MINNESOTA
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ADMINISTRATIVE
HEARINGS

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March 26, 2018

VIA EFILING ONLY
Andrea Barker
85 E 7th Pl Ste 125
Saint Paul, MN 55101
andrea.barker@state.mn.us

Re: ***In the Matter of the Proposed Rule Governing Chapter 1800***
OAH 5-9038-34735; Revisor R-4374

Dear Ms. Barker:

Enclosed please find the Amended Report of the Chief Administrative Law Judge in the above-entitled matter and the Amended Report of Administrative Law Judge Jim Mortenson. The Board may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval.

If the Agency chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, or request reconsideration, the Board must file the documents required by Minn. R. 1400.2240, subps. 4 and 5.

If you have any questions regarding this matter, please contact Katie Lin at (651) 361-7911 or katie.lin@state.mn.us.

Sincerely,

JIM MORTENSON
Administrative Law Judge

Enclosure
cc: Office of the Governor
Office of the Revisor of Statutes
Legislative Coordinating Commission

OAH 5-9038-34735
Revisor R-4374

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Definitions, Noncompliant Conduct, Applications for Examination, Licensure and Temporary Permits, Qualifying Education and Experience, Qualifications for Licensure, Certification and Signature, Housekeeping Updates and Proposed Repeal of Obsolete Rules; Minnesota Rules Chapter 1800

AMENDED REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2016), and Minn. R. 1400.2240, subp. 4 (2017). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's report when there are findings that a proposed agency rule should not be approved.

By Order dated March 16, 2018, the Chief Judge approved in all respects the findings in the Report of the Administrative Law Judge dated March 14, 2018,[1] including the disapproval of proposed Minn. R. 1800.0130, subp. 6. The Report indicated that the hearing record closed for all purposes on February 12, 2018, which was the date set by the Administrative Law Judge during the rulemaking hearing.

On March 19, 2018, the Office of Administrative Hearings was made aware that its rulemaking e-comment site incorrectly stated that the record in this matter would close on February 14, 2018. Due to this inadvertent error, members of the public understandably may have believed that the deadline for the submission of timely rebuttal comments regarding the proposed rules had been extended to February 14, 2018. Under these circumstances, the Chief Judge concludes that page 2 of the Report issued by Judge Mortenson must be amended to indicate that the rulemaking record closed for all purposes on February 14, 2018, rather than February 12, 2018.

Of all the comments received after the hearing, including three filed during the rebuttal period, only one was submitted after the February 12, 2018 deadline. That comment, from Mr. Daniel Corey, was submitted on February 14, 2018. Mr. Corey had submitted prior comments on November 9, 2017, and January 18, 2018. His concerns and the Board's response are discussed in Findings 130-137 of the Administrative Law Judge's Report. Pursuant to the above amendment, Mr. Corey's February 14, 2018,

[1] Judge Mortenson's Report is incorrectly dated March 16, 2018, and will be amended to reflect the actual date it was completed and submitted to the Chief Judge for review.

comment was received prior to the close of the rulemaking record. To clarify that Mr. Corey also submitted a timely comment during the rebuttal period, the Chief Judge further concludes that it is appropriate to amend Finding 130 of the Report of the Administrative Law Judge by adding the following sentences to the end of that Finding:

> In a post-hearing comment submitted on February 14, 2018, Mr. Corey reiterated his opposition to the Board's proposed language regarding land surveying credits. Specifically, Mr. Corey expressed concern about an applicant's ability to present evidence of meeting the minimum approved land surveying credits when the course title reflected in a college transcript is not sufficiently clear. Mr. Corey is of the opinion that an applicant's statements or "testimony" would not be considered evidence. Mr. Corey also found the Board's responses to his concerns to be inadequate and requested further clarification on how the Board intends to apply course credits to various categories.

The Findings in Judge Mortenson's Report, as amended, are approved in all respects. After reviewing the substance of Mr. Corey's February 14, 2018, comment, the Chief Judge continues to agree with the Administrative Law Judge's finding that the Board has adequately shown that proposed Minn. R. 1800.3505 is needed and reasonable and within the Board's statutory authority.[2] Accordingly, no additional amendments to Judge Mortenson's Report are necessary.

As indicated in the Chief Judge's March 16, 2018, Report, the changes or actions necessary for approval of the one disapproved rule are as identified in the Administrative Law Judge's Report. If the Board elects not to correct the defects associated with the proposed rules, the Board must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2016).

If the Board chooses to make changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the State Register, the Board's order adopting the rules, and the rule showing the agency's changes. The Chief Administrative Law Judge will then make a determination as to whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: March 23, 2018

TAMMY L. PUST
Chief Administrative Law Judge

[2] *See Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999) (An agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one).

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AMENDED
REPORT OF THE
ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Jim Mortenson conducted a public hearing on this rulemaking proceeding on January 17, 2018. The public hearing was held at 9:30 a.m. in Suite 295, Golden Rule Building, 85 East Seventh Place, Saint Paul, Minnesota. The hearing continued until everyone present had an opportunity to be heard concerning the proposed rules.

The Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design (Board) proposes to amend its rules regarding licensing and certification requirements, exam and application procedures, and educational and experience standards. The Board also seeks to repeal obsolete rules. The mission of the Board is to regulate these professions and enforce the statutes and rules in order to protect the health, safety, and welfare of the public.

The public hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The Minnesota Legislature designed the rulemaking process to ensure that state agencies meet all of the requirements that Minnesota law specifies for adopting rules.[2] The rulemaking process also includes a hearing when 25 or more persons request one or when ordered by the agency.[3]

The hearing was conducted to allow the Board representatives and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.[4] Further, the

[1] Minn. Stat. §§ 14.131-.20 (2016).
[2] *See* Minn. Stat. §§ 14.05-.20 (2016); Minn. R. 1400.2000-.2240 (2017).
[3] See Minn. Stat. § 14.25 (2016).
[4] *See* Minn. Stat. § 14.14; Minn. R. 1400.2210-.2230.

hearing process provided the general public an opportunity to review, discuss, and critique the proposed rules.

The Board must establish that the proposed rules are within the Board's statutory authority; necessary and reasonable; follow from compliance with the required procedures; and that any modifications that the Board made after the proposed rules were initially published in the State Register are within the scope of the matter that was originally announced.[5]

Andrea Barker, the Board's Assistant Executive Director, represented the Board at the hearing. The other members of the Board's hearing panel (Board Panel) included: Dennis Martenson, Board Chair and Professional Engineer; Darcy Hield, Board member and Certified Interior Designer; Marjorie Pitz, Board member and Landscape Architect; Keith Rapp, Board member and Professional Geologist; and Doreen Frost, Executive Director of the Board.

The Board received approximately 105 written comments on the proposed rules between November 6, 2017, and December 6, 2017.[6] Approximately 28 people attended the hearing on January 17, 2018, and ten made statements during the hearing.

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for an additional 20 calendar days, until February 5, 2018, to allow interested persons and the Board to submit written comments. Thereafter, the record remained open for an additional five business days, until February 14, 2018, to allow interested persons and the Board to file written responses to any comments received during the initial comment period.[7]

Approximately eight written comments were received from members of the public after the hearing, along with two responses from the Board.[8] To aid the public in participating in this matter, all comments were posted at the Office of Administrative Hearings' Rulemaking eComments website.

The hearing record closed for all purposes on February 14, 2018.

SUMMARY OF CONCLUSIONS

The Board has established that it has the statutory authority to adopt the proposed rules, it complied with the applicable procedural requirements to promulgate the rules, and that, with one exception, the proposed rules are needed and reasonable.

[5] Minn. Stat. §§ 14.05, 14.23, 14.25, 14.50 (2016).
[6] Exhibit (Ex.) I.
[7] *See* Minn. Stat. § 14.15, subd. 1.
[8] *See* Board's Response to Comments (Feb. 6, 2018); and Final Board Response to Comments (Feb.9, 2018).

The Board's proposed Minn. R. 1800.0130, subp. 6, is unduly vague and grants too much discretion to the Board. The Administrative Law Judge has suggested modifications to cure this defect.

Based upon all the testimony, exhibits, and written comments the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Background to the Proposed Rules

1. The Board regulates the architecture, engineering, land surveying, landscape architecture, geoscience, and interior design professions in Minnesota in order to protect the health, safety and welfare of the public.[9] The Board ensures individuals practicing in these fields meet the education, examination and experience standards for licensure or certification, and maintain their records in good standing.[10]

2. In this rulemaking, the Board seeks to amend its rules to update its licensing, certification, and exam procedures, and educational requirements. It also seeks to update and expand definitional terms contained in rule, clarify certification and signature requirements, including allowing for the use of electronic signatures, and make other housekeeping modifications. Finally, the Board seeks to repeal obsolete rules regarding a Board-designed stamp for certification and signature.

II. Rulemaking Authority

3. The Board relies upon its general rulemaking authority under Minn. Stat. § 326.06 (2016), as its statutory authority to adopt these proposed rules. This statute provides, in relevant part, that the Board "shall make all rules, not inconsistent with law, needed in performing its duties."

