

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF ARCHITECTURE, ENGINEERING, LAND SURVEYING,  
LANDSCAPE ARCHITECTURE, GEOSCIENCE AND INTERIOR DESIGN

In the Matter of the Proposed Amendments  
to Rules Relating to Classes of Buildings,  
Minnesota Rules, Chapter 1800.

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Beverly Jones Heydinger conducted a hearing concerning the above rules beginning at 9:30 a.m. on May 8, 2007, in Room 295, Golden Rule Building, 85 East 7<sup>th</sup> Place, St. Paul, Minnesota. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.<sup>1</sup> The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable; that they are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published are within the scope of the matter that was originally announced.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency 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. The Administrative Law Judge is employed by the Office of Administrative Hearings (OAH), an agency independent of the Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design (the Board, or, the Agency).

The members of the Board's hearing panel were Doreen Johnson Frost, Executive Director; Harvey Harvala, Board Member and Professional Engineer; William Kuretsky, Assistant Attorney General; Patricia Litchy, Board Rulemaking Coordinator; and Lynette DuFresne, Board Investigator. Twelve members of the public signed the hearing register and five members of the public spoke at the hearing.

The Board received written comments on the proposed rules before the hearing. After the hearing, the record remained open for five business days, until May 15, 2007,

---

<sup>1</sup> Minn. Stat. §§ 14.131 through 14.20 (2006).

to allow interested persons and the Board an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five business days to allow interested persons and the Board the opportunity to file a written response to the comments submitted. The OAH hearing record closed on May 22, 2007. All of the comments received were closely read and thoroughly considered.

## **SUMMARY OF CONCLUSIONS**

The Board has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable.

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

## **FINDINGS OF FACT**

### **Regulatory Framework and Nature of the Proposed Rules**

1. This rulemaking proceeding involves revisions to the rules governing classes of buildings, which generally pertain to all licensees and all certificate holders within the Board's regulatory jurisdiction. The proposed rules will simplify existing rules by clarifying what types of structures require the professional services of those professions within the Board's regulatory jurisdiction.<sup>2</sup>

2. According to the Board, these proposed rules do not include substantive changes to the current rules other than adding "retaining walls with over 4 feet of vertical exposed face" to the table under the Utility occupancy to clarify current and past practice related to retaining walls with less than 4 feet of vertical exposed face. The Board argues that this clarification is necessary since retaining walls are a necessary component of buildings when shaping final site grading at and around buildings.<sup>3</sup>

3. Currently, Minn. R. 1800.5800, identifies various types of structures by conveniently using the categories in the Minnesota State Building Code (MSBC) as occupancy classifications along with the Board's determination on which of those occupancies require the services of a Board-licensed professional. "Nonexempt structures" require licensed design professionals, "exempt structures" do not, and "exemption thresholds" are those where the occupancy has been identified as exempt but then requires the work to be performed by Board-licensed professionals based upon the complexity of the structure in certain circumstances.<sup>4</sup>

4. This rulemaking reorganizes various categories of structures into the occupancy classifications currently used by the MSBC, while retaining the exempt and threshold statuses that currently exist in rule. The modifications proposed are intended to increase usability, enforceability, and clarity so that members of the public, code

---

<sup>2</sup> Exhibit E (SONAR), page 1.

<sup>3</sup> SONAR at 1. Retaining walls with up to four feet of exposed vertical face may be designed by unlicensed designers, while retaining walls with greater than four feet of exposed vertical face require a licensed engineer. *Id.*

<sup>4</sup> *Id.* at 1-2.

officials, building contractors, licensees, and certificate holders can easily determine whether services related to particular structures and/or circumstances are required to be performed by a professional licensed by the Board.<sup>5</sup> The Board believes this rulemaking will also meet its mission of safeguarding life, health, and property, and promoting the public welfare.

