OAH 80-9000-35236
Revisor R-4353

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent Rules Governing Licensing of Radon Professionals, Minn. R., 4620.7000-4620.7950, 4717.7000

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2018) and Minn. R. 1400.2240, subp. 4 (2017). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule should not be approved.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge agrees with and hereby **CONCURS** with all disapprovals contained in the Report of the Administrative Law Judge dated September 12, 2018.

The Chief Administrative Law Judge **CONCURS** that the following proposed rules are **DISAPPROVED:**

Minn. R. 4620.7200, subp. 4; and

Minn. R. 4620.7600, subp. 1.

The changes or actions necessary for approval of the disapproved rules are as identified in the Administrative Law Judge's Report.

If the Department elects not to correct the defects associated with the proposed rules, the Department must submit the proposed rules to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2018).

Dated: September 13, 2018

TAMMY L. PUST
Chief Administrative Law Judge

[118564/1]

OAH 80-9000-35236
Revisor R-4353

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent Rules Governing Licensing of Radon Professionals, Minn. R., 4620.7000-4620.7950, 4717.7000	**REPORT OF THE ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge LauraSue Schlatter for a rulemaking hearing on July 17, 2018. The hearing was held at the Orville L. Freeman Building, Room B-107, 625 Robert Street North, St. Paul, Minnesota. The Minnesota Department of Health (Department) proposes to adopt Minn. R., 4620.7000-4620.7950 relating to the licensing of radon measurement and mitigation professionals; and to amend Minn. R. 4717.7000, relating to rule variance requests.

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act (APA).[1] The purpose of this process is to ensure that state agencies meet all requirements established by law for adopting rules.

The hearing process permitted agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and any changes that might be appropriate. Further, the hearing process provided the general public an opportunity to review, discuss, and critique the proposed rules.

The Department's panel at the public hearing included: Patricia Winget, an attorney with the Department; Mary Navara, manager of the Indoor Environments and Radiation Section of the Department's Environmental Health Division; Dan Tranter, the supervisor of the Department's radon program; Joshua Kerber, an environmental research scientist with the Department; and John Olson, the Department's project manager for the rules revision.

41 people submitted comments and requests for a hearing between June 28, 2018, and July 6, 2018.[2] Approximately 31 people attended the public hearing and signed the hearing register.[3] The hearing continued until all interested persons had an opportunity to be heard concerning the proposed rules. Thirteen members of the public made statements or asked questions during the hearing.[4] Six of the thirteen speakers spoke in favor of the rule.[5]

---

[1] *See* Minn. Stat. §§ 14.131-.20 (2018).
[2] Exhibit (Ex.) I.
[3] Rule Hearing Register (July 17, 2018).
[4] Hearing Transcript (Tr.) at 2 (July 17, 2018).
[5] *Id.* at 31-34 (Bill Angell), 34-39 (Andy Kelly), 39-58 (Greg Olson), 60-64 (William Carlson), 78-81 (Brian Benasutti), 81 (Jesse Green).

After the close of the hearing, the rulemaking record remained open for another 20 calendar days—until Monday, August 6, 2018—to permit interested persons and the Department to submit written comments. Four members of the public and the Department submitted comments during the initial post-hearing comment period. Following the initial comment period, the hearing record was open an additional five business days to permit interested persons and the Department an opportunity to reply to earlier-submitted comments.[6] The Department submitted five rebuttal comments on August 13, 2018, the close of the rebuttal comment period.

The hearing record closed on Monday, August 13, 2018.

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules and, with two exceptions, that the proposed rules are needed and reasonable.

The Administrative Law Judge disapproves the following two proposed rules based on the standards at Minn. R. 1400.2100 (2017):

(1) The Department's planned change to Minn. R. 4620.7200, subp. 4; and

(2) Minn. R. 4620.7600, subp. 1.

In addition, the Administrative Law Judge makes several recommendations for technical and clarifying changes. Finally, the Administrative Law Judge approves Department's changes to the rules as published, except as discussed at Section V.A.ii., below, in relation to Minn. R. 4620.7200, subp.4.