4. The Administrative Law Judge concludes that the Board has the statutory authority to adopt the proposed rules.

III. Procedural Requirements of Chapter 14 (2016)

A. Publications

5. On May 23, 2016, the Board published a Request for Comments in the State Register seeking comments on "its possible amendment to rules governing definitions, noncompliant conduct, applications, education and experience, qualifications for licensure, certification and signature, enforcement and housekeeping updates."[11]

6. On October 6, 2017, the Board requested review and approval of its Additional Notice Plan and proposed Notice of Intent to Adopt Rules Without a Public

[9] Minn. Stat. §§ 326.01 – .15 (2016).
[10] Minn. Stat. §§ 326.01 – .15.
[11] Ex. A; 40 State Register 1555 (May 23, 2016).

Hearing Unless 25 or More Persons Request a Hearing, and Notice of Hearing if 25 or More Requests for Hearing are Received (Dual Notice).

7. The Dual Notice set December 6, 2017, as the deadline for comments or to request a hearing.[12] The Dual Notice stated that if 25 or more persons submitted written requests for a hearing, the Board would hold a public hearing at the Board's offices on Wednesday, January 17, 2018.[13]

8. On October 12, 2017, Administrative Law Judge Eric L. Lipman issued an Order on behalf of Administrative Law Judge Jim Mortenson approving the Additional Notice Plan and Dual Notice. This Order recommended certain typographical changes and additions to the text of the notice.[14]

9. On October 17, 2017, the Board submitted an electronic copy of the SONAR to the Legislative Reference Library via email.[15]

10. On October 26, 2017, pursuant to its Additional Notice Plan, the Board mailed postcards to all individuals on its general mailing list (19,824 individuals), including all current licensees and certificate holders. The postcard announced the Board's intent to adopt the proposed rule amendments and included the link to its website where copies of the Dual Notice, SONAR and proposed rules could be found.[16]

11. Pursuant to its Additional Notice Plan, the Board also posted the Dual Notice, proposed rule amendments, and SONAR on its website on October 27, 2017.[17]

12. On October 31, 2017, the Board mailed a copy of the Dual Notice and proposed rules to all persons and associations on its rulemaking list, and to all persons and associations identified in its Additional Notice Plan.[18]

13. On October 31, 2017, the Board also emailed a copy of the Dual Notice and proposed rules to all persons and associations on the Board's rulemaking email list established pursuant to Minn. Stat. § 14.14, subd. 1a.[19]

14. By December 6, 2017, more than 25 persons had requested a hearing on the Board's proposed rules.[20]

15. At the hearing, on January 17, 2018, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

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[12] Ex. F.
[13] *Id*.
[14] *See* Order on Review of Additional Notice Plan and Dual Notice (Oct. 12, 2017).
[15] Ex. E.
[16] Ex. H1.
[17] Ex. H2.
[18] Exs. G1 and G2.
[19] Ex. G3.
[20] Ex. I1.

a. The Board's Request for Comments as published in the State Register on May 23, 2016;[21]

b. [N/A];

c. Proposed rules dated September 19, 2017, including the Revisor's approval;[22]

d. The Board's Statement of Need and Reasonableness (SONAR);[23]

e. The Certificate of Mailing the SONAR to the Legislative Reference Library on October 17, 2017, and copy of the transmittal letter;[24]

f. The Dual Notice as mailed and as published in the State Register on November 6, 2017;[25]

g. Certificate of Mailing the Dual Notice to the Board's rulemaking mailing list and Giving Notice Pursuant to the Additional Notice Plan, dated October 31, 2017;[26] Certificate of Accuracy of the Mailing List dated October 31, 2017;[27] and Certificate of Mailing the Dual Notice to the Board's Rulemaking Email List, dated October 31, 2017;[28]

h. Certificate of Providing Additional Notice pursuant to Additional Notice Plan dated November 3, 2017;[29] and copy of posting Dual Notice on Board's website in compliance with Additional Notice Plan dated October 27, 2017;[30]

i. Written comments received during the comment period;[31]and written comments received after the comment period;[32]

j. [N/A];

k. Authorizing Resolution to Publish the Request for Comments;[33] Comments Received Following the Publication of the Request for Comments;[34] Correspondence with Minnesota Management and Budget showing consultation

[21] Ex. A; 40 *State Register* 1555 (May 23, 2016).
[22] Ex. C.
[23] Ex. D.
[24] Ex. E.
[25] Ex. F1.
[26] Ex. G1.
[27] Ex. G2.
[28] Ex. G3.
[29] Ex. H1.
[30] Ex. H2.
[31] Ex. I1.
[32] Ex. I2.
[33] Ex. K1.
[34] Ex. K2.

pursuant to Minn. Stat. § 14.131;[35] Authorizing Resolution to Publish the Dual Notice;[36] Certificate of Notifying Certain Legislators under Minn. Stat. § 14.116, dated October 31, 2017;[37] Certificates of Giving Notice.[38]

B. Additional Notice Requirements

16. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or, alternatively, the agency must detail why these notification efforts were not made.

17. Between October 26, and October 31, 2017, the Board provided the Dual Notice in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

(a) The Dual Notice was posted on the Board's website and the Board has maintained these materials continuously since they were posted.[39]

(b) The Board mailed postcards to all individuals on its general mailing list, including all current license and certificate holders. The postcards announced the Board's intent to adopt the proposed rules that included the link to its website where copies of the Dual Notice, SONAR and proposed rules could be found;[40]

(c) The Dual Notice was sent by first class mail to all persons and associations on its rulemaking list, and to all persons and associations identified in its Additional Notice Plan, including numerous professional associations and academic institutions;[41]

(d) A copy of the Dual Notice of Intent to Adopt was sent by electronic mail to all persons and associations on the Board's rulemaking email distribution list;[42]

18. The Administrative Law Judge finds that the Board has fulfilled its additional notice requirements.

[35] Ex. K3.
[36] Ex. K4.
[37] Ex. K5.
[38] Exs. K7 – K9 (dated Dec. 12, 2017, Dec. 18, 2017, and Jan. 4, 2018).
[39] Ex. H2.
[40] Ex. H1.
[41] Exs. G1 and G2.
[42] Ex. G3.

C. Notice Practice

1. Notice to Stakeholders

19. On October 31, 2017, the Board provided a copy of its Dual Notice to its official rulemaking list (maintained under Minn. Stat. § 14.14) and to persons and associations identified in its Additional Notice Plan.[43]

20. The comment period on the proposed rules expired at 4:30 p.m. on December 6, 2017.[44]

21. There are 35 days between October 31, 2017, and December 6, 2017.

22. The Administrative Law Judge concludes that the Board fulfilled its responsibility to mail the Dual Notice "at least 33 days before the . . . start of the hearing."[45]

2. Notice to Legislators

23. On October 31, 2017, the Board sent a copy of the Dual Notice and SONAR to legislators and the Legislative Coordinating Commission as required by Minn. Stat. § 14.116.[46]

24. Minn. Stat. § 14.116(b) requires the agency to send a copy of the Notice of Hearing and the SONAR to certain legislators on the same date that it mails its Notice of Hearing to persons on its rulemaking list and pursuant to its additional notice plan.

25. The Administrative Law Judge concludes that the Board fulfilled the requirements of Minn. Stat. § 14.116(b).

3. Notice to the Legislative Reference Library

26. On October 17, 2017, the Board submitted via email a copy of the SONAR to the Legislative Reference Library.[47]

27. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

28. The Administrative Law Judge concludes that the Board met the requirement of Minn. Stat. § 14.23 that it send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent is mailed.

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[43] Exs. G1 – G3.
[44] Ex. F.
[45] Minn. R. 1400.2080, subp. 6.
[46] Ex. K5.
[47] Ex. E.

D. Impact on Farming Operations

29. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the State Register.

30. The Board did not provide the Commissioner of Agriculture with a copy of the proposed rules and notice of its intent to adopt the rules because the proposed rules do not affect farming operations.[48]

31. The Administrative Law Judge concludes that the Board was not required to provide notice to the Commissioner of Agriculture under Minn. Stat. § 14.111.

E. Statutory Requirements for the SONAR

32. The Administrative Procedure Act obliges an agency adopting rules to address certain factors in its SONAR.[49] Those factors are:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
>
> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
>
> (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
>
> (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

[48] Ex. D at 14.
[49] Minn. Stat. § 14.131.

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

1. The Agency's Regulatory Analysis

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

33. The Board states that the classes of persons affected by and benefiting from the proposed modifications to the rules include: all license and certificate applicants, exam candidates, licensees, certificate holders, and the public. The Board has budgeted for the cost of this rulemaking, and does not anticipate any increases in the cost to comply with or enforce the proposed rules.[50]

(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

34. Other than the costs associated with this rulemaking, the Board does not anticipate any increase in costs related to implementing and enforcing the proposed rules. The Board also does not foresee any probable costs to other agencies because it is the sole entity charged with implementing and enforcing the proposed rules.

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

35. The Board asserts that rulemaking is the only method available to modify existing rule language. Therefore, the Board cannot identify any less costly or less intrusive methods available to achieve the Board's purpose to clarify and update the existing rules.[51]

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

[50] Ex. D at 7.
[51] *Id*.