#### **Procedural Requirements of Chapter 14**

5. On May 9, 2005, the Board published a Request for Comments on Possible Amendments to Rules Governing Classes of Buildings. The Request indicated that the Board was considering amending the rules to align them with the relevant portions of the MSBC and to enhance the rules' usability, understanding, and enforceability for regulated parties. The Request for Comments was published at 29 State Register 1330.<sup>6</sup>

6. By letter dated November 8, 2006, and received by OAH on November 9, 2006, the Board requested that OAH schedule a hearing and assign an Administrative Law Judge. The Board also filed a proposed Dual Notice, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR). In a letter dated November 15, 2006, Administrative Law Judge Beverly Jones Heydinger approved the Board's Dual Notice.

7. On December 8, 2006, the Board mailed the Dual Notice to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons identified in the additional notice plan. The Dual Notice stated that a copy of the proposed rules was attached to the notice.<sup>7</sup>

8. On December 8, 2006, the Board sent a copy of the Dual Notice and Statement of Need and Reasonableness to the legislators specified in Minn. Stat. § 14.116.<sup>8</sup>

9. On December 8, 2006, the Board mailed a copy of the Statement of Need and Reasonableness to the Legislative Reference Library.<sup>9</sup>

10. On December 11, 2006, the proposed rule and the Dual Notice were published at 31 State Register 739.<sup>10</sup>

11. By the end of the comment period, the Board had received more than 25 requests for a hearing, but those requests raised legal issues about the scope of the proposed rules. Accordingly, on January 18, 2007, by Notice of Cancellation of Hearing to Persons Who Requested a Hearing dated January 17, 2007, the Board cancelled the public hearing scheduled for January 24, 2007, and instead scheduled a public meeting to discuss the legal issue raised by the requests for hearing.<sup>11</sup>

---

<sup>5</sup> *Id.*

<sup>6</sup> Ex. B.

<sup>7</sup> Exs. G, H, and I.

<sup>8</sup> Ex. H.

<sup>9</sup> Ex. F.

<sup>10</sup> Ex. G.

<sup>11</sup> Ex. K.

12. At the public hearing, the Board was unable to obtain a sufficient number of withdrawals of the requests for hearing. Because the Board believed that the requests for hearing were not compliant with Minn. Stat. § 14.25, it petitioned the Administrative Law Judge to review the requests and make a decision as to whether the Board had to proceed to hearing.<sup>12</sup>

13. By letter dated February 20, 2007, the undersigned ALJ determined that there were at least 25 statutorily-compliant requests for a hearing, and that the Board must hold a public hearing on these rules.<sup>13</sup>

14. On March 21, 2007, the Board mailed it Notice of Hearing to all individuals who had previously requested a hearing in this matter.<sup>14</sup>

15. On April 9, 2007, the Board published a Notice of Hearing in the State Register at 31 SR 1392.<sup>15</sup> The rule hearing was rescheduled for May 8, 2007.

16. On the day of the hearing the following documents were placed in the record:

- Side-by-Side Comparison of Current Rule and Proposed Rule (Ex. A);
- The Request for Comments published May 9, 2005, at 29 SR 1330 (Ex. B);
- Authorization for Rulemaking, dated October 13, 2006 (Ex. C);
- Proposed rule with Revisor’s approval dated November 9, 2006 (Ex. D);
- Statement of Need and Reasonableness (SONAR) (Ex. E);
- Letter showing the agency sent a copy of the SONAR to the Legislative Reference Library and Certificate of Mailing, both dated December 8, 2006 (Ex. F);
- Dual Notice of Intent to Adopt Rules as mailed and as published in the State Register at 31 SR 739 (Ex. G);
- Certificate of Mailing the Dual Notice of Intent to Adopt Rules to the Board’s rulemaking mailing list dated December 8, 2006, and Certificate of Accuracy of the Mailing List (Ex. H);
- Certificates of Additional Notice given on December 8, 2006 (Ex. I);
- Written comments on the proposed rules (Ex. J);
- Withdrawal of Hearing and Notice of Public Meeting, signed January 17, 2007 (Ex. K);
- Certificate of Mailing Withdrawal of Hearing and Notice of Public Meeting on January 18, 2007 (Ex. L);

---

<sup>12</sup> Ex. N.

<sup>13</sup> Ex. O.

<sup>14</sup> Ex. Q.

<sup>15</sup> Ex. P.