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. During the 2015 legislative session, the Minnesota Legislature enacted the Minnesota Radon Licensing Act, Minn. Stat. § 144.4961.[7] The Act was amended in 2016 to lower statutory licensing fees and clarify categories of individuals who must be licensed.[8] A further amendment during the 2017 special session required that the rules adopted by the Department to implement the Act go into effect on January 1, 2019.[9]

2. The Department's rulemaking authority was granted in light of, and is partly limited by, other statutes. The Minnesota Radon Awareness Act requires that home

[6] *See* Minn. Stat. §14.15, subd. 1.
[7] *See* 2015 Minn. Laws ch. 71, art. 8, § 24, at 249-251.
[8] *See* 2016 Minn. Laws. ch. 189, art. 20, §§ 11-13, at 295-96.
[9] *See* 2017 Minn. Laws 1st Spec. Sess. ch. 6, art. 10, § 63, at 268.

buyers receive disclosure and notices about radon risks in the course of most real estate transactions.[10] Another statute, Minn. Stat. § 326B.106, subd. 6 (2018), directs the Department of Labor and Industry to adopt rules for radon control as a part of the State Building Code for all new residential buildings.

3. Minn. Stat. § 144.4961, subd. 3, directs the Department to "adopt rules establishing licensure requirements and work standards relating to indoor radon in dwellings and other buildings, with the exception of newly constructed Minnesota homes according to section 326B.106, subdivision 6." Pursuant to that directive, the Department has proposed rules intended to meet its statutory rulemaking mandate.[11]

4. In this rulemaking proceeding, the Department must establish that the proposed rules are within its statutory authority, necessary and reasonable, follow from compliance with the required procedures, and that any modifications that the Department made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[12]

II. Rulemaking Authority

5. Minn. Stat. § 144.4961, subd. 3, confers specific authority upon the Department to adopt rules governing radon testing and mitigation, providing that "[t]he commissioner of health shall adopt rules establishing licensure requirements and work standards relating to indoor radon in dwellings and other buildings, with the exception of newly constructed Minnesota homes according to section 326B.106, subdivision 6."

6. The Department has statutory authority to adopt the proposed rules.

III. Procedural Requirements of Chapter 14

A. Publications

7. On August 17, 2015, and July 18, 2016, the Department published Requests for Comments in the *State Register* seeking comments on possible rules governing licensing of radon professionals.[13]

8. On May 11, 2018, the Department requested review and approval of its Additional Notice Plan for the Department's Dual Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing (Dual Notice) under Minn. R. 1400.2600, subp. 2B (2017).[14]

9. On May 16, 2018, the Administrative Law Judge issued an Order approving the Department's Additional Notice Plan and Dual Notice.[15]

---

[10] *See* Minn. Stat. § 144.496 (2018).
[11] Exhibit (Ex.) C.
[12] Minn. Stat. §§ 14.05, .23, .25, .50 (2018).
[13] Ex. A.
[14] Ex. H (Order on Review of Additional Notice Plan and Dual Notice Plan (May 16, 2018)).
[15] *Id.*

10. On June 4, 2018, the Department published the Dual Notice in the *State Register* stating its intent to adopt rules following the receipt of input from the public.[16] In the Dual Notice, the Department announced it would hold a hearing on July 17, 2018, at the Orville L. Freeman Building, 625 Robert Street North, St. Paul, Minnesota, if 25 or more persons requested a hearing.[17]

11. On May 30, 2018, the Department sent an electronic copy via email of the Dual Notice, to all persons and associations who had registered their names with it for the purpose of receiving such notice and to all persons and associations identified in its Additional Notice Plan.[18] To those individuals and associations who did not have an electronic mail address, the Department mailed a copy of the Dual Notice by depositing the copies in the United States mail with postage paid.[19]

12. The Department received more than 25 requests for a hearing.[20]

13. At the hearing on July 17, 2018, the Department filed copies of the following documents:[21]

(a) the Department's Requests for Comments as published in the *State Register* on August 17, 2015 and July 18, 2016;[22]

(b) the proposed rule dated March 8, 2018, which included the Revisor's approval;[23]

(c) the Department's Statement of Need and Reasonableness (SONAR);[24]

(d) the Certificate of Mailing the SONAR to the Legislative Reference Library on May 29, 2018;[25]

(e) the Dual Notice as mailed and as published in the *State Register* on June 4, 2018;[26]

(f) the Certificate of Mailing the Dual Notice to the rulemaking mailing list on May 30, 2018, and the Certificate of Accuracy of the Mailing List;[27]

---

[16] Ex. F; 42 Minn. Reg. 1499 (June 4, 2018).
[17] Ex. F; 42 Minn. Reg. 1499 (June 4, 2018).
[18] Exs. G, H. The Certificate of Mailing does not specify which documents were included, but the Dual Notice indicated that a copy of the rules was available in the State Register, or online, or by contacting the agency contact person. Similarly, the Dual Notice stated the SONAR was available online or by contacting the agency contact person. The Administrative Law Judge infers that the Dual Notice itself was the only document sent directly to those on the mailing list, as permitted by Minn. Stat. § 14.22, subd. 1 (2018).
[19] Exs. G, H.
[20] Ex. I.
[21] *See* Minn. R. 1400.2220 (2017).
[22] Ex. A.
[23] Ex. C.
[24] Ex. D.
[25] Ex. E.
[26] Ex. F.
[27] Ex. G.