36. The Board notes that the rules serve to protect the public health, safety and welfare by ensuring that licensees, certificate holders and applicants meet the education, examination and experience required for licensure or certification. Because rulemaking is the only method available for modifying or proposing rule language, no other alternative methods were seriously considered by the Board.[52]

(5) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

37. The Board states that there are no probable compliance costs associated with the proposed rules to be borne by governmental units, businesses, or individuals. The Board notes that the proposed modifications to the rules simply clarify and update existing rule language and do not add or increase application or licensure fees. The Board insists that, in many instances, the proposed rules offer more latitude to individuals for meeting and complying with requirements.[53]

38. The Board received one comment from an individual who asserted that the proposed rules will require all licensees to incur costs associated with procuring and maintaining verifiable electronic signature software. In its post-hearing response, the Board clarified that the proposed rule does not require digital signatures and does not require applicants, licensees or certificate holders to purchase special software. Instead, the proposed rules allow individuals to use electronic signatures that meet the definition of the Uniform Electronic Transactions Act.[54]

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

39. The Board asserts that failing to adopt the proposed rule revisions will result in essential terms not being defined and existing definitions not being updated. For example, "noncompliant conduct" is currently not defined, yet the Board is required to investigate such conduct in the event of a suspected breach of exam security. According to the Board, the lack of definitions or updated definitions results in uncertainty as terms remain open to subjective interpretation.[55]

40. The Board also notes that failing to adopt the proposed rules will result in a continued lack of procedures for the reinstatement of licenses and certificates,

[52] Ex. D at 7.
[53] Ex. D at 8.
[54] Test. of A. Barker at 7-8 (Jan. 17, 2018); Board's Response to Comments at 19. *See*, Minn. Stat. § 325L.02(h) (2016).
[55] Ex. D at 8.

applications for licensure by comity, and the issuance of temporary permits. The processes for these matters will instead continue to be left to internal Board policy.[56]

41. The Board further states that certain educational and experiential requirements for applicants will remain out of date if the proposed rules are not adopted. For example, land surveyor applicants will not be allowed to use experience gained prior to graduation toward the experience requirement for licensure. In addition, categories of courses required for land surveying, geology, and soil science licensure are not defined. If the proposed rules are not adopted, it will continue to be left to Board members to determine if minimum education requirements have been met.[57]

42. Finally, the Board notes that if the proposed rules are not adopted, certain obsolete, unnecessary and confusing language will remain in the rule.[58]

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

43. The Board states that there is no federal counterpart to the proposed rules. Therefore, no assessment of differences between the proposed rules and federal regulations was conducted.

(8) Assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

44. The Board did not conduct an assessment of the cumulative effect of the rule with other federal and state regulations because no other Minnesota laws or federal regulations address the matters covered by the proposed rules.[59]

45. The Administrative Law Judge finds that the Board satisfied the evaluation requirements of Minn. Stat. § 14.131.

2. Performance-Based Regulation

46. The Administrative Procedure Act[60] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[61]

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[56] Ex. D at 8.
[57] *Id*.
[58] Ex. D at 9.
[59] *Id*.
[60] Minn. Stat. § 14.131.
[61] Minn. Stat. § 14.002 (2016).

47. The Board asserts that the proposed rule modifications meet the state's requirement for flexible, performance-based standards. The Board notes that its regulatory objectives are to assure the public that persons practicing architecture, engineering, land surveying, landscape architecture, geology, and soil science, and using the title certified interior designer are competent and qualified through education and experience. The Board states that by modifying language in the rules that is outdated or confusing, it is emphasizing superior achievement by decreasing ambiguity and helping regulated parties and the public better understand licensure and certification requirements.[62]

48. The Board also maintains that in a number of specific ways the proposed rule amendments allow for maximum flexibility for regulated parties.[63] For example, the proposed rule amendments: grant licensees more time to notify the Board of disciplinary action taken against them in other jurisdictions; allow applicants for licensure as architects to simultaneously complete the education, examination, and experience requirements through the Integrate Path to Architectural Licensure (IPAL) program; allow applicants for licensure as landscape architects with an Landscape Architectural Accreditation Board (LAAB) accredited master's or doctorate degree to meet the education requirement without a "related" undergraduate degree; allow applicants for licensure as professional engineers two additional methods to fulfill the education and experience requirements; allow land surveyor license applicants to use experience gained prior to graduation toward the experience requirement; and allow applicants to use current electronic signature technology.[64]

49. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for consideration and implementation of the legislative policy supporting performance-based regulatory systems.

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

50. As required by Minn. Stat. § 14.131, the Board consulted with MMB to help evaluate the fiscal impact and benefits of the proposed rules on local units of government.[65]

51. By letter dated October 16, 2017, Shawn Kremer, an Executive Budget Officer with MMB, notified the Board that he had reviewed the proposed rules and SONAR and concluded the proposed rules will have no fiscal impact on local units of government.[66]

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[62] Ex. D. at 10.
[63] Ex. D at 10-11.
[64] *Id*.
[65] Ex. K3.
[66] *Id*.

52. The Administrative Law Judge finds that the Board fulfilled its duty to consult with MMB to help evaluate the fiscal impacts and benefits of the proposed rule on units of local government as required under Minn. Stat. § 14.131.

4. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

53. Minn. Stat. § 14.127 requires the Agency to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[67]

54. The Board determined that the cost of complying with the proposed rule amendments will not exceed $25,000 for any business or statutory or home rule charter city.[68] As discussed in the Regulatory Analysis section above at item (5), the Board asserts that there are no probable costs of complying with the proposed rules to be borned by governmental units, businesses or individuals.[69]

55. The Board notes that the proposed modifications to the rules simply clarify and update existing rule language and do not add or increase application or licensure fees. The Board insists that, in many instances, the proposed rules offer more latitude to individuals for meeting and complying with requirements.[70]

56. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.127 and approves that determination.

5. Adoption or Amendment of Local Ordinances

57. Under Minn. Stat. § 14.128 the Board must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[71]

58. The Board determined that local governments will not need to adopt or amend ordinances or regulations in order to comply with the proposed rules.[72] The proposed rules govern the Board's licensure and certification requirements. Only

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[67] Minn. Stat. § 14.127, subds. 1 and 2.
[68] Ex. D at 15.
[69] *Id*.
[70] Ex. D at 8.
[71] Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.
[72] Ex. D at 15.

individuals seeking licenses or certificates, and not local governments or other entities, need to comply with the proposed rules.[73]

59. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.

IV. Rulemaking Legal Standards

60. The Administrative Law Judge must make the following inquiries: whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[74]

61. Under Minn. Stat. § 14.14, subd. 2 and Minn. R. 1400.2100 (2017), the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[75] "legislative facts" (namely, general and well-established principles that are not related to the specifics of a particular case but which guide the development of law and policy),[76] and the agency's interpretation of related statutes.[77]

62. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[78] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[79]

63. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[80] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[81]

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[73] Ex. D at 15.
[74] *See* Minn.Stat. § 14.14, subd. 2; Minn. R. 1400.2100.
[75] *See Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).
[76] *Compare generally United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[77] *See Mammenga v. Dept. of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[78] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[79] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).
[80] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[81] *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

64. Because both the Board and the Administrative Law Judge suggested changes to the proposed rule language after the date it was originally published in the State Register, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.

65. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2(b). The statute specifies that a modification does not make a proposed rule substantially different if:

> (1) the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;
>
> (2) the differences are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice; and
>
> (3) the . . . notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

66. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge must consider whether:

> (1) persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;
>
> (2) the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing; and
>
> (3) the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.[82]

V. Rule by Rule Analysis

67. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Board's regulatory choice or otherwise requires closer examination.

68. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of the facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

[82] *See* Minn. Stat. § 14.05, subd. 2.

69. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

A. Revisions by the Board for Clarity

70. At a meeting on December 7, 2017, the Board voted to make a number of revisions to the text of the proposed rules in response to stakeholder feedback.[83] The changes were to improve readability and remove ambiguous language.

71. On January 8, 2018, the Board's Executive Committee voted to recommend additional changes to the proposed rules to the Board. On February 2, 2018, the Board voted in favor of those amendments.

72. The revisions are needed and reasonable and none would result in a substantial change from the rule as originally proposed, as those terms are used in Minn. Stat. § 14.05, subd. 2(b).

B. Minn. R. 1800.0120 Notification

73. The Board proposes to increase the time period in which applicants, licensees and certificate holders must inform the Board of disciplinary action taken against them in other jurisdictions from 10 days to 60 days.