- Letter to Judge Heydinger after Comment Period, dated January 18, 2007 (Ex. M);
- Letter to Judge Heydinger requesting Legal Opinion, dated February 9, 2007 (Ex. N.);
- Legal Opinion from Judge Heydinger, dated February 20, 2007 (Ex. O);
- Notice of Hearing as published in the State Register at 31 SR 1392 (Ex. P);
- Certificate of Mailing Notice of Hearing on March 21, 2007 (Ex. Q); and
- Pamphlet of the Board's Rules and Regulations marking the Board's rulemaking authority for this rulemaking (Ex. R).

**Additional Notice**

17. Minnesota Statutes sections 14.131 and 14.23, require that the SONAR contain a description of the Board's efforts to provide additional notice to persons who may be affected by the proposed rules. The Board submitted an additional notice plan to the Office of Administrative Hearings. This plan was reviewed and approved by letter dated November 15, 2006. In addition to notifying those persons who earlier-requested notice of rulemaking proceedings under Minn. Stat. § 14.14, the Board represented that it would also provide notice to the following groups and individuals:

- League of Minnesota Cities;
- Minneapolis/St. Paul Building Owners & Managers Association;
- Construction Specification Institute;
- Minnesota Mechanical Contractors Association;
- Builders Association of the Twin Cities;
- Minnesota Construction Association;
- Department of Labor and Industry, Construction Codes & Licensing Division, Building Codes and Standards;
- Minnesota State Fire Marshall;
- Association of Minnesota Building Officials;
- Department of Labor and Industry, Construction Codes & Licensing Division, Electrical Licensing and Inspection; and
- Department of Labor and Industry, Construction Codes & Licensing Division, Plumbing and Engineering.

Further, the Board also posted the Dual Notice, the proposed rules, and the SONAR on its internet website.

18. The Administrative Law Judge finds that the Board did give notice to those individuals contained in its Additional Notice Plan on December 8, 2006.

## Statutory Authority

19. The Board is authorized to adopt these rules pursuant to Minn. Stat. § 326.06, which directs the Board to “make rules to define classes of buildings with respect to which persons performing services described in section 326.03, subdivision 2, may be exempted from the provisions of sections 326.02 to 326.15, by a finding of no probable risk to life, health, property or public welfare.”

20. The Administrative Law Judge finds that the Board has the statutory authority to adopt the proposed rules.

## Regulatory Analysis in the Statement of Need and Reasonableness (SONAR)

21. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

**(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.**

The Board states that the class of affected parties will include individuals requiring the services of professionals licensed by the Board, those individuals licensed by the Board, and Building Code Officials. Individuals requiring the services of professionals licensed by the Board and individuals licensed by the Board will continue to bear the costs of the proposed rules. The regulated parties will benefit from the proposed rules because the rules will be easier to understand and apply to certain circumstances. In addition, individuals who use the buildings that require licensed design will benefit from the proposed rules.<sup>16</sup>

**(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.**

The Board does not anticipate any increase or decrease in the costs pertaining to the implementation or enforcement of the proposed rules since the rules already exist as law and have already been implemented.<sup>17</sup> The Board does not anticipate any effect on state revenues.

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

The Board asserts that this rulemaking is the least costly and the least intrusive method of achieving the purpose of the proposed rules since it is the most economical

---

<sup>16</sup> SONAR at 3.

<sup>17</sup> *Id.* at 4.

method available to continue implementing the purpose and intent of the existing rules.<sup>18</sup> There was no evidence to the contrary.

**(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.**

The Board did not consider any alternative methods for achieving the purpose of the proposed rules.<sup>19</sup>

**(5) The probable costs of complying with the proposed rules.**

The probable costs of complying with the proposed rules will remain the same regardless of whether or not the proposed rules are adopted since these requirements already exist in law. As such, the Board did not evaluate the costs of complying with the proposed rules. Likewise, the Board did not evaluate the portion of costs to be borne by identifiable categories of affected parties for the same reasons.<sup>20</sup>

