OAH 60-1904-32225

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent Rules Governing the Minnesota Plumbing Code, Adopting the 2012 Uniform Plumbing Code, *Minnesota Rules*, Chapter 4714 and Repeal of *Minnesota Rules,* Chapter 4715.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge James E. LaFave for a rulemaking hearing on April 30, 2015. The public hearing was held in the Minnesota Room of the Minnesota Department of Labor and Industry's (Agency or Department) offices in Saint Paul, Minnesota.

The Minnesota Plumbing Board (Board) proposes to amend its permanent rules by repealing the current Plumbing Code in chapter 4715 and replace it with a new Plumbing Code in chapter 4714.[1] The Board proposes to incorporate the 2012 Uniform Plumbing Code (UPC) by reference, with amendments, to replace the existing Plumbing Code.[2]

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.[3] The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[4]

The agency panel at the public hearing included Jim Peterson (DLI Chief Plumbing Inspector), Cathy Tran (Plumbing Plan review Supervisor), Jim Lungstrom

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[1] Ex. 3 at 1 (Statement of Need and Reasonableness – "SONAR").
[2] *Id.*
[3] *See,* Minn. Stat. §§ 14.131-.20 (2014).
[4] Minn. Stat. §§ 14.05, .131, .23, .25 (2014).

(DLI Assistant Director), John Parizek (Board Chair), Suzanne Todnem (General Counsel) and Wendy Wilson Legge (Chief General Counsel).[5]

Approximately 40 people attended the hearing and 17 signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Fifteen members of the public made statements or asked questions during the hearing.[6]

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until May 20, 2015 – to permit interested persons and the Agency time to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.[7] The hearing record closed on May 28, 2015.

SUMMARY OF CONCLUSIONS

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

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

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. Plumbing in Minnesota has been supervised by a state entity since 1933.[8] In 2007, the rulemaking authority for the Minnesota Plumbing Code was transferred to the then newly-established Board.[9] Although the Plumbing Code is adopted by the Board, it is administered and enforced by the Department.[10]

2. The current Plumbing Code is homegrown.[11] The Board proposes to amend its permitting rules by repealing the current Plumbing Code in chapter 4715 and replace it with a new Plumbing Code in chapter 4714.[12] The Board proposes to incorporate the 2012 UPC by reference, with amendments, to replace the existing Plumbing Code.[13]

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[5] Hearing Transcript at 9 (April 30, 2015).
[6] Hearing Transcript at 2 (April 30, 2015).
[7] *See,* Minn. Stat. § 14.15, subd. 1.
[8] Ex. 3 at 1 (Statement of Need and Reasonableness – "SONAR").
[9] *Id.*; *See* Minn. Stat. § 326.37 (2007) c. 135 art 3 s 19, 20.
[10] Ex. 3 at 1 (SONAR).
[11] *Id.*
[12] *Id.*
[13] *Id.*

II. Rulemaking Authority

3. The Board cites Minn. Stat. §§ 326B.43, subd. 1; .435, subd. 2 (2014) as its source of statutory authority for these proposed rules. Minn Stat. § 326B.43, subd. 1, grants the Board the authority to "prescribe minimum standards which shall be uniform and which shall be effective for all new plumbing installations performed anywhere in the state, including additions, extensions, alterations and replacements."[14] Under Minn. Stat. § 326B.435, subd. 2, "(a) the board shall have the power to … (3) adopt the Plumbing Code that must be followed in this state and any Plumbing Code amendments thereto. The Plumbing Code shall include the minimum standards described in sections 326B.43, subdivision 1, and 326B.52, subdivision 1. The board shall adopt the Plumbing Code and any amendments thereto pursuant to chapter 14 and as provided in subdivision 6, paragraphs 6, paragraphs (b), (c), and (d)."[15]

4. The Administrative Law Judge concludes that the Board has the statutory authority to adopt rules amending the Minnesota Plumbing Code.