74. Allowing individuals additional time to comply with this reporting requirement is reasonable. Moreover, as the Board notes in its SONAR, it is less critical to receive disciplinary information immediately as many national professional associations maintain disciplinary databases that Board investigators frequently monitor.[84]

75. The Administrative Law Judge finds the proposed amendment to Minn. R. 1800.0120 to be needed and reasonable.

C. Minn. R. 1800.0130 Examination Irregularities; Cheating and Noncompliant Conduct

76. The Board proposes to modify this rule part to include "noncompliant conduct" by an applicant in applying for or taking an examination to the list of behaviors that will result in a Board investigation and possible disciplinary actions.[85]

77. The Board's proposed Subpart 6 reads as follows:

> **Subp. 6. Consequences of noncompliant conduct with examination policies and procedures.** Evidence of failing to comply with the exam administrator's policies and procedures subsequent to an examination may

[83] Ex. L.
[84] Ex. D at 17.
[85] *Id*.

also be cause for action by the board. An examinee who does not fully comply with the exam administrator's policies and procedures during and after an examination is subject to having the exam results invalidated and being prohibited from taking the examination for a period of time as determined by the board. A licensure examination taken and passed in another state while barred from taking an examination in Minnesota is not acceptable for licensure purposes in Minnesota.[86]

78. The Board states in its SONAR that by including noncompliant exam conduct in the proposed rules, "it makes clear that the Board *will* investigate any noncompliance with these policies and procedures."[87] The Board maintains that the security of exams and exam questions is paramount to ensuring valid, reliable and psychometrically defensible results.[88] According to the Board, individuals who do not comply with exam policies and procedures put themselves, the exam, the Board and the public at risk.[89] In addition, the Board notes that the financial costs associated with replacing examinations compromised by noncompliant individuals can be as high as hundreds of thousands of dollars.[90]

79. As written, the subpart states that the Board "may" (or, presumably, may not) take disciplinary action if an individual fails to comply with exam procedures. In addition, it provides that the disciplinary action may include prohibiting the individual from taking the exam "for a period of time as determined by the board."

80. The Administrative Law Judge finds that the language of proposed Minn. R. 1800.0130, subpart 6 is vague and grants too much discretion to the Board. A proposed rule is impermissible if it delegates unbridled discretion to administrative officers.[91] To correct the defect, the Board should consider deleting the word "may" and replacing it with the word "will" to reflect the intent the Board expressed in its SONAR. The Board should also consider adding a specific period of time that an examinee could be prohibited from taking an exam.

81. The defect could be corrected by modifying the language in subpart 6 as follows:

Subp. 6. Consequences of noncompliant conduct with examination policies and procedures. Evidence of failing to comply with the exam administrator's policies and procedures subsequent to an examination will be cause for action by the board. Examinees who do not fully comply with the exam administrator's policies and procedures during and after an examination are subject to having their exam results invalidated and being

[86] Ex. C at 3.
[87] Ex. D at 17 (emphasis added).
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *See* Minn. R. 1400.2100 D; *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949).

prohibited from taking the examination for a period of time of up to two years. Licensure examinations taken and passed in other states are not acceptable for licensure purposes in Minnesota while an individual is barred from taking a licensure examination in Minnesota.

82. If the defect is corrected, the proposed rule would be needed and reasonable. The suggested modification would not result in a substantial change from the rule as originally proposed, as those terms are used in Minn. Stat. § 14.05, subd. 2(b).

D. Minn. R. 1800.0400 Application for Examination, Licensure, and Certification

83. The Board proposes to modify this rule part by adding a subpart governing failure to complete applications.[92]

84. The Board's proposed Subpart 1b reads as follows:

> **Subp. 1b. Failure to complete application.** The board shall consider an application withdrawn if an application for examination, licensure, or certification has not been acted upon by the board within six months of the date of the board's receipt of the application, due to failure of the applicant to furnish the board with information pertaining to the application.[93]

85. The Board states in its SONAR that when it receives an application that is missing required information, it sends a letter to the applicant requesting the applicant provide the missing information.[94] The Board explained in its post-hearing response to comments that the intent of the rule is to allow the Board to close application files when an applicant does not respond to requests for information within six months.[95] The Board asserts that it is reasonable to provide in rule that if an applicant fails to provide the requested information within six months, the application will be deemed withdrawn.[96]

86. Following the hearing, and in response to comments, the Board modified the proposed subpart as follows:

> **Subp. 1b. Failure to complete application.** The board shall consider an application withdrawn should the applicant fail to furnish the board with all required information pertaining to the application within six months of the date of the board's receipt of the application.[97]

[92] Ex. D at 18.
[93] Ex. C at 4.
[94] Ex. D at 18.
[95] Board's Response to Comments at 2 (Feb. 6, 2018).
[96] Ex. D at 18.
[97] Board's Response to Comments at 2 (Feb. 6, 2018).

87. The Administrative Law Judge finds the proposed subpart needed and reasonable. For clarity, the Administrative Law Judge suggests the Board consider replacing the word "should" with "if" and modifying the subpart to read:

> The board shall consider an application withdrawn if the applicant fails to provide the board with all required information pertaining to the application within six months of the board's receipt of the application.

88. The Board has also proposed adding subparts 4 and 5. Proposed subpart 4 governs reinstatement applications. The Board notes that, pursuant to Minn. Stat. § 326.10, subd. 9, licensees and certificate holders whose credentials have expired may apply for reinstatement of the expired license or certificate by satisfying certain conditions.[98] Because the current rules do not specify the process for applying for reinstatement, the Board is proposing language similar to the process set forth for applying for licensure and certification.[99]

89. The Board's proposed subpart 5 governs the requirement that applicants for examination, licensure, certification, or reinstatement submit a certification.[100] The certification affirms that the applicants have read and will comply with governing statutes and rules; are not under disciplinary actions in other jurisdictions; have never been convicted of a felony; have not represented themselves as licensed professionals without proper licensure or certification; and have not performed professional service without proper licensure or certification.[101]

90. The Administrative Law Judge finds subparts 4 and 5 are needed and reasonable.

91. The Administrative Law Judge recommends that the Board modify the first sentence in proposed subpart 5 by adding the word "affirming" after the word "certification." With this suggested modification, the proposed subpart would read as follows: "An applicant for examination, licensure, certification, or reinstatement shall submit to the board, on a form provided by the board, a certification affirming that the applicant: . . ."

E. Minn. R. 1800.0500 Fees

92. Following the hearing and in response to comments the Board proposes to modify proposed subpart 2 governing refunds as follows:

> **Refunds**. Application fees are not refundable. Examination, licensure, or certification fees must not be refunded except for those circumstances when an applicant does not meet ~~required qualifications~~ the education,

[98] Ex. D at 19.
[99] *Id*.
[100] *Id*.
[101] *Id*. at 19-20.

examination, or experience requirements for examination, licensure, or certification.[102]

93. The Administrative Law Judge finds the proposed rule to be needed and reasonable. The modification clarifies when fees may be refunded and does not make the rule substantially different from what was originally proposed.

F. Minn. R. 1800.0850 Comity Application Procedures

94. The Board proposes to add this new rule part, which governs the process for individuals licensed or certified in other jurisdictions to apply for licensure or certification in Minnesota.[103] Minn. Stat. § 326.10 requires the Board to issue licenses or certifications to individuals from other jurisdictions who apply and meet Minnesota requirements. This type of application is commonly referred to as "comity."[104] The proposed rule delineates the procedures and requirements for applying for a license or certificate by comity.[105]

95. The Board's proposed subpart 4 governs failure to complete an application. Following the hearing and in response to comments, the Board modified proposed subpart 4 to read as follows:

> **Subp. 4. Failure to complete application**. The board shall consider an application withdrawn should the applicant fail to furnish the board with all required information pertaining to the application within six months of the date of the board's receipt of the application.[106]

96. For clarity, the Administrative Law Judge suggests the Board consider replacing the word "should" with "if" and modifying the subpart to read:

> The board shall consider an application withdrawn if the applicant fails to provide the board with all required information pertaining to the application within six months of the board's receipt of the application.

97. The Administrative Law Judge finds proposed Minn. R. 1800.0850 to be needed and reasonable. The modifications suggested above would not make the rule substantially different from what was originally proposed, as those terms are used in Minn. Stat. § 14.05, subd. 2(b).

G. Minn. R. 1800.0900 Qualification Procedures

98. The Board proposes modifications to this rule part for clarity and proposes to add a new subpart 7 governing applications for temporary permits.[107] The Board notes

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[102] Board's Response to Comments at 4 (Feb. 6, 2018).
[103] Ex. D at 21.
[104] *Id*.
[105] *Id*.
[106] Board's Response to Comments at 2 (Feb. 6, 2018).
[107] Ex. D at 22.

that Minn. Stat. § 326.13, clause (1) allows applicants to apply for temporary permits to practice their profession prior to licensure or certification. The proposed rules offer a procedure by which an applicant may apply for a temporary permit.[108]

99. The Administrative Law Judge finds the proposed amendments to Minn. R. 1800.0900 are needed and reasonable.

H. Minn. R. 1800.1200 Examination

100. The Board proposes to modify subpart 1, governing the Architect Registration Examination (ARE), by adding two items relating to applicants who fail sections of the examination.[109] The Board explained in its SONAR that, pursuant to Minn. R. 1800.0900, subp. 4, applicants who fail exams must submit a new application each time they take an exam.[110] In the case of the ARE, however, the exam is comprised of six sections taken on different days. The proposed rule modifications are meant to clarify that an applicant may attempt each section of the ARE one time per application. The applicant does not need to complete a new application every time they want to sit for an individual section.[111]

101. The Board is also proposing to modify the rule to clarify that an applicant who fails to appear for an examination within three years of applying, must submit a new application for examination.[112] The Board's proposed item F reads as follows:

> F. An applicant who has not attempted at least one section of the examination for three years shall submit a new application for examination to resume testing.

102. To clarify the intent of this item, the Administrative Law Judge suggests the Board consider modifying the proposed language to read as follows:

> An applicant who fails to take at least one section of the examination within three years of applying shall submit a new application for examination in order to resume testing.