**(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.**

According to the Board, the probable costs of not adopting the proposed rules are difficult to quantify; however, the probable costs of not adopting the proposed rules may increase for some identifiable categories of affected parties. As the MSBC is amended in the future, the current rules will become increasingly antiquated and difficult to read, interpret, and apply to specific types of structures. This will cost regulated parties additional time and money. Another possible result is increased staff time and effort on the part of Building Code Officials. This in turn affects the Board in that it will need to add its staff time to answer questions and provide explanation and interpretation of the rules.<sup>21</sup> The Board argues that its adoption of these proposed rules will avoid these potentially additive costs, which is in keeping with today's expectation and demand for streamlined, effective, and efficient government.<sup>22</sup>

**(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.**

The Board asserts that there is no relationship between these rules and federal regulations.<sup>23</sup>

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> SONAR at 5.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.*

## **Performance-Based Rules**

22. The Administrative Procedure Act<sup>24</sup> 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.<sup>25</sup>

23. The Board states that the rules are inherently prescriptive in nature because the licensed professional is either required or not required as it relates to particular types of structures. The Board notes that the MSBC is itself a performance-based standard that allows flexibility to the regulated party.<sup>26</sup>

## **Consultation with the Commissioner of Finance**

24. Under Minn. Stat. § 14.131, the agency is required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

25. The Board consulted with its Department of Finance representative by letter dated March 27, 2006.<sup>27</sup> The Board received a response dated March 31, 2006, in which the Department of Finance indicated that it had no comment on the proposed rules.

26. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

## **Analysis Under Minn. Stat. § 14.127**

27. Effective July 1, 2005, under Minn. Stat. § 14.127, the Board must "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."<sup>28</sup> 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.<sup>29</sup>

28. The Board has determined that the cost of complying with the proposed rules in the first year after they take effect will not exceed \$25,000 for any one small business or small city. The Board made this determination based upon the fact that the

---

<sup>24</sup> Minn. Stat. § 14.131 (2006).

<sup>25</sup> Minn. Stat. § 14.002 (2006).

<sup>26</sup> SONAR at 6.

<sup>27</sup> SONAR at 7.

<sup>28</sup> Minn. Stat. § 14.127, subd. 1 (2006).

<sup>29</sup> Minn. Stat. § 14.127, subd. 2 (2006).

proposed rules are not intended to make substantive modifications to the existing rules.<sup>30</sup>

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

### **Rulemaking Legal Standards**

30. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.<sup>31</sup> The Board prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Board primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Board representatives at the public hearing and in a written post-hearing submission.

31. In addition to need and reasonableness, the Administrative Law Judge must also assess other factors; namely: whether the agency has complied with rule adoption procedures; whether the rule grants undue discretion; whether the Board has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another entity; or whether the proposed language does not meet the statutory requirements for a rule.<sup>32</sup>

32. In this proceeding, the Board has not proposed additional changes to its rules governing classes of buildings after the proposed rules were published in the State Register. Accordingly, it is not necessary for the Administrative Law Judge to make a determination regarding substantial change from that which was originally proposed.<sup>33</sup>

33. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if “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,” the differences “are a logical outgrowth of the contents of the ... notice of hearing and the comments submitted in response to the notice,” and the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

34. In determining whether modifications make the rules substantially different, the Administrative Law Judge is to consider whether “persons who will be affected by the rule should have understood that the rulemaking proceeding ... could affect their interests,” whether “the subject matter of the rule or issues determined by

---

<sup>30</sup> SONAR at 7.

<sup>31</sup> *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

<sup>32</sup> Minn. R. 1400.2100 (2004).

<sup>33</sup> Minn. Stat. § 14.15, subd. 3 (2006).

the rule are different from the subject matter or issues contained in the ... notice of hearing,” and whether “the effects of the rule differ from the effects of the proposed rule contained in the ... notice of hearing.”<sup>34</sup>

35. Any substantive language that differs from the rule as published in the State Register has been assessed to determine whether the language is substantially different. Because some of these changes are not weighty or controversial, they are not separately set forth below. Any change that is not separately referenced below is found to be not substantially different from the rule as published in the State Register.

## **Analysis of the Proposed Rules**

### **General**

36. This report focuses upon the one issue that received significant comment and requires a detailed examination. When rules are adequately supported by the SONAR or the Board’s oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically referenced below are authorized by statute and there are no other deficiencies that would prevent the adoption of the rules.

