



STATE OF NEW MEXICO  
**REGULATION & LICENSING DEPARTMENT**  
OFFICE OF THE SUPERINTENDENT  
Toney Anaya Building  
2550 Cerrillos Road, Santa Fe, New Mexico 87504  
Information Line: (505) 476-4500 • Fax: (505) 476-4511  
Direct Line: (505) 476-4508

**Bill Richardson**  
GOVERNOR

**Edward J. Lopez, Jr.**  
SUPERINTENDENT

**Lisa D. Martinez**  
DIRECTOR  
Construction  
Industries Division

**Construction Industries Division**  
5200 Oakland Ave., NE  
Albuquerque, NM 87113

Alcohol & Gaming  
Division  
(505) 476-4875  
Boards & Commissions  
Division  
(505) 476-4600  
Construction Industries  
Division  
(505) 476-4700  
Financial Institutions  
Division  
(505) 476-4885  
Manufactured Housing  
Division  
(505) 476-4770  
Securities Division  
(505) 476-4580  
Administrative Services  
Division  
(505) 476-4800

August 31, 2007

Chuck Nobel, Assistant General Counsel      by email to: [chuck.noble@state.nm.us](mailto:chuck.noble@state.nm.us)  
Environment Department  
State of New Mexico  
1190 St. Francis Drive  
Santa Fe, NM 87503

Re:    Liquid waste installation certification and product approval questions

Dear Mr. Nobel:

This letter will attempt to provide the New Mexico Environment Department (NMED) with clarification on the Construction Industries Division's (CID) position on the referenced questions. As you noted in your email of August 14, 2007, these questions have been the subject of discussions between NMED and CID at two meetings, but there continues to be confusion about CID's view of the two agencies' respective enforcement roles.

The first question, as CID understands it, is whether NMED can require installers of certain liquid waste systems to be "certified" by NMED as a prerequisite to performing that work. It is CID's opinion that this practice would constitute dual licensing, which is prohibited by the Construction Industries Licensing Act (CILA).

The CILA provides that its purpose is to eliminate "the wasteful and inefficient administrative practices of dual licensure . . . and jurisdictional conflicts." (NMSA 1978, Section 60-13-1.1.) It goes on to identify those who must be licensed: "No person shall act as a contractor without a license issued by the division classified to cover the type of work to be undertaken." (NMSA 1978, Section 60-13-12.) A "contractor" is defined as anyone who undertakes contracting, and "contracting" includes construction, alteration, repair, installation or demolition of "sewerage, water, gas or other pipeline" and "sewerage or water treatment facility" or structures or installations that are covered by applicable codes adopted under the CILA. (NMSA 1978, Section 60-13-3.)<sup>1</sup> The CILA also makes failure to be licensed by CID a misdemeanor. (NMSA 1978, Section 60-13-52.)

<sup>1</sup> The State has adopted the Uniform Plumbing Code, as amended by NMAC, Title 14, Chapter 8, which provides that all liquid waste disposal must be installed in accordance with its provisions. In addition, the CILA requires any

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Given the express statutory provisions that persons installing liquid waste systems must be licensed by CID, and that dual licensure is prohibited, it is CID's position that NMED's rules requiring certification of the same activity are contrary to and disallowed under the CILA. Further, if the NMED enabling legislation does not authorize NMED to require liquid waste system installers to be certified by NMED, it is evident that they are invalid. (See In re Proposed Revocation of Food & Drink Purveyor's Permit for House of Pancakes, 102 N.M. 63, 691 P.2d 64, 1984 N.M. App. LEXIS 718 (N.M. Ct. App. 1984). The New Mexico Court of Appeals found that the New Mexico Environmental Improvement Division could not revoke a restaurant permit pursuant to a rule that was not authorized by statute. "Administrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them. An agency cannot amend or enlarge its authority through rules and regulations. Nor may an agency, through the device of regulations, modify the statutory provision.")

The second question concerns the approval of alternative liquid waste systems. Appendix K of the Uniform Plumbing Code (UPC) provides the criteria for construction of liquid waste systems in New Mexico. The Alternate Materials and Methods of Construction Equivalency provisions of Section 301.2 of the UPC allow for alternatives to the provisions of Appendix K, but only on a case-by-case basis. Under this code section, each proposed alternative to Appendix K must be designed and installed pursuant to the manufacturer's specifications and result in a system that is equal or superior to systems conforming to Appendix K. Neither the adopted codes nor the CILA authorizes a "blanket" approval of any alternative system *type*. This is the provenance of the code body that publishes the national code; in this case, the International Association of Plumbing and Mechanical Officials. Therefore, it is CID's position that it cannot approve system types that are not in conformance with Appendix K and that, to the extent that NMED is permitting and inspecting liquid waste systems in lieu of CID, arguably, it is similarly constrained. It is not apparent that NMSA 1978, Section 74-1-1, et seq. preempts the CILA and state building codes governing the standards applicable to liquid waste systems.

I hope this information is helpful to NMED in its consideration of the questions posed. Please let me know if CID can be of further assistance.

Sincerely,



Lisa D. Martinez  
Director, CID

cc: J.T. Baca, Mechanical/Plumbing Bureau Chief