequately treated to the United States Environmental Protection Agency (EPA) secondary effluent standards.

At N.J.A.C. 7:9A-2.1 and 8.3, Standard 40 and 245 are referred to as "NSF Standard 40 and/or Standard 245." A correct citation should include reference to "ANSI" in addition to NSF. Therefore, the Department is also proposing to correct this throughout N.J.A.C. 7:9A-2.1 and 8.3, such that all updated references would read as follows: "NSF/ANSI Standard 40 and/or Standard 245."

Social Impact

The Department anticipates the proposed amendments will have no social impact. The Department is not proposing to change the underlying standards to which advanced wastewater pretreatment devices must be certified. The level of health and safety protection currently afforded by the Standards will not change and, thus, the amendments will have no social impact.

Economic Impact

The Department anticipates the proposed amendments will have a positive economic impact. Broadening the scope of permitted certifiers will lead to a fairer and more equitable marketplace and encourage a diverse and healthy marketplace for pretreatment devices, ideally leading to greater cost benefits to consumers.

It is expected that the vast majority of industry will welcome this change and experience economic benefits. The proposed amendments will open the New Jersey market to all pretreatment devices certified to NSF/ANSI Standard 40 and/or Standard 245.

Pursuant to the existing rules, pretreatment device manufacturers wishing to market their product in New Jersey are required to obtain a certification from NSF and cannot participate in the New Jersey market if they are unable or unwilling to do so. These proposed amendments will allow a greater number of pretreatment device manufacturers to participate in the New Jersey market, ultimately leading to economic benefits for them.

Likewise, the proposed amendments will equally apply the Standards to all third-party certification bodies accredited by ANSI to certify to NSF/ANSI Standard 40 or Standard 245. Such organizations are unnecessarily prevented from participating in the New Jersey market pursuant to the existing rules.

The Department also anticipates the proposed amendments will lead to positive economic benefits to consumers due to the anticipated influx of available pretreatment systems and increase in competition.

The Department acknowledges that the proposed amendments will cause NSF to lose its competitive advantage. However, the Department anticipates the economic impact to NSF will be minimal. According to its website, NSF has certified 755 pretreatment systems to Standard 40 across 36 manufacturers and 179 pretreatment systems to Standard 245 across 17 manufacturers. In comparison, as a global organization, NSF has certified a total of more than 657,000 products across multiple sectors. Moreover, even with the proposed amendments, manufacturers may continue to have their products certified by NSF if they wish. The Department's intent in promulgating existing N.J.A.C. 7:9A-2.1 and 8.3 was not to create an economic benefit for a single entity. The purpose of the Standards is to protect public and environmental health and safety and it is the Department's position that these amendments will continue to meet the goal of the Standards as discussed below in the Environmental Impact Statement.

Environmental Impact

The Department anticipates a positive environmental impact. The advanced wastewater pretreatment devices included on the Department's list will continue to be tested and certified to the rigorous NSF/ANSI Standard 40 and/or Standard 245. By continuing application of NSF/ANSI Standard 40 and/or Standard 245, ongoing protection of public and environmental health is ensured. This protection is likewise ensured by expanding permitted certification organizations to those only accredited by ANSI.

There are many advanced wastewater pretreatment devices that are currently prevented from entering the New Jersey market due to the language at existing N.J.A.C. 7:9A-2.1 and 8.3.

These proposed amendments will open the New Jersey market to additional pretreatment devices and new technologies, which the Department anticipates will ultimately lead to positive environmental benefits and encourage development of technological enhancements.

Federal Standards Statement

N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65), requires State agencies that adopt, readopt, or amend State rules that exceed Federal standards or requirements to include in the rulemaking document a Federal standards analysis.

The Department's authority for regulating the construction of individual subsurface sewage disposal systems comes solely from State statute, specifically N.J.S.A. 58:11-23 et seq., 58:10A-1 et seq., 13:1D-1 et seq., and 26:3A2-21 et seq. The rules at N.J.A.C. 7:9A are not promulgated pursuant to the authority of, or in order to implement, comply with, or participate in any program established pursuant to Federal law or a State statute that incorporates or refers to Federal laws, Federal standards, or Federal requirements.

Jobs Impact

The Department anticipates that this rulemaking will have a positive impact on job creation and retention for both certification organizations, pretreatment device manufacturers, and installers. The jobs impact anticipated by the Department is three-fold. First, these amendments will open the New Jersey market to all third-party certification bodies accredited by ANSI to test and certify to NSF/ANSI Standard 40 or Standard 245. Second, these amendments will benefit pretreatment device manufacturers to the extent there exist pretreatment devices certified to NSF/ANSI Standard 40 and/or Standard 245 by ANSI-accredited organizations other than NSF. Third, the Department anticipates that expanding the scope of permitted pretreatment devices will lead to more of these devices being installed in the State, thus benefiting installers.

Agricultural Impact

The Department anticipates that the proposed amendments will not impact the agricultural industry.