### **Discussion of Proposed Rules by Topic**

37. All of the requests for hearing received by the Board addressed the same issue. Wastewater treatment professionals argued that the Board should include a full exemption in the proposed rule for individual sewage treatment systems (ISTS) with design flows less than or equal to 10,000 gallons per day.<sup>35</sup>

38. ISTS professionals as represented by the Minnesota Onsite Wastewater Association (MOWA)<sup>36</sup> contend that the only licensing requirement for ISTS installers is through the Minnesota Pollution Control Agency (MPCA) as described in Minn. Stat. § 115.56 and the associated rules in chapter 7080. In their view only the MPCA license is required for practicing in the ISTS industry because no other profession or trade requires the training or has the experience necessary to protect public health and the environment through treatment and dispersal of wastewater in the manners subject to associated statutes and rules.<sup>37</sup>

39. The MPCA also submitted comments and appeared at the hearing regarding this issue and suggested that the Board take this rule revision opportunity to clarify its rules governing design qualification requirements for ISTS.<sup>38</sup> Specifically, the MPCA recommends that the Board’s exemption table clearly state that ISTS designers

---

<sup>34</sup> Minn. Stat. § 14.05, subd. 2 (2006).

<sup>35</sup> Ex. J.

<sup>36</sup> MOWA represents the decentralized wastewater treatment industry in Minnesota with 400+ members representing local governments, University of Minnesota educators, private-sector subsurface sewage treatment system (SSTS) designers, installers, pumpers, inspectors, Professional Engineers, and Professional Soil Scientists.

<sup>37</sup> Ex. J.

<sup>38</sup> Ex. J (20).

holding the appropriate licensure, but who are not Professional Engineers or Soil Scientists, may perform ISTS design.

40. The MPCA states that it currently licenses more than 1800 ISTS businesses that collectively design and install more than 15,000 ISTS per year. Only 21 Board-registered Professional Engineers and 11 Board-registered Professional Soil Scientists simultaneously hold MPCA ISTS licenses. The MPCA argues that these 33 persons cannot fill the current demand for wastewater work in the ISTS field for the entire state. The MPCA proposed an option of having a two-party design team including a Board-registered professional and a MPCA-licensed ISTS designer work together to design and approve wastewater systems but points out that for small ISTS systems, the costs of a two-party design team is not justifiable.<sup>39</sup>

41. Furthermore, the MPCA believes that its licensing program for ISTS designers provides sufficient protection of the public health and the environment for the design of systems serving three or fewer dwellings and for non-dwellings with sewage flows less than 2,500 gallons per day. The applicable statutes and rules for ISTS designers include requirements for training, examination, and experience prior to professional registration and licensure for those in the private ISTS design and installation practice. The program also includes an active enforcement component to oversee and take appropriate action if issues arise with those registered or licensed. Additional consumer protection is also required in the form of liability insurance and surety bonds.<sup>40</sup> The MPCA also asserts that because the permitting of ISTS design and construction occurs at the local level through county/city/township ordinances, there is an added level of oversight that further protects the public health and the environment.

42. The MPCA is currently in the process of amending chapter 7080 to include more advanced training and special registration for ISTS designers who work on larger or more complex systems.<sup>41</sup> Professional engineers and ISTS contractors both expressed concern about the lack of exemption on the Board's classes of buildings exemption table and how it could create confusion and potential liability for those who design ISTS without Professional Engineer or Professional Soil Scientist licensure.

43. Accordingly, the MPCA proposes that the following language be added to the proposed exemption table regarding classes of buildings:

<b>Classifications</b>	<b>Elements that must be met to be exempt*</b>
<u>Individual sewage treatment systems</u>	<u>Serving three or fewer dwellings; or serving any non-dwelling with flow less than 2500 gallons per day.</u>

<sup>39</sup> Ex. J (20).

<sup>40</sup> Ex. J (20). The MPCA also notes that the proposal to allow design of ISTS systems by non-state registered professional is consistent with current practice in many states which have a less rigorous training and licensing program for the ISTS industry than Minnesota.

<sup>41</sup> ALJ Eric L. Lipman conducted public hearings in this matter on April 18 and 20, 2007. The OAH Docket No. is 8-2200-17794-1.