103. The Administrative Law Judge finds the proposed amendments to Minn. R. 1800.1200, subpart 1 to be needed and reasonable. If the Board makes the modification suggested above, it would not make the rule substantially different from the rule as originally proposed.

I. Minn. R. 1800.1500 Education and Experience

104. Minnesota Rule part 1800.1500 governs the education and experience requirements for licensure as a landscape architect. The Board proposes to modify this

[108] Ex. D at 22.
[109] Ex. D at 25.
[110] *Id*.
[111] *Id*.
[112] *Id*.

rule part to remove duplicative language and clarify specific educational and experiential requirements for licensure. [113]

105. In subpart 4A, the current rules require an individual who graduates from a Landscape Architectural Accreditation Board (LAAB) accredited master's or doctorate curriculum in landscape architecture to have a "related degree."[114] The phrase "related degree" implies that the individual's undergraduate degree must be "related" to landscape architecture.[115] The Board maintains that there is no reason to exclude applicants with unrelated bachelor's degrees so long as they obtain LAAB-accredited graduate degrees.[116] In addition, the phrase "related degree" is vague and subjective. Therefore the Board is proposing deleting references to "a related degree" in proposed subpart 4A.[117]

106. The Administrative Law Judge finds the proposed modification to subpart 4A, deleting the phrase "related degree," to be needed and reasonable.

107. Both the current rules and proposed rules require the applicant to obtain a degree from a landscape architectural curriculum accredited by LAAB. Under the current subpart 4, applicants have three options to meet the education requirement:

(1) Graduate from a five-year baccalaureate curriculum in Landscape Architecture accredited by the LAAB;

(2) Graduate from a four-year baccalaureate curriculum in Landscape Architecture accredited by the LAAB; or

(3) ~~Have a related degree PLUS~~ Graduate from a LAAB-accredited master's or doctorate curriculum in landscape architecture.[118]

108. The Board received several requests from individuals that it modify Minn. R. 1800.1500 to create an alternate path to licensure for individuals without a LAAB-accredited degree.[119] These requests were not in response to any rule change proposed by the Board.

109. Gregg Thompson, Water Resource Specialist with the City of Eagan, commented that the Board should provide an alternate pathway to licensure that establishes a minimum number of years of practical experience in landscape architecture work; reduces the number of years of experience needed under direct supervision by a licensed landscape architect; and accepts as qualifying non-accredited programs in

[113] Ex. D at 25-26.
[114] Ex. D at 26.
[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] *See* Minn. R. 1800.1500, subp. 4 (2017).
[119] *See* Board's Response to Public Comments at 5 (Feb. 6, 2018).

landscape architecture.[120] Mr. Thompson asserts that more than 30 other states provide such alternate standards within their licensing rules.[121] According to Mr. Thompson, the absence of alternate standards for licensure, particularly one that recognizes non-accredited programs for qualifying education, makes it very difficult for applicants to obtain licensure and advance their careers.[122]

110. The Board also received several requests that the Board reduce the number of years of experience required under the direct supervision of a licensed landscape architect.[123] Those commenting maintain that reducing the direct supervision requirement will provide a more flexible path to licensure and allow many well-qualified professionals to practice in a licensed capacity.[124] In addition, several people commented that there are few licensed landscape architects in the public sector and that, as a result, it is difficult for public sector employees to obtain the required number of years of direct supervision and fulfill this licensure requirement.[125] For example, Gregg Thompson noted that despite over 20 years of practical experience in landscape architectural work, he has had only two years of direct supervision by a licensed landscape architect. Mr. Thompson maintains that this direct supervision requirement acts as a barrier to licensure for those working in the public sector.[126]

111. At the rulemaking hearing, Assistant Executive Director Andrea Barker testified that the Board does not believe there is a compelling reason to modify the current requirement that applicants work under the direct supervision of a licensed landscape architect. Ms. Barker stated that the Board believes it is important for the applicant to gain experience under the direct supervision of a licensed landscape architect in order to protect the health, safety and welfare of the public once the applicant is practicing as a licensee.[127]

112. In comments provided during the rulemaking hearing, Jay Riggs, District Manager of the Washington Conservation District, urged the Board to provide more flexibility for applicants to obtain licensure as landscape architects.[128] Like Mr. Thompson, Mr. Riggs believes the requirement that applicants obtain 2-3 years of experience under the direct supervision of a licensed landscape architect to be overly burdensome and an impediment to licensure.[129] Mr. Riggs maintains that there are few

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[120] Ex. I1.; *See also* Public Comment of Matthew James, Ed.D, Associate Professor of Landscape Architecture, South Dakota State University, submitted December 6, 2017.
[121] Public Comment of Gregg Thompson submitted Jan. 17, 2018.
[122] *Id*.
[123] Ex. I1; *See* Board's Response to Public Comments at 5 (Feb. 6, 2018).
[124] *See* Public Comment of Daniel Shaw submitted December 5, 2017; Public Comment of Lillian Leatham submitted December 5, 2017.
[125] *See* Public Comment of Mikael Isensee, Administrator, Middle St. Croix Watershed Management Organization, submitted December 6, 2017; Public Comment of James Riggs, District Manager, Washington Conservation District, submitted December 6, 2017; Public Comment of Matt Moore, South Washington Watershed District (SWWD), submitted December 6, 2017.
[126] Public Comment of Gregg Thompson submitted Jan. 17, 2018.
[127] Test. of Andrea Barker, Assistant Executive Director of the Board.
[128] Test. of Jay Riggs (Jan. 17, 2018).
[129] *Id*.

licensed landscape architects in the public sector. As a result, Mr. Riggs maintains that landscape architects employed in the public sector are unable to advance their careers and obtain licensure.[130] According to Mr. Riggs, landscape architects frequently leave the public sector in order to fulfill the direct supervision licensing requirement in the private sector.[131]

113. In its post-hearing comments, the Board responded to these concerns by stating that it has had several lengthy discussions with individuals regarding establishing an alternate path to licensure but that it chose not to make changes to the education and experience requirements at this time.[132] The Board asserts that it has not had the opportunity to thoroughly research the issues surrounding alternatives to the existing education and experience requirements.[133]

114. Finally, the Board notes that Minn. Stat. §§ 14.055 and 14.056 (2016) allow applicants to petition the Board for a variance from the rule and that individuals who do not meet the requirements for licensure may petition the Board for a waiver of the rule.[134]

115. The Administrative Law Judge finds the proposed modifications to Minn. R. 1800.1500 to be needed and reasonable. It is within the Board's discretion to decline to revise the rule to provide an alternate path to licensure. However, the Administrative Law Judge finds the concerns expressed regarding the need for an alternative path to licensure to be compelling and urges the Board to give the matter serious consideration for future rulemaking.

J. Minn. R. 1800.1750 Procedures

116. The current rules lack language detailing the procedures for submitting an application for initial licensure as a landscape architect. The proposed rule explains the process and mirrors the language for the other professions covered by this chapter.[135]

117. The Administrative Law Judge finds proposed Minn. R. 1800.1750 to be needed and reasonable.

K. Minn. R. 1800.2500 Education and Experience

118. This rule part governs the education and experience requirements for obtaining licensure as a professional engineer.

119. Throughout this part, the Board has proposed changing the term "credit hours" to "credits." The Board notes that students earn credits in college, not "credit hours."[136] The Board also proposes modifications to subparts 2 and 2a. The

[130] *Id*.
[131] *Id*.
[132] Board's Response to Public Comments at 5 (Feb. 6, 2018).
[133] *Id*.
[134] *Id*.
[135] Ex. D at 26.
[136] Ex. D at 27.

modifications are intended to clarify the ways in which applicants can demonstrate they meet the educational and qualifying experience requirements, including experience applicants may obtain before graduation in order to be admitted to the written engineering examinations.[137]

120. In response to comments, the Board has proposed modifying subpart 2a, item C, which governs qualifications for admission to the written Principles and Practice of Engineering (PE) examination. For clarity, the Board is proposing deleting the phrase, "graduation from one of the engineering curricula," and replacing it with the phrase, "completion of one of the education requirements."[138] As modified, the first sentence in subpart 2a, item C would state: "Qualifying engineering experience gained before completion of one of the education requirements in item A must meet the following conditions:"[139]

121. The Administrative Law Judge finds the proposed rule to be needed and reasonable. In addition, the Board's modification does not render the rule substantially different from the rule as originally proposed.

L. Minn. R. 1800.2900 Procedures

122. The Board is proposing a new subpart 7 governing applications for engineering examinations.[140] The Board's proposed subpart 7 includes four items and states as follows:

A. An applicant may attempt an examination one time per application;

B. An applicant approved by the board for an examination administered on a specific date who does not register, cancels, or fails to appear for the examination shall submit a new application.

C. An applicant approved by the board for an examination administered continuously throughout the year, who does not take the examination within three years of the date of the application, shall submit a new application.

D. Upon notification of failure of an examination, an applicant may submit a new application.

123. To clarify the Board's intent as stated in its SONAR, the Administrative Law Judge suggests the following modifications to the proposed language:

A. An applicant may take one examination for each application approved by the board;

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[137] Ex. D at 27-28.
[138] Board's Response to Comments at 8 (Feb. 6, 2018).
[139] *Id*.
[140] Ex. C at 26-27; Ex. D at 33-34.