III. Procedural Requirements of Chapter 14 (2014)

A. Publications

5. On Tuesday, November 13, 2012, the Board published in the *State Register* a Request for Comments seeking comments on its proposal to replace the Minnesota Plumbing Code with a model plumbing code.[16]

6. By way of an Order dated July 1, 2014, Chief Administrative Law Judge Tammy L. Pust approved the Board's request to omit the text of the proposed rule changes in the *State Register*.[17]

7. On February 6, 2015, the Board requested approval of its Notice of Intent to Adopt Rules With or Without a Hearing (Dual Notice) and Additional Notice Plan.[18]

8. On February 9, 2015, Administrative Law Judge Jeanne M. Cochran issued an Order that approved the Board's Dual Notice and Additional Notice Plan.[19]

9. The Dual Notice of Intent to Adopt Rules, published in the March 9, 2015 *State Register*, set April 8, 2015, as the deadline for comments or to request a hearing.[20]

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[14] Minn. Stat.§ 326B.43, subd. 1.
[15] Minn. Stat. § 326B.435, subd. 2.
[16] 37 *State Register* 757 (November 13, 2012).
[17] Ex. 37.
[18] Ex. 15.
[19] *Id*.
[20] Ex. 17.

10. On March 3, 2015, the Board mailed a copy of the Dual Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.[21]

11. On March 5, 2015, the Board e-mailed a copy of the Dual Notice and the statement of need and reasonableness to certain legislators and the Legislative Coordinating Commission in an effort to comply with Minn. Stat. § 14.116.[22]

12. On March 5, 2015, the Board e-mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131, .23.[23]

13. The Notice of Hearing identified the date and location of the hearing in this matter.[24]

14. At the hearing on April 30, 2015, the Board filed copies of the following documents as required by Minn. R. 1400.2220 (2013):

a. the Agency's Request for Comments as published in the *State Register* on November 13, 2012;[25]

b. the proposed rules dated January 21, 2015, including the Revisor's approval;[26]

c. the Agency's Statement of Need and Reasonableness (SONAR);[27]

d. the Certificate of Mailing the SONAR to the Legislative Reference Library on March 5, 2015;[28]

e. the Dual Notice as mailed and as published in the *State Register* on March 9, 2015;[29]

f. the Certificate of Mailing the Dual Notice to the Plumbing USPS rulemaking mailing list and the State Building Code rulemaking list on March 3, 2015, and the Certificate of Accuracy of the Plumbing

[21] Ex. 24.
[22] Ex. 19.
[23] Ex. 18.
[24] Ex. 17.
[25] Ex. 1.
[26] Ex. 2.
[27] Ex. 3.
[28] Ex. 18.
[29] Ex. 17.

USPS Mailing List and the State Building Code USPS Mailing List;[30]

g. the Certificate of E-Mailing the Dual Notice to the Plumbing rulemaking e-mail list and the State Building Code rulemaking e-mail lists on March 5, 2015; and the Certificate of Accuracy of the Plumbing rulemaking e-mail list and the State Building Code e-mail list;[31]

h. the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on March 3, 2015;[32]

i. the written comments on the proposed rules that the Agency received during the comment period that followed the Dual Notice;[33]

j. the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on March 5, 2015;[34] and

k. a February 2, 2015, memorandum from Minnesota Management and Budget.[35]

B. Additional Notice Requirements

15. Minn. Stat. §§ 14.131, .23 requires 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.

16. On March 3, 2015, the Board mailed the Dual Notice of Intent to Adopt to the following organizations and trade associations anticipated to be substantially affected by the proposed rules, in accordance with the Additional Notice Plan approved by the Office of Administrative Hearings:

- American Backflow Prevention Association (ABPA) – Region 10;
- American Society of Plumbing Engineers (ASPE) – Minnesota Chapter;
- American Society of Civil Engineers – Minnesota Section;
- American Council of Engineering Companies of Minnesota;

[30] Exs. 20 and 21.
[31] Exs. 22 and 23.
[32] Ex. 24.
[33] Exs. 35 and 36.
[34] Ex. 19.
[35] Ex. 38.

- American Society of Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) – Minnesota Chapter;
- American Waterworks Association – Minnesota Chapter;
- Associated Builders and Contractors;
- Association of General Contractors of Minnesota;
- Association of Minnesota Building Officials (AMBO);
- Association of Minnesota Counties;
- Building Officials licensed in Minnesota;
- Building Owners and Managers Association (BOMA)/Duluth;
- Building Owners and Managers Association (BOMA)/Minneapolis;
- Building Owners and Managers Association (BOMA)/St. Paul;
- Builders Association of Minnesota (BAM);
- Builders Association of the Twin Cities;
- City Engineers Association of Minnesota;
- Laborers-Employers Cooperation Education trust – Minnesota Chapter (LECET);
- League of Minnesota Cities;
- Metropolitan Council;
- Minnesota Association of Plumbing and Mechanical Officials;
- Minnesota Association of Townships;
- Minnesota Department of Agriculture;
- Minnesota Department of Natural Resources;
- Minnesota–licensed plumbers and plumbing contractors;
- Minnesota Mechanical Contractors Association;
- Minnesota Nursery & Landscape Association;