(g) the Certificate of Giving Additional Notice on May 24, 2018, pursuant to the Additional Notice Plan on May 16, 2018;[28]

(h) the written comments on the proposed rules that the Department received during the comment period that followed the Dual Notice;[29]

(i) the Certificate of Sending the Dual Notice and SONAR to Legislators and Legislative Coordinating Commission on May 31, 2018;[30]

(j) a statement certifying that, on April 9, 2018, the Department consulted with Minnesota Management and Budget (MMB) about the fiscal impact and fiscal benefits of the proposed rule by letter; and on April 26, 2018, Department staff engaged in further consultation with MMB when they met with MMB's Executive Budget Officer;[31]

(k) the Certificate of Mailing a Notice of Hearing to those who requested a hearing;[32]

B. Additional Notice Requirements

14. Minn. Stat. §§ 14.131, 14.23 (2018) require that an agency include in the 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.

15. On May 24, 2018, the Department provided a copy of the Dual Notice to persons and groups detailed in its approved Additional Notice Plan.[33]

16. If the agency implements an approved additional notice plan, the order approving the additional notice plan is the final determination by the Office of Administrative Hearings that the additional notice plan is adequate.[34]

17. The Department met the additional notice requirements of Minn. Stat. §§ 14.131, 14.23.

C. Notice Practice

i. Notice to Stakeholders

18. On May 24, 2018, the Department provided a copy of the Dual Notice to stakeholders identified in its Additional Notice Plan.[35]

---

[28] Ex. H.
[29] Ex. I.
[30] Ex. K.1.
[31] Ex. K.2.
[32] Ex. K.3.
[33] Exs. D at 15-16, G, H.
[34] Minn. R. 1400.2060, subp. 4 (2017).
[35] Ex. H.

19. On May 30, 2018, the Department provided a copy of the Dual Notice to persons listed on its official rulemaking list maintained under Minn. Stat. § 14.14.[36]

20. The comment period on the proposed rules expired at 4:30 p.m. on Friday, July 6, 2018.[37]

21. The Department complied with Minn. R. 1400.2080, subp. 6 (2017), by mailing the Dual Notice "at least 33 days before the end of the comment period . . . ." to stakeholders identified in its Additional Notice Plan and to persons listed on its official rulemaking list under Minn. Stat. § 14.14.

ii. Notice to Legislators

22. Minn. Stat., § 14.116 (2018), requires an agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators when it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan as required by Minn. Stat. § 14.22 (2018).

23. On May 31, 2018, the Department sent a copy of the Dual Notice and SONAR to legislators via email.[38]

24. The Department provided the Dual Notice to the legislators at least 33 days before the end of the comment period.

25. However, because the Department failed to mail the Dual Notice and SONAR to legislators when it mailed its Dual Notice to stakeholders pursuant to its additional notice plan, it violated the requirements of Minn. Stat. § 14.116 (b).

26. Nonetheless, the Administrative Law Judge concludes that the Department's failure to mail the Dual Notice and SONAR to legislators when it mailed the Dual Notice to stakeholders was harmless error under Minn. Stat. § 14.26, subd. 3(d) (2016). The later-mailing to legislators did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. The Administrative Law Judge appreciates and applauds the Department's efforts to provide stakeholders with copies of the Dual Notice well in advances of the hearing deadline. However, the Department should note that the law requires that legislators receive notice of an intent to adopt a rule when other notice required by Minn. Stat. §§ 14.14 or 14.22 is provided.

iii. Notice to the Legislative Reference Library

27. Minn. Stat. § 14.23 provides that an agency must send a copy of the SONAR to the Legislative Reference Library when the Dual Notice is mailed.

[36] Ex. G.
[37] Ex. F at 1500.
[38] Ex. K.1.

28. On May 29, 2018, the Department submitted a copy of the SONAR by email to the Legislative Reference Library.[39]

29. The Department submitted the SONAR as required by Minn. Stat. § 14.23.

D. Impact on Farming Operations

30. Additional notice requirements exist when proposed rules affect farming operations.[40] In that circumstance, an agency must 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*.

31. The proposed rules at issue here do not impose restrictions or have an impact on farming operations. The Department was not required to notify the Commissioner of Agriculture.

E. Statutory Requirements for the SONAR

32. An agency adopting rules must address eight factors in its SONAR.[41] 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;

[39] Ex. E.
[40] Minn. Stat. § 14.111 (2018).
[41] Minn. Stat. § 14.131.

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

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

i. 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.