	<p><u>MPCA-licensure is required for all ISTS designs, regardless of system size.</u></p>
--	---

\* All terms used in this table shall be as defined by the Minnesota State Building Code, except that “individual sewage treatment system” and “dwelling” shall be as defined in Minnesota Rules ch. 7080.0020.

44. The MPCA asserts that the failure to add this language could negatively affect the livelihood of ISTS designers. According to the MPCA, “[i]n the extreme, since the proposed Exemption Table does not specifically address an exemption for ISTS design, it could be inferred that even design of a single-family ISTS would have to be performed by a Professional Engineer and/or Soil Scientist.”<sup>42</sup>

45. MOWA echoes the proposal of the MPCA, but further argues that the exemption should apply to systems with design flows less than or equal to 10,000 gallons per day as was intended by the legislature in 1996 when it enacted Minn. Stat. § 115.56.<sup>43</sup>

46. In the alternative, MOWA proposes to clarify the potential conflict between chapters 1800 and 7080 by modifying Minn. R. 1800.5200, subp. 5 as follows:

The provisions of Minnesota Statutes, sections 326.02 to 326.15 shall not apply to individuals or businesses, licensed under Minnesota Statutes, section 115.56 and working within the scope of licensed activities in associated Minnesota Rules, that plan, design, construct or install, observe or inspect the construction or installation of, for the purpose of assuring compliance with design and specifications, or operate subsurface sewage treatment systems.

47. The Board responds by arguing that the proposed rules are reasonable because the decision to adopt them was made after a task force made up of Board members, building officials, and members of the public met several times to evaluate the effectiveness of the exempt table and recommended that the rule be clarified so the public would find it easier to understand and use. While the Board acknowledges MOWA’s position, it does not wish to update the proposed rule at this stage in the rulemaking process because the Board believes that the issue has not yet been thoroughly examined and because it believes that the change would create a substantially different rule that is beyond the scope of this rulemaking.<sup>44</sup>

48. In addition, the Board points out that none of the comments received during the comment period or at the hearing objected to the form or content of the proposed exempt table or had any changes that they believed should be made to the proposed exempt table other than adding a category relating to ISTS.<sup>45</sup>

<sup>42</sup> Ex. J (20).

<sup>43</sup> MOWA comment dated May 8, 2007, and submitted at the hearing.

<sup>44</sup> Board’s post-hearing comments dated May 15, 2007.

<sup>45</sup> *Id.*

49. The Board suggests that the request to include ISTS in the exempt table should be by way of a separate rulemaking after the Board has determined whether it has the statutory authority to include such systems in its rules, and if so, whether ISTS can be included in the exempt table without creating a risk to the public safety, health and welfare. The Board argues that both of these discussions would require a substantial amount of time and energy from the Board members.<sup>46</sup> While the Board did consider adding other exemptions to the table for this rulemaking, it asserts that it lacks the time and unanimity among Board members to proceed with other exemptions at this point. At this time, the Board wishes to deal only with the “clean-up” of the rules as proposed.

50. In February 2007, MOWA initiated legislation in the Minnesota Legislature to clarify the overlap and potential conflict in the existing statutes and rules of the Board and the MPCA. On May 25, 2007, following the close of the post-hearing comment period, the Governor signed into law a bill that amended Minn. Stat. § 115.56, subd. 2, as follows:

(i) Until December 31, 2010, no other professional license is required to:

(1) design, install, maintain, or inspect an individual sewage treatment system with a flow of 10,000 gallons of water per day or less if the system designer, installer, maintainer, or inspector is licensed under this subdivision and the local unit of government has not adopted additional requirements; and

(2) operate an individual sewage treatment system with a flow of 10,000 gallons of water per day or less if the system operator is licensed as a system designer, installer, maintainer, or inspector under this subdivision and the local unit of government has not adopted additional requirements.