- Minnesota Onsite Wastewater Association (MOWA);
- Minnesota Pipe Trades Association;
- Minnesota Plumbing, Heating and Cooling Contractors Association;
- Minnesota Pollution Control Agency; Municipal Division;
- Minnesota Rural Water Association;
- Minnesota State Fire Chiefs Association;
- Minnesota State Fire Marshal Division;
- Minnesota Utilities Contractors Association;
- Minnesota Water Quality Association (MWQA);
- U.S. Green Building Council – Minnesota Chapter;
- Untied Association of Plumbers and Gasfitters Local Union #15;
- University of Minnesota Extension Program: Onsite Sewage Treatment Program;
- Water conditioning engineers licensed in Minnesota; and
- Water Quality Association (WQA).[36]

C. Notice Practice

1. Notice to Stakeholders

17. On March 3, 2015, the Board provided a copy of the Dual Notice of Intent to Adopt by United States Mail to those recipients on its official rulemaking list (maintained under Minn. Stat. § 14.14), who signed up to receive rulemaking notices pertaining to plumbing or the state building code via the United States Postal Service and to stakeholders identified in its additional notice plan.[37] On March 5, 2015, the Board provided a copy of the Dual Notice of Intent to Adopt by e-mail to those recipients on its official rulemaking list (maintained under Minn. Stat. § 14.14), who signed up to receive rulemaking notices pertaining to plumbing or the state building code via the electronic mail (e-mail).[38]

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[36] Ex. 3 at 4-6 (SONAR); Ex. 24.
[37] Exs. 20 and 24.
[38] Exs. 22 and 23.

18. The comment period on the proposed rules expired at 4:30 p.m. on April 8, 2015.[39]

19. There are 36 days between March 3, 3015 and April 8, 2015. There are 34 days between March 5, 2015 and April 8, 2015.

20. The Administrative Law Judge concludes that the Board fulfilled its responsibilities, under Minn. R. 1400.2080, subp. 6 (2013), to mail the Dual Notice "at least 33 days before the end of the comment period …."

2. Notice to Legislators

21. On March 5, 2015, the Agency sent a copy of the Notice of Hearing and the Statement of Need and Reasonableness to Legislators as required by Minn. Stat. § 14.116.[40]

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

23. The Administrative Law Judge concludes that the Board fulfilled its responsibilities to mail the Dual Notice "at least 33 days before the end of the comment period …."

3. Notice to the Legislative Reference Library

24. On March 5, 2015, the Board e-mailed a copy of the SONAR to the Legislative Reference Library.[41]

25. 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.

26. The Administrative Law Judge concludes that the Board fulfilled its responsibilities, to mail the Dual Notice "at least 33 days before the end of the comment period …."

D. Impact on Farming Operations

27. 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*.

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[39] Ex. 17.
[40] Ex. 19.
[41] Ex. 18.

28. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Board was not required to notify the Commissioner of Agriculture.

E. Statutory Requirements for the SONAR

29. The Administrative Procedure Act obliges an agency adopting rules to address seven factors in its Statement of Need and Reasonableness.[42] 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;

(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.

[42] Minn. Stat. § 14.131.

1. The Agency's Regulatory Analysis

(a) 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.

30. The Board asserts the proposed rules will likely affect: plumbing contractors; journeymen; apprentices; master plumbers; restricted master plumbers; restricted journeymen; plumber's apprentices; employers of persons who perform plumbing work; persons who wish to perform plumbing work; plumbing inspectors; building officials; engineers; persons in the water conditioning industry; residential and commercial building contractors; owners; and the general public.[43]

(b) 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.

31. While the Board is empowered to adopt the Plumbing Code, it does not administer or enforce it; therefore the Board will not incur any costs associated with the adoption of the proposed rules. The Plumbing Code is administered by the Department. The Board anticipates that the costs to the Department will include the cost of purchasing code books for state employees who address plumbing code questions. In addition, the Board believes that because the Plumbing Rules are funded through the collection of fees, the adoption of the proposed rules will not affect state revenues.[44]

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

32. The Board points out that the purpose of the proposed rules "is to promote the public health and safety through properly designed, acceptably installed, and adequately maintained plumbing systems."[45] In this case the proposed rule adopts a model code. The Board maintains therefore that no other less costly or less intrusive methods would establish minimum plumbing standards and adequately maintain plumbing systems.[46]

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[43] Ex. 3 at 3 (SONAR).
[44] *Id.*
[45] Minn. Stat. § 326B.41 (2014).
[46] Ex. 3 at 3 (SONAR).