B. An applicant approved by the board for an examination administered on a specific date who fails to register, cancels, or fails to appear for the examination must submit a new application in order to take the examination on another date.

C. An applicant approved by the board for an examination administered continuously throughout the year, who does not take the examination within three years of the date of the application, must submit a new application in order to take the examination.

D. If an applicant fails an examination, the applicant must submit a new application in order to take the examination on another date.

124. The Administrative Law Judge's suggested changes to the Board's proposed language do not reflect a finding of a defect. The modifications are merely suggested for clarity. The Administrative Law Judge recommends further that the Board make the same modifications to similar language found in proposed **Minn. R. 1800.3750, subpart 6** (validity of application).

125. The Board has demonstrated the proposed amendments to Minn. R. 1800.2900 are needed and reasonable. The suggested modifications to proposed subpart 7 would not render the rule substantially different from the rule as originally proposed.

M. Minn. R. 1800.3505 Education and Experience

126. This rule part governs the education and experience requirements for obtaining licensure as a land surveyor. Subpart 3 governs admission to the Principles and Practice of Surveying (PS) examination. The Board has proposed a new item C that mirrors language in Minn. R. 1800.2500. Item C is intended to clarify the type and amount of experience an applicant may obtain before graduation based on educational requirements met in items A or B.[141]

127. The Board received at least one comment that item C was confusing. To clarify its intent, the Board is proposing to modify subpart 3, item C, by deleting the word "graduation" and adding the phrase "completion of one of the education requirements in item A or B." As modified, the first sentence of subpart 3, item C would state: "Qualifying land surveying experience gained before completion of one of the education requirements in item A or B must meet the following conditions:"[142]

128. The Administrative Law Judge finds the proposed rule to be needed and reasonable. The proposed modification does not render the rule substantially different from the rule as originally proposed.

[141] Ex. D at 30 and 34.
[142] Board's Response to Comments at 7 (Feb. 6, 2018).

129. In subpart 4, the Board is proposing new language governing approved land surveying curriculum and credits. The Board explains that, for many years now, applicants who do not graduate from a four-year land surveying curriculum have been required to provide evidence of completion of a minimum of 22 semester credits in land surveying.[143] The Board states that applicants frequently ask for clarification as to what qualifies as a "land surveying credit." With input from professional land surveying organizations, the Board compiled a list of 11 core subjects in land surveying to help define "land surveying credit."[144] The list is not a list of classes, but a list of categories in which an applicant's courses are applied.[145]

130. In a comment submitted on November 9, 2017, Daniel Corey asserted that requiring applicants to have a minimum 22 semester or 32 quarter credits in the land surveying categories identified in subpart 4 is overly burdensome.[146] Mr. Corey states that frequently land surveying coursework is taught in civil engineering classes that do not have the word "surveying" in the course title. Mr. Corey maintains that, without a syllabus or examples of course work, it is very difficult to demonstrate the required credits.[147] In a post-hearing comment submitted on February 14, 2018, Mr. Corey reiterated his opposition to the Board's proposed language regarding land surveying credits. Specifically, Mr. Corey expressed concern about an applicant's ability to present evidence of meeting the minimum approved land surveying credits when the course title reflected in a college transcript is not sufficiently clear. Mr. Corey is of the opinion that an applicant's statements or "testimony" would not be considered evidence. Mr. Corey also found the Board's responses to his concerns to be inadequate and requested further clarification on how the Board intends to apply course credits to various categories.

131. Mr. Corey also asserts that other fundamental land surveying concepts are excluded from the categories listed, including trigonometry and "coursework on contracts, liens, and other legal issues facing surveyors."[148] Mr. Corey is concerned that by identifying the eleven categories the Board is essentially saying these are the only things a land surveyor needs to know.[149]

132. In a post-hearing comment submitted on January 18, 2018, Mr. Corey also notes that St. Cloud State University is the only institute of higher education that offers a four-year land surveying program in the five state region of Minnesota, South Dakota, North Dakota, Iowa and Wisconsin.[150] Mr. Corey maintains that the proposed curriculum and credit requirements favor graduates of St. Cloud State University and make it more difficult for graduates of other schools to attain licensure.[151]

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[143] Ex. D at 34.
[144] *Id*.
[145] Board's Response to Comments at 12 (Feb. 6, 2018).
[146] Ex. I1.
[147] *Id*.
[148] Public Comments of Daniel Corey dated Nov. 9, 2017, and Jan. 18, 2018.
[149] Public Comment of Daniel Corey dated Nov. 9, 2017.
[150] Public Comment of Daniel Corey submitted Jan. 18, 2018.
[151] *Id*.

133. In response to these comments, the Board points out that the rules have required a minimum of 22 semester credits in land surveying for many years. By proposing subpart 4 and identifying 11 core categories for land surveying, the Board is attempting to assist students and applicants in determining whether a course counts as a land surveying credit.[152] It is the Board's task to interpret applicants' transcripts to determine whether the applicant has completed coursework in at least six of the 11 categories. The Board maintains that it is to the applicant's advantage that a course may fit multiple categories because the applicant selects which category to apply the course.[153]

134. With respect to the comment that trigonometry should be included in the list of categories, the Board states that individuals graduating from a land surveying curriculum are most certainly going to be required to take certain math courses.[154] However, the 22 semester credits required for individuals graduating from a non-land surveying curriculum must be specific to land surveying. Mathematics is not considered to be a strictly "land surveying" course. Therefore, mathematics is not a category listed for land surveying credits.[155] In response to the suggestion that coursework on legal issues, such as contracts and liens, be added to the categories, the Board stated that applicants may gain that information through general classes. The Board contends that the 22 semester credits in land surveying required of graduates from a non-land surveying program should be focused on land surveying specific topics.[156]

135. Finally the Board notes that applicants are able to request a variance from the rules under Minn. Stat. §§ 14.055 and 14.056. If an applicant does not have enough coursework to fulfill the 22 semester credit requirement, the applicant has the option of requesting a variance in order to have another course count.[157]

136. Following the hearing and in response to comments, the Board proposed modifying the categories listed subpart 4 to add "construction surveying" and "cadastral surveying."[158]

137. The Administrative Law Judge finds the Board has shown the proposed rule to be needed and reasonable. In addition, the proposed modification to subpart 4 does not make the rule substantially different from what was originally proposed based on the standards set forth at Minn. Stat. § 14.05, subd. 2.

N. Minn. R. 1800.3910 Education and Experience

138. This rule part governs the education and experience requirements for obtaining licensure within a geoscience discipline.

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[152] Board's Response to Comments at 11-12 (Feb. 6, 2018).
[153] Board's Response to Comments at 10 (Feb. 6, 2018).
[154] *Id*. at 11.
[155] *Id*.
[156] *Id*. at 12.
[157] *Id*. at 11.
[158] Ex. L.

139. Apart from some housekeeping changes to enhance clarity, the Board is proposing to add language in subpart 3, item C, defining what constitutes qualifying geoscience experience gained before graduation.[159] In response to comments, the Board has proposed deleting the phrase, "graduation from one of the geoscience curricula," and replacing it with the phrase, "completion of one of the education requirements." As modified, the first sentence in subpart 3, item C would state: "Qualifying geoscience experience gained before completion of one of the education requirements in item A must meet the following conditions:"

140. The Board is also proposing language in subpart 5A defining the criteria for an approved geoscience curriculum and the coursework required in the soil science area.[160] The Board is proposing changing the education requirement from "a baccalaureate or higher degree in geology" to "a baccalaureate of higher degree with a major in geology." In its SONAR, the Board explained that most institutions do not offer degrees specifically in geology. Rather, the degree is in another discipline, such as Earth Science, with a major is geology.[161] Minnesota schools that offer degrees with a major in geology include the University of Minnesota-Twin Cities, University of Minnesota-Duluth, University of Minnesota-Morris, St. Cloud State University, Macalester College, Carleton College, and Minnesota State University–Winona.[162]

141. Similarly, the Board is proposing language in subpart 5B defining the criteria for licensure as a professional soil scientist. In its SONAR, the Board explained that for licensure as a professional soil scientist, the current rules require a baccalaureate or higher degree in soil science. However, the Board notes that across the United States, there remain very few degree programs in soil science.[163] The University of Minnesota – Twin Cities ended its soil science undergraduate degree program in 2006. Therefore, the Board is proposing that applicants have a bachelor's degree in any subject plus a minimum of 16 semester credits in soil science and 14 semester credits in closely related geoscience courses. The Board maintains that this will allow applicants greater flexibility in meeting the education requirements for licensure.[164]

142. The Board received comments from individuals requesting that the Board delete the word "accredited" and accept degrees from institutions with non-accredited programs.[165] These individuals maintain that the majority of higher education institutions do not have accredited geoscience programs and they assert that requiring only degrees from accredited institutions will result in an unfair barrier to licensure.[166]

143. In its response, the Board explained that the word "accredited" is referring to the institution of higher learning not the program. The Board notes that geology and

[159] Ex. D at 35.
[160] Ex. D at 35.
[161] *Id*.
[162] *Id*.
[163] Ex. D at 36.
[164] *Id*.
[165] *See* Public Comment of Bruce Johnson, PG, submitted January 24, 2018.
[166] *Id*.

soil science programs do not have specialized accreditation. Therefore, as long as the applicant's degree is earned from an accredited institution, the Board states the "accredited" standard has been met.[167]