**EFFECTIVE DATE.** This section is effective the day following final enactment.<sup>47</sup>

51. Additional ISTS law, entitled **ISTS LICENSING REPORT**, was enacted as part of the same bill as shown below:

The commissioner of the Pollution Control Agency must report to the legislative committees with jurisdiction on environmental policy by February 15, 2008, after consulting with officials from the Minnesota Onsite Wastewater Association; the Minnesota Society of Professional Engineers; the American Council of Engineering Companies; the Minnesota Association of Professional Soil Scientists; the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design; the Geoscience Professional Organization; the University of Minnesota Water Resources Center; the Association of Minnesota Counties; the League of Minnesota Cities; the Coalition of Greater Minnesota Cities; the Minnesota Association of Small Cities; and the Minnesota Association of Townships,

<sup>46</sup> *Id.*

<sup>47</sup> Laws of Minnesota 2007, chapter 131, article 1, section 73.

on further issues relating to the licensing of individual sewage treatment systems.

**EFFECTIVE DATE.** This section is effective the day following final enactment.<sup>48</sup>

52. As written, the amendment to Minn. Stat. § 115.56, subd. 2, clearly prohibits the Board from requiring a professional license other than the MPCA ISTS license to design, install, maintain, or inspect ISTS systems up to 10,000 gallons of water per day. The Legislature has spoken clearly and it is likely that the Board will apply the law when analyzing any complaint concerning unlicensed activity.

53. The statutory change does not make the Board's rule amendments unnecessary or unreasonable. But the Board could choose to incorporate the new statutory exception into the amended exemption table or add the new exception to its rules in some other way.<sup>49</sup> The rules would be more complete if so amended. Because the rule amendments as proposed properly raised the issue of exemption for persons holding an ISTS license, and that topic was fully addressed at the hearing and in written comments, a change at this time by the Board to reflect the statutory exception would not constitute a substantial change.

54. Finally, to the extent that the Conclusions that follow contain matters that are more appropriately described as Findings, the Administrative Law Judge incorporates those matters into these Findings.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Board gave proper notice of the hearing in this matter.
2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. Newly promulgated rules are reasonable if they are: (1) within the delegated authority of the agency;<sup>50</sup> (2) rationally related to the end sought to be achieved by the governing statute;<sup>51</sup> and (3) adequately grounded in the facts and circumstances set forth in the rulemaking record.<sup>52</sup>
4. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the

---

<sup>48</sup> Laws of Minnesota 2007, chapter 131, article 1, section 95.

<sup>49</sup> At the rule hearing, there was some discussion about whether an exception for persons holding an ISTS license was appropriately placed on a chart that addresses classes of buildings.

<sup>50</sup> In re *Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 43 N.W.2d 281, 284 (Minn. 1950).

<sup>51</sup> *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

<sup>52</sup> See, generally, *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943); *Greenhill v. Bailey*, 519 F.2d 5, 19 (8<sup>th</sup> Cir. 1975).

evidence connects rationally with the agency's choice of action to be taken."<sup>53</sup> An agency is entitled to make choices between possible approaches so long as the alternative selected is one that a rational person could have made.

5. It is not the role of the Administrative Law Judge to make an independent assessment as to which of several possible policy alternatives represents the "best approach" in a given case. The duty and opportunity to make these choices are among the powers conferred by the Legislature, to the agency, with the grant of rulemaking authority.

6. 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, 14.14, and 14.50 (i).

7. The Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).

8. To the extent that the Memorandum that follows below contains matters that are more appropriately described as Conclusions, the Administrative Law Judge incorporates those matters into these Conclusions.

9. A finding or conclusion of need and reasonableness with respect to any particular rule, or part thereof, does not preclude (nor should it discourage) the Board from further modification of the proposed rules based upon an examination of the public comments, provided that the final rule adopted by the agency is based upon facts appearing in this rule hearing record.

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

**RECOMMENDATION**

**IT IS HEREBY RECOMMENDED** that the proposed rules be adopted.

Dated this 21<sup>st</sup> day of June, 2007.

/s/ Beverly Jones Heydinger  
\_\_\_\_\_  
BEVERLY JONES HEYDINGER  
Administrative Law Judge

Reported: Court Reported by Shaddix & Associates;  
No transcript prepared.

<sup>53</sup> *Manufactured Housing Institute*, 347 N.W.2d at 244.

## **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.

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, she 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.