(d) 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.

33. The Board claims it seriously considered three options for achieving the purpose of the proposed rule: 1) update the existing Minnesota Plumbing Code; 2) adopt the International Plumbing Code (IPC), with amendments; and 3) adopt the UPC. The Board rejected the first option because the existing code is outdated; updating it would be as time-consuming as adopting a model code but would not yield the benefits of adopting a model code. The second option was rejected because the Board wished to adopt a model code and the UPC most closely resembles the existing Minnesota Plumbing Code.[47] In addition, the UPC has been adopted in three of the four states adjacent to Minnesota: North Dakota, South Dakota and Iowa.[48] Further, Minnesota has plumbing reciprocity agreements with North Dakota and South Dakota.[49]

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

34. The Board believes the costs associated with complying with the UPC will not be significantly different than those incurred with the existing code. The Board notes that plumbers, municipal inspection departments and designers will need to purchase copies of the UPC. Also, training curriculum will need to be updated to incorporate any changes in the code. In addition, the Board believes the costs to new home or commercial buildings or other plumbing to which the code applies is anticipated to be neutral. The Board asserts that some changes in the code might result in higher expenses than the existing rule requirements, but that other code changes will result in a cost savings.[50]

(f) 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.

35. The Board asserts the existing code is outdated so not adopting rules would result in a Plumbing Code that would become further outdated. Also, other consequences of not adopting the proposed rule would include barring new technologies from the pool of available products and methods.[51]

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[47] *Id.*
[48] *Id.* at n.11.
[49] *Id.*
[50] *Id*. at 4 (SONAR).
[51] *Id.*

(g) 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.

36. The Board claims there are no applicable federal regulations that address Plumbing Code issues in the construction of non-federally owned buildings.[52]

(h) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule … '[C]umulative effect' means the impact that results from incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time.

37. The Board asserts there are no other state or federal regulations related to the specific purpose of the proposed rules.[53]

2. Performance-Based Regulation

38. The Administrative Procedure Act[54] 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.[55]

39. The Board believes the proposed rules are performance based because they balance the method with the end result of the plumbing work within a framework of standards.[56]

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

40. As required by Minn. Stat. § 14.131, by Office Memorandum dated February 2, 2015, the Commissioner MMB responded to a request by the Department to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Agency's proposed rules and concluded that: "there does not appear to be

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[52] *Id.*
[53] *Id.*
[54] Minn. Stat. § 14.131.
[55] Minn. Stat. § 14.002.
[56] Ex. 3 at 4 (SONAR).

significant costs to local units of government that are not recoverable through local fees as a result of this proposed rule."[57]

41. The Administrative Law Judge finds that the Agency 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, and the fiscal impact on units of local government.

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

42. 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.[58]

43. The Board determined that the cost of complying with the proposed rules in the first year after the rules take effect "will not" exceed $25,000 for any small business or small city.[59]

44. The Administrative Law Judge finds that the Board has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

5. Adoption or Amendment of Local Ordinances

45. Under Minn. Stat. § 14.128, the agency 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 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.[60]

46. The Board concluded that the only required amendment to a local ordinance would be a change in any specific references from chapter 4715 to 4714. Other than that minor change, no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules.[61]

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

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[57] Ex. 38.
[58] Minn. Stat. § 14.127, subds. 1, 2.
[59] Ex. 3 at 6-7 (SONAR).
[60] 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, 3.
[61] Ex. 3 at 16 – 17 (SONAR).

IV. Rulemaking Legal Standards

48. The Administrative Law Judge must make the following inquiries: (1) whether the agency has statutory authority to adopt the rule; (2) whether the rule is unconstitutional or otherwise illegal; (3) whether the agency has complied with the rule adoption procedures; (4) whether the proposed rule grants undue discretion to government officials; (5) whether the rule constitutes an undue delegation of authority to another entity; and (6) whether the proposed language meets the definition of a rule.[62]

49. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, 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,[63] "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),[64] and the agency's interpretation of related statutes.[65]

50. 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."[66] 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." [67]

51. 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.[68] 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.[69]

52. Because the Board 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. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat.