144. In a comment dated November 7, 2017, Steve Townsend, Principal Geologist with SCST Engineering, recommended that the Board consider modifying the requirement in subpart 5A that an applicant major in geology.[168] Mr. Townsend stated that many universities are now using the terms "Earth Science" or "Earth & Planetary Science" in place of "Geology." In addition, Mr. Townsend noted that "geoscience" is more commonly used than "geology." Therefore, Mr. Townsend recommends that Board replace the word "geology" in this subpart with the word "geoscience." Mr. Townsend expressed concern that young geoscientists who major in earth science but have the requisite coursework for geoscience may not be able to sit for an examination if they did not major in geology.[169]

145. The Board considered Mr. Townsend's comment but declined to amend the rules to require a major in "geoscience" instead of "geology." The Board noted that applicants seek licensure as professional geologists, not professional geoscientists.[170] Additionally, the Board stated that individuals who do not have a degree with a major in geology, but who complete the geology credit requirements, may still qualify to sit for the examination to become licensed as a professional geologist. The Board emphasized that the name of the major is much less important than the coursework completed to obtain the degree.[171]

146. In a written comment submitted November 9, 2017, James Balogh, Professional Soil Scientist with Spectrum Research, Inc., recommended removing several classes from the list of classes the Board identified as meeting curriculum requirements for soil science.[172] Specifically, Mr. Balogh recommended removing from Subpart 5, Item B(2)(d): introduction to soil science, forest soils, peatland, and introduction to land resouces. Mr. Balogh maintains that these courses lack enough specific content to meet the education requirement of 2 semester or 3 quarter credits.[173] Mr. Balogh also recommended that soil and water conservation and soil conservation and land use management be removed from the coursework identified in Subpart 5, item B(2)(a). Mr. Balogh maintains that these classes also lack sufficient content in soil physics to meet the education requirement of 2 semester or 3 quarter credits.[174] Mr. Balogh contends that, at most, these classes would have a 1 semester or 1.5 quarter credit content meeting the education requirements.[175]

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[167] Board's Response to Public Comments at 13.
[168] Ex. I1.
[169] Ex. I1.
[170] Test. of A. Barker at 6 (Jan. 17, 2018).
[171] *Id*.
[172] Ex. I1.
[173] *Id*.
[174] *Id*.
[175] *Id*.

147. Similarly, for the coursework listed under subpart 5, item B(2)(c), governing soil biological properties, and item B(2)(b), governing soil chemical properties, Mr. Balogh recommends removing soil biology and soil fertility.[176] Mr. Balogh maintains that this class would have 1 semester or 1.5 quarter credit meeting the education requirements.[177] Mr. Balogh suggests that there be flexibility in the rules to permit applying partial credits from one course to other courses.[178]

148. Following the hearing and in response to comments, the Board proposed modifying subpart 5 item B(2) by deleting references to the following soil science courses: soil and water conservation, soil conservation and land use, soil fertility, soil biology and soil fertility, soil chemistry laboratory, soil fertility laboratory, introduction to soil science, forest soils, peatlands, and introduction of land resources.[179]

149. Under subpart 6 of the current rule, qualifying experience must be obtained under the direct supervision of a licensed geologist.[180]

150. The Board received a number of comments from people requesting that professional experience obtained under the direct supervision of a non-licensed professional be considered qualifying experience. Several people noted that a Professional Geologist license is not required for many high-level geoscience positions in the public sector. According to these individuals, the requirement that applicants obtain five years of experience under the direct supervision of a licensed geologist, puts public sector employees at a disadvantage for career opportunities.[181]

151. In its response, the Board states that the rules have required experience to be obtained under a licensed professional geologist for many years, and the proposed amendments to the rules do not change this requirement.[182] The Board asserts that it will take these comments into consideration in future discussions regarding paths to licensure for the various professions. The Board maintains, however, that it has not had the opportunity to fully research the issue and does not believe it is appropriate to change this requirement at this time.[183]

152. The Administrative Law Judge concludes the proposed amendments to Minn. R. 1800.3900 (2017) are needed and reasonable. The Board's rationale in declining at this time to reduce the number of hours of experience under the direct supervision of a licensed professional geologist is reasonable. The modifications do not render the rule substantially different within the meaning of Minn. Stat. § 14.05, subd. 2.

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[176] *Id*.
[177] *Id*.
[178] Ex. I1.
[179] Board's Response to Comments at 13-15 (Feb. 6, 2018).
[180] Minn. R. 1800.3910, subp. 6 (2017).
[181] *See* Public Comment of Jane De Lambert, MPH, Hydrologist, Minnesota Department of Health, submitted Jan. 8, 2018.
[182] Board's Response to Comments at 12 (Feb. 6, 2018).
[183] Board's Response to Comments at 13 (Feb. 6, 2018).

O. Minn. R. 1800.4200 Certification and Signature

153. This rule part governs requirements for licensees and certificate holders to certify and sign their work. The Board proposed several amendments to this rule part. Following the hearing, and in response to many comments, the Board proposed additional modifications.

154. Pursuant to Minn. Stat. § 326.12, subd. 3, each plan, drawing, specification, plat report, or other document prepared by a licensed professional is required to bear the signature of the licensed or certified person preparing it. Exempted from this requirement are

> any plans, drawings, specifications, plats, reports, or other documents of an intraoffice or intracompany nature or that are considered to be drafts or of a preliminary, schematic, or design development nature by licensed or certified individuals who would normally be responsible for their preparation.[184]

155. To conform to the statute, the Board proposes to modify subpart 1 to include the word "drawings" and delete the term "etc."[185] The proposed changes make the subpart more specific and remove the vagueness created by the use of the term "etc."[186]

156. Nancy Daubenberger, Assistant Commissioner for Engineering Services, Minnesota Department of Transportation (MnDOT), sought clarification from the Board that the reference to electronic signatures in subpart 1 has the same meaning as the definition for electronic signatures under the Minnesota Uniform Electronic Transactions Act at Minn. Stat. § 325L.02(h) (2016).[187] Assistant Commissioner Daubenberger explained that, because modern three-dimensional plans do not allow for the most commonly-used electronic signatures, the full range of options allowed under the Uniform Electronic Transactions Act are needed to accommodate three-dimensional plan sheets.[188]

157. During the rulemaking hearing, Christopher Roy, Assistant Division Director of Engineering Services for MnDOT, provided public comment that echoed the concerns of Assistant Commissioner Daubenberger.[189] Mr. Roy recommend that the Board include a reference to the Uniform Electronic Transactions Act in subpart 1 for clarity.[190]

158. In response to these comments, the Board has proposed modifying subpart 1 to add the phrase: "as defined in Minnesota Statutes, section 325L.02, paragraph (h)." As modified, the second sentence in subpart 1 will state: "The certification

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[184] Minn. Stat. § 326.12, subd. 3.
[185] Ex. D at 38.
[186] *Id*.
[187] Ex. I1. Public Comment of Nancy Daubenberger submitted Dec. 5, 2017.
[188] *Id*.
[189] Test. of Christopher Roy (Jan. 17, 2018).
[190] *Id*.

and signature may be electronic, as defined in Minnesota Statutes, section 325L.02, paragraph (h), facsimile, or digital."[191]

159. The Board has proposed repealing subpart 2, governing a Board designed stamp, as unnecessary and obsolete.[192]

160. The Board also proposes a new subpart 4a, identifying documents that must be signed and certified.[193] As proposed, subpart 4a states:

> **Subp. 4a. Documents requiring signature and certification**. Documents required to be signed and certified include the following:
>
> A. Any documents submitted to a public agency or private client for approval, including preliminary plats, site plans, and development plans;
>
> B. Each drawing sheet of a set of construction documents;
>
> C. The cover sheet, index page, or certification page of a set of specifications;
>
> D. The certification page or each technical report;
>
> E. Legal descriptions;
>
> F. Addenda; and
>
> G. Change orders.