Regulatory Flexibility Statement

As required pursuant to the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has evaluated the reporting, recordkeeping, and other compliance requirements that the proposed amendments would impose upon small businesses. The Regulatory Flexibility Act defines the term "small business" as "any business which is a resident in this State, independently owned and operated and not dominant in its field, and which employs fewer than 100 full-time employees." The Department has determined that the proposed amendments will not impose any additional reporting, recordkeeping, or other compliance requirements beyond what the existing rules require.

Housing Affordability Impact Analysis

In accordance with N.J.S.A. 52:14B-4.1, the Department has evaluated the proposed rulemaking to determine its impact, if any, on the affordability of housing. Insofar as the proposed amendments are anticipated to broaden the New Jersey market and encourage a healthy and diverse marketplace for pretreatment devices, the Department anticipates a minimal positive impact on affordable housing and the average cost of housing in the State.

Smart Growth Development Impact Analysis

In accordance with N.J.S.A. 52:14B-4, the Department has evaluated the proposed rulemaking to determine its impact, if any, on housing production in Planning Areas 1 or 2, or within designated centers, pursuant to the State Development and Redevelopment Plan. The

Department has determined that the rulemaking is unlikely to evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, pursuant to the State Development and Redevelopment Plan.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

In accordance with N.J.S.A. 52:14B-4(a)(2) and 2C:48B-2, the Department has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 2. DEFINITIONS

7:9A-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

…

"Advanced wastewater pretreatment device" means an NSF International [(NSF)] **(NSF)/American National Standards Institute (ANSI)** Standard 40 or Standard 245 certified technology, which may be incorporated as a part of an onsite wastewater treatment system, which [bears the NSF mark] **is certified by a third-party certifying program accredited by ANSI, bears a certification mark or seal,** and is designed, installed, operated, monitored**,** and

maintained in accordance with that certification and this chapter. This definition also includes those technologies that are authorized for use in the Pinelands Area through the Pinelands Advanced Wastewater Treatment Systems Pilot Program at N.J.A.C. 7:50-10.23.

…

SUBCHAPTER 8. PRETREATMENT COMPONENTS

7:9A-8.3 Advanced wastewater pretreatment components

(a) The use of an advanced wastewater pretreatment device**,** in addition to**,** a septic tank, or in lieu of a septic tank provided a primary settling component is incorporated into the design, may be allowed or required, at the discretion of an administrative authority, for new construction, projects where there is an increase in the expected volume of sanitary sewage pursuant to N.J.A.C. 7:9A-7.4, or to alter an existing, malfunctioning system. For individual systems with expected volumes of sanitary sewage less than or equal to 1,500 gallons per day, advanced wastewater pretreatment devices shall have obtained an [NSF] **NSF/ANSI** Standard 40 and/or Standard 245 certification, [bear the mark of NSF] **from a third-party certifying program accredited by ANSI, shall bear a certification mark or seal,** and must be used in accordance with all conditions of that certification in addition to the requirements in this chapter. For systems with expected volumes of sanitary sewage greater than 1,500 gpd or systems that receive waste flows that are not residential in nature, advanced wastewater pretreatment devices shall be from a manufacturer that has obtained an [NSF] **NSF/ANSI** Standard 40 and/or Standard 245 certification for the treatment technology **from a third-party certifying program accredited by ANSI**, be certified by the manufacturer that the technology is designed to achieve secondary effluent standards for the actual or proposed waste strength that will be generated at the site**,** and

must be used in accordance with all requirements in this chapter. The Department shall maintain a list of advanced wastewater pretreatment devices that are applicable [under] **pursuant to** this section that comply with the following:

1. Any advanced wastewater pretreatment device manufacturer that wishes to have their device listed by the Department shall submit a written request and a copy of [an NSF] **a** Final Report **issued by the organization certifying the device meets NSF/ANSI Standard 40 and/or Standard 245**. The written request shall include an acknowledgement by the manufacturer to comply with all applicable requirements of this chapter.

2. (No change.)

3. All advanced wastewater pretreatment devices shall be used in accordance with the provisions of this chapter and all documentation in the [NSF] Final Report **issued by the organization certifying the device meets NSF/ANSI Standard 40 and/or Standard 245** provided to the Department.

(b) Prior to submitting any design that includes an advanced wastewater pretreatment device to the administrative authority, a system designer shall:

1.-8. (No change.)

9. Include in the design**,** a septic tank prior to any advanced wastewater pretreatment devices unless otherwise specifically identified in the [NSF] **NSF/ANSI** Standard 40 [or] **and/or Standard** 245 certification and the manufacturer's recommendations or specifications. Effluent filters required at N.J.A.C. 7:9A-8.2 may be relocated to another point downstream of the septic tank or may be eliminated provided that this design consideration is specifically identified in the manufacturer's recommendations or specifications;

10.-11. (No change.)

(c) – (e) (No change.)