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[62] *See,* Minn. R. 1400.2100 (2013).
[63] *See, Manufactured Housing Institute 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).
[64] *Compare generally, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[65] *See, Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[66] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[67] *See, Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).
[68] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[69] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

§ 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.'

53. In reaching a determination regarding whether modifications result in a rule that is 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';
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> whether 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
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> whether 'the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.'

V. Rule by Rule Analysis

54. As will be discussed more fully below, the primary objections made by the public to the proposed rules were that at a meeting on April 19, 2011, the Board adopted the UPC without appropriate consideration of the IPC, that there were deficiencies in the SONAR, and that the proposed rules expand the definition of "plumbing." Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows focuses on those portions of the proposed rules to which there is a genuine dispute as to the reasonableness of the Board's regulatory choice or otherwise requires closer examination.

55. The Administrative Law Judge finds 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.

56. 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. Minor changes to the Proposed Rules

57. At its meeting on April 21, 2015, the Board made three minor changes to the proposed rules.[70] The first change was to correct a typographical error in proposed Minn. R. 4714.0050. In line 1.7 of that rule "Offices" was changed to "Officials."[71] The second approved change amends UPC section 612.0 and 612.1 to coordinate with other Minnesota building codes.[72] The third approved change deletes language from proposed Minn. R. 4714.110.2.9 at lines 47.22 and 47.33 that was incorrectly printed in the APSE standard 45 and therefore was incorrectly included in the proposed rule.[73]

58. The Board's actions in revising the text is needed and reasonable and would not be a substantial change from the rules as originally proposed.

VI. Critiques by Stakeholders

59. During the April 30, 2015, rulemaking hearing, and thereafter during the public comment periods, there were three principal critiques of the proposed rule: (1) that on April 19, 2011, the Board adopted the UPC without appropriate consideration of the IPC; (2) that there were deficiencies in the Board's SONAR; and (3) that the adoption of the UPC will expand the the definition of "plumbing.". Each of these critiques is addressed below.

A. Claims that on April 19, 2011, the Board adopted the UPC without appropriate consideration of the IPC.

60. The Board adopted the UPC at its April 19, 2011, meeting.[74] At that meeting the Board gave representatives of the International Code Council 10 minutes to make a presentation in support of the IPC.[75] Then representatives of the International Association of Plumbing and Mechanical Officials gave a 10 minute presentation in support of the UPC.[76] Afterwards the Board voted unanimously in favor of adopting a national plumbing code.[77] The Board then voted, with nine votes in favor, one opposed, and one abstention to move forward with future rulemaking to propose the adoption of the UPC with state amendments.[78]

61. A number of commentators argue the Board did not adequately consider the IPC.[79] They note that the International Code Council was only given time for a 10

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[70] Ex. 57.
[71] Hearing Transcript at 27 (April 30, 2015); Exs. 27 and Ex. 58.
[72] Hearing Transcript at 28.
[73] *Id.;* Exs. 27 and 28.
[74] Exs. 59, 64 and 64A.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *See, e.g.,* letter from Douglas P. Seaton to The Honorable James E. LaFave (May 20, 2015).
[79] Exs. 59, 64, 64A.

minute presentation and that there was no side-by-side comparison of the UPC and the IPC.[80] The commentators maintain that the Board, by voting to select the UPC, unilaterally adopted a rule without due notice or consideration of the IPC and without engaging in the statutorily required rulemaking process.[81] They argue the process implemented by the Board from 2011 to the present lacked fairness, transparency, and the thoroughness.[82]

62. Similarly, these commentators assert the IPC is favored by more jurisdictions than the UPC.[83] They point out that the IPC is part of a family of model codes that cover all aspects of building and construction and that the codes are correlated and coordinated so that they work together and that there is no conflict.[84]

63. The Board adamantly defends the process it undertook in this rulemaking proceeding.[85] It points out that it fully complied with all the open meeting law requirements for the April 19, 2011, Board meeting. The agenda for the meeting was posted in advance, which included listing the presentations from the International Code Council and the International Association of Plumbing and Mechanical Officials.[86] In addition, the Board maintains it has followed all of the procedural requirements necessary under the Minnesota Administrative Procedure Act.[87]

64. The Board asserts the proposed rules are needed and reasonable.[88] It notes that the UPC is a safe code and that it is respected and utilized nationwide.[89] In addition, the Board notes the UPC has been adopted in North Dakota, South Dakota, and Iowa.[90]