161. The Board states that the intent of proposed subpart 4a was to provide clarity as to which documents must be signed and certified.[194]

162. Assistant Commissioner Daubenberger commented that it was unclear whether the list of documents is all inclusive.[195] If the list is all inclusive, Ms. Daubenberger recommended that the subpart be modified to state "the following documents must be signed and certified."[196] Ms. Daubenberger also recommended the Board delete the word "technical" from the phrase "technical report" at item D.[197]

163. In a comment submitted on December 6, 2017, Gaius Nelson, a licensed architect, stated that the Board should delete the reference to "private client" in item A.[198] Mr. Nelson asserted that certification should occur after client approval is received and prior to submission to the authorities that have jurisdiction.[199] Mr. Nelson also advised

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[191] Board's Response to Comments at 16 (Feb. 6, 2018).
[192] Ex. D at 39.
[193] Ex. D at 39.
[194] Board's Response to Comments at 17 (Feb. 6, 2018).
[195] Ex. I1.
[196] *Id*.
[197] *Id*.
[198] Ex. I1.
[199] *Id*.

deleting item F as "addenda" are changes to already signed and certified documents, and item G as "change order" are contractual items between the client and contractor and do not impact public health and safety.[200]

164. John Sponsel, a licensed Minnesota architect, submitted a comment on November 9, 2017, regarding the documents requiring signatures and certification under proposed Subpart 4a.[201] Mr. Sponsel noted that many initial or preliminary documents are submitted to public agencies and private clients simply as a means of communicating options or design concepts.[202] Mr. Sponsel suggested that the Board modify subpart 4a to require signatures and certifications on only documents submitted to a public agency for "formal approval."[203] Mr. Sponsel also recommended other modifiers to items A-G in subpart 4a to clarity and make the items more specific. For example, Mr. Sponsel recommends modifying the phrase "set of specifications" in item C to "set of construction specifications," and replacing the phrase "change orders" in item G with "contract document modifications" or "construction document changes."[204] Mr. Sponsel explained that "change orders" are one of several terms defined in AIA standard construction contract documents as "contract modifications" or "changes in the work."[205] Because there is a wide range of construction document revisions that occur during a project, Mr. Sponsel suggested that the Board could limit the type of documents requiring certification to those pertaining to the statutory purpose of protecting health and safety.[206]

165. Nathan Gruman, a licensed professional geologist, questioned whether technical reports and documents, including environmental assessment worksheets, would be required to be signed and certified under proposed subpart 4a.[207]

166. In a post-hearing comment submitted February 6, 2018, John T. Lee, PE, President of Barr Engineering Company, asserted that the proposed modified subpart 4a remains vague as to whether draft and preliminary documents that are routinely exchanged for review and comment between engineers and clients, regulators and others are required to be certified. Mr. Lee recommended modifying the first sentence in subpart 4a to read: "The following documents must be signed and certified whenever issued for formal review, construction, or project documentation:".[208]

167. After considering the many comments expressing confusion and concern about proposed subpart 4a, the Board has proposed modifying subpart 4a to be consistent with Minn. Stat. § 326.12.[209] As modified, proposed subpart 4a reads, as follows:

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[200] *Id.*; *See also* Public Comment of Becca Colbert submitted December 6, 2017.
[201] Ex. I1.
[202] *Id*.
[203] *Id*.
[204] *Id*.
[205] *Id*.
[206] *Id*.
[207] Ex. I1.
[208] Public Comment of John. T. Lee, submitted Feb. 6, 2018.
[209] Board's response to Comments at 17-18 (Feb. 6, 2018).

Subp. 4a. Documents requiring signature and certification. The following documents must be signed and certified:

A. the certification page of each report;

B. legal descriptions prepared by a land surveyor; and

C. other documents that require a signature according to Minnesota Statutes, section 326.12, subdivision 3.

168. The Board also proposed allowing for the use of electronic signatures and certifications under proposed subpart 4b.[210] In its SONAR, the Board states that more and more design professionals are using electronic means to create and submit documents. According to the Board, the proposed rule language in subpart 4b creates guidelines for the use of electronic signatures while protecting the public' safety and welfare.[211]

169. Andrew Lawver, an engineer with MnDOT, submitted a comment on November 7, 2017.[212] Mr. Lawver expressed concern that proposed subpart 4b allowed use of an electronic signature only if it is "under the sole control of the licensee or certificate holder using it."[213] Mr. Lawver is the Engineer of Record for MnDOT plans. He stated that, while he personally signs the title sheet, his electronic signature is inserted via a "cell" contained in the Microstation design (CADD) file that is available to the MnDOT Design Technicians and other MnDOT personnel.[214] Therefore, he does not have "sole control" over his electronic signature. Mr. Lawver recommended that the Board modify this requirement in the proposed rule, otherwise MnDOT will no longer be able to electronically sign plan sheets.[215]

170. Assistant Commissioner Daubenberger echoed Mr. Lawver's concerns. Ms. Daubenberger stated that the Board should allow organizations, like MnDOT, to use electronic signatures that are not under the "sole control" of the licensee where there are documented procedures or policies in place and where the licensee has authorized such use.[216]

171. In response to these comments, and in light of the Board's modification to subpart 1 referencing the Uniform Electronic Transaction Act, the Board now maintains that it is no longer necessary to define "electronic signature." Therefore, the Board is now proposing deleting subpart 4b.

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[210] Ex. D at 39.
[211] *Id*.
[212] Ex. I1.
[213] *Id*.
[214] *Id*.
[215] *Id*.
[216] Ex. I1. Public Comment of N. Daubenberger submitted Dec. 5, 2017.

172. The Board also proposed a new subpart 6 governing the requirement to certify revisions to documents.[217] As proposed, subpart 6 states:

> **Subp. 6. <u>Certified document revisions</u>**. <u>Each revision to a certified document must be identified and certified by the licensee or certificate holder responsible for the revision and must include the revision date.</u>

173. The Board received several comments on this proposed subpart.

174. Assistant Commissioner Daubenberger asserted that unless this proposed subpart is narrowed or clarified, it will have significant impacts on State and local highway, bridge, and building construction projects in terms of both their cost, and length of time required to build them.[218] Ms. Daubenberger noted that MnDOT spends approximately a billion dollars a year on public construction projects. MnDOT constructs or undertakes major repairs to hundreds of highways and bridges annually, and constructs or remodels dozens of buildings. Ms. Daubenbert maintains that, as proposed, subpart 6 is "patently overbroad" as it will require certification for each revision. According to Ms. Daubenberger, complex construction projects entail hundreds of pages of plan sheets. Frequently, these projects require a multitude of field revisions resulting in written revisions to the plan sheets. Ms. Daubenberger states that a significant portion of these changes are de minimus, and do not involve the exercise of engineering judgment. These de minimus changes should not, in Ms. Daubenberger's view, require certification.

175. In a comment submitted November 30, 2017, Dana Wheeler, Executive Director of the Minnesota Government Engineering Council (MGEC), objected to the lack of clarity in proposed subpart 6 regarding what document revisions require certification.[219] Mr. Wheeler questioned whether, for example, minor variations in slope grading construction or the addition of utility poles in final plan sheets would be considered revisions requiring certification.[220] Mr. Wheeler also noted that in complex projects, many revisions are made by more than one person.[221]

176. In addition to his written comments, Gaius Nelson provided public comments at the rulemaking hearing.[222] Mr. Nelson expressed concern about the requirement in proposed subpart 6 to sign and certify each revision. Mr. Nelson noted that projects can take many years and may involve as many as 300 revisions and clarifications.[223] Mr. Nelson questioned whether de minimis revisions would require certification. He also wondered, as a practical matter, where the additional signatures and certifications would be placed on the drawing sheet.[224]

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[217] Ex. C at 45.
[218] Ex. I1.
[219] Ex. I1.
[220] *Id*.
[221] *Id*.
[222] Test. of Gaius Nelson (Jan. 17, 2018).
[223] *Id*.
[224] *Id*.

177. Steven Kordosky, President of the Minnesota Government Engineer Council, likewise expressed concern at the public hearing that the requirement to certify revisions was too vague and burdensome.[225]

178. In response to comments, the Board initially proposed deleting proposed subpart 6 and replacing it with a new subpart 7a.[226] However, after further consideration, the Board determined that it needs additional time to refine the proposed rules governing succession and certification of revised documents. Therefore, the Board has opted to strike proposed subparts 6, 7 and 7a from its proposed rule amendments.[227]

179. The Administrative Law Judge concludes that the proposed amendments to Minnesota Rule 1800.4200, including the repeal of subpart 2, are needed and reasonable. The modifications, including the decision to delete proposed subparts 6, 7 and 7a, did not render the rule substantially different from what was originally proposed based on the standards set forth at Minn. Stat. § 14.05, subd. 2.

180. The Administrative Law Judge concludes that the Board has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

181. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute, and that, to the extent they are severable from the defective rules, there are no other defects that would bar the adoption of those rules.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Board gave proper notice of the hearing in this matter, pursuant to Minn. Stat. §14.14, subd. 1(a).

2. The Board fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Administrative Law Judge concludes that the Board fulfilled its additional notice requirements.

4. Except as noted in Finding 80, the Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

[225] Test. of Steven Kordosky (Jan. 17, 2018).
[226] Ex. L.
[227] Board's Response to Comments at 18-19 (Feb. 6, 2018).

5. Except as noted in Finding 80, the Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of the facts in the record within the meaning of Minn. Stat. §§ 14.14, 14.50.

6. The modifications to the proposed rules suggested by the Board after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

7. The modifications to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

8. As part of the public comment process, a number of stakeholders urged the Board to adopt other revisions to the rule parts. In each instance, the Board's rationale in declining to make the requested revisions to its rules was reasonable.

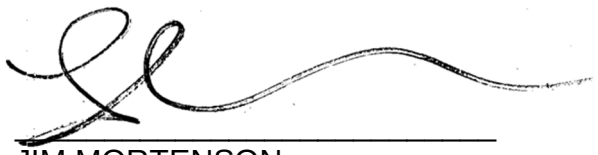
9. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Board from further modification of the proposed rules – provided that the rule finally adopted is based on facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

Except as noted in Finding 80, **IT IS HEREBY RECOMMENDED** that the proposed amended rules be **ADOPTED**.

Dated: March 14, 2018



JIM MORTENSON
Administrative Law Judge

NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before the Board takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Board of actions that will correct the defects, and the Board may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Board may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Board makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Board is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the Board elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes; and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Board makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Board, and the Board will notify those persons who requested to be informed of their filing.

J.R.M.