65. When an agency, with the authority to adopt rules, engages in the rulemaking process it is forced to make choices between different possible regulatory approaches. The agency, however, must explain what evidence it relied on in making its choice and how that evidence rationally connects to the proposed rule.[91]

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[80] *See, e.g.,* letter from James A. Ranfone to Administrative Law Judge James E. LaFave (April 29, 2015).
[81] *See, e.g.,* letter from Douglas P. Seaton to The Honorable James E. LaFave (May 20, 2015).
[81] *Id.*
[82] *Id.*
[83] *See, e.g.,* letter from James A. Ranfone to Administrative Law Judge James E. LaFave (April 29, 2015).
[84] Hearing Transcript at 81.
[85] Letter from John Parizek, Chair, Minnesota Plumbing Board, and Suzanne Todnem, Attorney for Minnesota Plumbing Board, to The Honorable James E. LaFave (May 20, 2015).
[86] *Id.* at 9.
[87] *Id.* at 1.
[88] *Id. at 9.*
[89] *Id.*
[90] Ex. 3 at p. 3 n. 11 (SONAR).
[91] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency,* 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

66. The Board has the statutory authority to adopt the Plumbing Code.[92] On April 19, 2011, in a public meeting, the Board voted to adopt the UPC with state amendments.[93] That vote represented the Board's choice of regulatory approach. The vote on April 19, 2011, fulfilled the statutory requirement to select a model to include in the next rulemaking proceeding.[94] The Board was fully aware that to implement that regulatory choice it still had to go through the proper rule making process.[95] The Board did not create a rule with the April 19, 2011 vote.

67. The Board has articulated a rational basis for selecting the UPC, including the fact the UPC most closely resembles the current Pluming Code and that three of four states adjacent to Minnesota have adopted the UPC.[96]

B. Claims there were deficiencies in the Board's SONAR

68. Several commentators argued there were defects in the Board's SONAR.[97] The commentators assert that items (1), (3), (4) and (5) required by Minn. Stat. § 14.131 to be in the Board's SONAR were deficient.

69. Minn. Stat. § 14.131(1) requires "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 who will benefit from the proposed rule." Commentators point out that materially-affected industry stakeholders, such as landscapers, who stand to lose their entire business are not mentioned in the SONAR.[98]

70. The Board maintains it complied with the requirements of Minn. Stat. § 14.141 because it made a "reasonable effort" as required by the law to supply the necessary information. Also, the Board believes the commentators' fears about landscapers losing business is mistaken. The Board maintains the landscaping community is currently allowed to install irrigation systems using established points of connection to the water distribution system without a state plumbing license and will continue to be able to do so under the proposed rules.[99] The Board's submissions were sufficient to fulfill its obligations under Minn. Stat. § 14.131(1).

71. Minn. Stat. § 14.131(3) requires "a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule."

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[92] Minn. Stat. § 326B.435, subd. 2(a)(3) (2014).
[93] *See* Exs. 64, 64A.
[94] Minn. Stat. § 326B.435, subd. 6(c) (2014).
[95] Hearing Transcript at p. 23.
[96] Ex. 3 at 3 (SONAR).
[97] *See, e.g.*, letter from Douglas P. Seaton to The Honorable James E. LaFave (May 20, 2015) and letter from Timothy H. Power to the Honorable James E. LaFave, Administrative Law Judge (May 1, 2015).
[98] Hearing Transcript at 59.
[99] Letter from John Parizek, Chair, Minnesota Plumbing Board, and Suzanne Todnem, Attorney for Minnesota Plumbing Board, to The Honorable James E. LaFave (May 20, 2015).

Several commentators asserted the Board's determination favoring the UPC was in error and that the IPC was a less costly alternative.[100]

72. The Board disagrees with the commentators' analysis of item (3). It submits that the correct legal interpretation of "methods" refers to the implementation of a model code as compared to keeping the current rule; not a comparison of which model code to adopt.[101] The Board's submissions were sufficient to fulfill its obligations under Minn. Stat. § 14.131(3).

73. Minn. Stat. § 14.131(4) requires "a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reason they were rejected in favor of the proposed rule." The Board considered updating the existing Minnesota Plumbing Code and adopting the IPC in addition to adopting the proposed rules.[102] Many commentators strongly favored adoption of the IPC.[103] Further, many commentators claim the Board failed to adequately consider the IPC.[104] They emphasize that the IPC was only given time for a 10 minute presentation at the April 19, 2011 meeting, and that the Board failed to perform a side-by-side comparison of the two codes.[105]

74. The Board demonstrated it fulfilled its statutory obligation to describe the alternative measures it considered and the reasons they were rejected in favor of the proposed rules.[106] The Board's submissions were sufficient to fulfill its obligations under Minn. Stat. § 14.131(4).

75. Minn. Stat. § 14.131(5) requires the Board to estimate "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." Certain commentators claim that the Board "greatly" understated the costs associated with adopting the UPC.[107]

76. The Board argues that because there is an existing code and that because the existing code is similar to the proposed rule, the costs to comply with the proposed rule, overall, are anticipated to be neutral.[108] The Board's submissions were sufficient to fulfill its obligations under Minn. Stat. § 14.131 (5).

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[100] *See, e.g.,* letter from Douglas P. Seaton to The Honorable James E. LaFave at p. 3; Hearing Transcript at 60, 117.
[101] *Id.*
[102] Ex. 3 at 3 (SONAR).
[103] *See* Hearing Transcript p. 32-37, 40-44, 44-56; Exs. 34, 35.
[104] *See* letter from Timothy H. Power to the Honorable James E. LaFave, Administrative Law Judge (May 1, 2015), letter from Douglas P. Seaton to The Honorable James E. LaFave (May 20, 2015).
[105] *Id.*
[106] Ex. 3 at 3 (SONAR), Exs. 64, 64A; letter from John Parizek, Chair, Minnesota Plumbing Board, and Suzanne Todnem, Attorney for Minnesota Plumbing Board, to The Honorable James E. LaFave (May 20, 2015).
[107] Letter from Douglas P. Seaton to The Honorable James E. LaFave (May 20, 2015).
[108] Letter from John Parizek, Chair, Minnesota Plumbing Board, and Suzanne Todnem, Attorney for Minnesota Plumbing Board, to The Honorable James E. LaFave (May 20, 2015).

C. Claims the adoption of the UPC will expand the scope of the plumbing code

77. Several commentators argue the proposed rules will expand the scope of the plumbing code with the effect of "fencing out"[109] some from their chosen professions.[110] The Minnesota Nursery and Landscape Association (MNLA) claims the proposed rules expand the plumbing industry's jurisdiction.[111] The MNLA argues the effect of this expanded definition of plumbing will create positive advantages for plumbers and place other established industries at a disadvantage, including the loss of work that had typically been performed by irrigation or landscape professionals.[112]

78. The Board argues the proposed rules do not expand the scope of the plumbing code. They note the definition of "plumbing" is: "the business, trade, or work having to do with the instillation, removal, alteration, or repair of plumbing and drainage systems or parts thereof."[113]

79. Currently a "plumbing system:"

> means and includes all potable water supplies and distribution pipes, all plumbing fixtures and traps, all drainage and vent pipes and all building drains, including their respective joints and connections, devices and appurtenances within the property lines of the premises and shall include all potable water treatment or using equipment.[114]

80. The Board points out that proposed rule 4714.0218 defines "plumbing system to mean:

> all potable water, building supply, and distribution pipes; all plumbing fixates and traps; all drainage and vent pipes; and all building drains and building sewers, including their respective joints and connections, devices, receptors, and appurtenances *within the property lines* of the premises and shall include potable water piping, potable water treating or using equipment, and nonpotable water piping serving plumbing fixtures.[115]

81. The Board argues that the plumbing code currently applies to some piping outside the building that is "within the property lines" and would continue to do so under

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[109] Ex. 65 at p. 2.
[110] *See, e.g.,* Ex. 65 and Letter from Timothy H. Power to the Honorable James E. LaFave, Administrative Law Judge (May 1, 2015).
[111] *See* letter from Timothy H. Power to the Honorable James E. LaFave, Administrative Law Judge (May 1, 2015).
[112] *Id.*
[113] Minn. R. 4715.0100, subp. 76 (2013).
[114] *Id.* at subp. 81 (2013).
[115] Ex. 2 (emphasis added).

the proposed rules. Therefore, the Board maintains the scope of the Minnesota Plumbing Code is the same in the proposed rule as in the current code.[116]

VII. The Board's failure to post comments

82. Minn. Stat. § 14.15, allows the agency and interested parties a rebuttal period of five working days from the end of the comment period to respond in writing to new information that has been submitted.

83. The comment period in this matter closed on May 20, 2015.[117] The rebuttal period closed on May 28, 2015.[118] On June 3, 2015, the International Code Council (ICC) informed the Administrative Law Judge that the post-hearing written submissions were not available on the Board's website until May 27, 2015, one day before rebuttal comments were due.[119]

84. The ICC maintained that giving the public a single day to file rebuttal comments is consistent with the Board's pattern of giving "short shrift" to public opinion.[120] The ICC argues this is another example of the substantively and legally insufficient process that has been practiced by the Board at every stage of the rulemaking process.[121] The ICC, however, specifically stated that it did not seek to re-open the rebuttal period.[122]

85. The Board responded that they had no legal requirement to post the post-hearing comments and that no one from the ICC contacted the Office of Administrative Hearings to request copies of the post-hearing submissions.[123]

86. The public's right to participate in the rulemaking process is evidenced by the elaborate publication and notice procedure the legislature built into chapter 14. While it is true there is no legal requirement for the Board to post the comments; the Board agreed to undertake that responsibility. The Board had posted all previous comments and the public had the reasonable expectation the Board would publish the comments due by May 20, 2015. In this case only four comments were received. However, the Board's failure to timely post comments is a concern and had the potential to deprive the public of the opportunity to meaningfully participate in the process.

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[116] Letter from John Parizek, Chair , Minnesota Plumbing Board and Suzanne Todnem, Attorney for Minnesota Plumbing Board to The Honorable James E. LaFave at 12 (May 20, 2015).
[117] Hearing Transcript at p. 8.
[118] *See* letter from Administrative Law Judge James E. LaFave to Suzanne Todnem, General Counsel (May 12, 2015).
[119] Letter form Douglas P. Seaton to the Honorable James E. LaFave (June 3, 2015).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] Letter form John Parizek, Chair, Minnesota Plumbing Board, and Suzanne Todnem, General Counsel, Minnesota Department of Labor and Industry.

VIII. The Administrative Law Judge's Determinations Regarding the Proposed Rules

87. The proposed rules represent a major change in the Plumbing Code for the state of Minnesota. They replace a "home gown" plumbing code with a model one. The Board had two model codes to choose from, the UPC and the ICC. When introducing a new model code it is inevitable that there will be disagreement between people as to which code to adopt. Here, reasonable minds can, and do, disagree as to the preferable code.

88. Commentators provided compelling evidence and testimony supporting the IPC and challenging the selection of the UPC. The Board, however, chose the UPC. As noted above, the Board is legally entitled to make choices between possible approaches as long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy is "best" or to substitute his judgment for that of the Board, for that would invade the policy making discretion of the Board. The question is whether the choice made by the Board is one that a rational person could have made.[124]

89. The Administrative Law Judge concludes the Board has shown there is a rational basis for the proposed rule. In compliance with Minnesota law the Board considered the advice of members of the public, businesses, and other organizations. As described in the SONAR, the Board engaged in an extensive review process. The process afforded significant opportunities for input from members of the public, organizations, businesses and others.

90. The Board's SONAR and post-hearing submissions provide an adequate explanation of the need for and reasonableness of the proposed rule and the rule falls within the broad authority the legislature has given to the Board to create the proposed rule. The Administrative Law Judge concludes that in accordance with applicable case law,[125] the Agency has provided ample explanation of the facts on which it is relying and how those facts connect rationally with the approach it has taken in creating the proposed rule.

91. Accordingly, the Administrative Law Judge finds that the Board has demonstrated:

a) that the proposed rules are needed and reasonable;

b) that there are no other impediments to preclude their adoption; and

c) that there are no defects found in the rules as proposed.

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[124] *Federal Sec. Adm'r v. Quaker Oat Co.,* 318 U.S. 218, 233 (1943).
[125] *Manufactured Hous. Inst. V. Pettersen,* 347 N.W.2d 238, 244 (1984).

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 Minnesota Plumbing Board gave notice to interested persons 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. The Administrative Law Judge concludes that the Board has fulfilled its additional notice requirements.

4. 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; .15, subd. 3; .50(i), (ii).

5. The Notice of Hearing, the proposed rules and Statement of Need and Reasonableness complied with Minn. R. 1400.2080, subp. 5 (2013).

6. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, .50.

7. The modification 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, .15, subd. 3.

8. As part of the public comment process, a number of stakeholders urged the Board adopt other revisions to the proposed rules. In each instance, the Board's rationale in declining to make the requested revisions to its rules was well grounded in this record and 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 based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

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

Dated: June 29, 2015

s/James E. LaFave
JAMES E. LAFAVE
Administrative Law Judge

Reported: One Transcript.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.