33. The Department contends that the proposed rules will primarily benefit customers of radon professionals, who are mainly homeowners, by helping to ensure that radon professionals perform high-quality measurement and mitigation in homes.[42]

34. The Department also contends that real estate professionals, government officials, and builders may benefit indirectly, because the proposed rules will help radon-licensed professionals who work with those groups to achieve more reliable results for their clients and constituents.[43]

35. The Department notes the groups that will probably be affected by the regulations include individuals conducting radon testing (radon measurement providers), individuals and companies that perform work to reduce radon concentrations in buildings (radon mitigation companies and providers), and laboratories that analyze radon test devices.[44] The Department estimates that there are approximately 200 radon measurement providers, 30 radon mitigation companies, 160 radon mitigation providers, and 10 radon testing labs that will be regulated under the proposed rules.[45]

(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.

36. The Department expects the license fees mandated by statute to fully fund the Department's radon inspection and enforcement program.[46]

[42] Ex. D at 7.
[43] *Id.*
[44] *Id*. at 6-7.
[45] *Id*. at 7.
[46] *Id.*

37. Because Minn. Stat. § 144.4961, subd. 3, grants the Department the sole control over implementing or enforcing radon rules, the Department expects that no other agencies will incur costs in the implementation and enforcement of the proposed rule.[47]

38. The Department expects any impact to state revenues resulting from the proposed rule to be minimal.[48] The Department suggests that, if the growth of radon mitigation in Minnesota tracks with growth in other states, the state "could realize thousands of dollars per year of additional business- and sales-tax revenue."[49]

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

39. The Department indicates that it reviewed national standards developed by various national and industry organizations to determine whether there were less intrusive methods for achieving the purposes of the proposed rules.[50] The Department states that it chose to incorporate standards developed by the American Association of Radon Scientists and Technologists (AARST). The Department chose the AARST standards because they are considered the most current standards of practice by the U.S. Environmental Protection Agency, they are periodically revised, and they are consensus standards. In addition, according to the Department, the AARST standards are approved by the American National Standards Institute (ANSI), developed by the U.S. radon industry, and commonly used by Minnesota radon professionals.[51] After evaluating all options, the Department determined that it knew of no less costly or less intrusive option to achieve the stated purpose of the proposed rules.[52]

(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.

40. The Department stated that it has maintained a federally-granted radon outreach, research, and education program since 1989 and is fully informed about developments in radon risk reduction and standards of practice.[53] To assist in developing the proposed rules, the Department convened an advisory committee charged with providing advice regarding alternative methods of meeting the objectives of the statute and proposed rules.[54] The Department's proposed rules are based on nationally-accepted standards. The advisory committee did not challenge the use of those standards and proposed several modifications to the first rule draft, most of which were accepted.[55] The Department thus maintains that there are no existing alternatives to the ANSI/AARST

---

[47] *Id.*
[48] *Id.*
[49] *Id*.
[50] *Id.* at 8.
[51] *Id*.
[52] *Id*.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 8-9.

national standards on which the proposed rules are based that would achieve the rule's purpose.[56]

41. Commenters Standard Water Control Systems, Inc. (Standard Water) and Minnesota Association of Radon Professionals (MARP) state that the SONAR fails to adequately describe why alternate methods of achieving the purpose of the proposed rules were rejected.[57] Standard Water and MARP note that the Minnesota Building Code already requires that new homes include a passive radon system,[58] and that the Department certifies "Gold Standard Builders" to install such systems. They question why "having a Minnesota residential building contractor license [is] not sufficient under the proposed [rule] when the [Department's] Gold Standard Radon Resistant Program asserts that such licensed contractors are qualified to install radon control systems in homes."[59]

42. The Department responds to Standard Water and MARP, stating that "the Legislature already made this decision" not to use the building code "by enacting the Radon Licensing Act" and for that reason the Department did not seriously consider using the building code to satisfy its statutory requirements under Minn. Stat. § 144.4961. The Department notes that the Radon Licensing Act exempts from its scope radon control systems installed in newly constructed homes. [60] Furthermore, the Department points out that, in recognizing "Gold Standard Builders" as builders who take "an active role in reducing the radon levels in the homes they build," the Department recognizes the distinct roles that the Department of Labor and Industry (DLI), which licenses building contractors, and the Department each have in keeping buildings safe and healthy in Minnesota. The legislature has assigned the role of reducing radon levels in new construction to licensed builders, but sees the role of reducing radon levels in existing buildings as appropriate for the Department.[61] The Department compares the radon-resistant new construction requirements in the building code with the more complex requirements and options that apply in existing buildings. The Department concludes that its experience with radon reduction and indoor air policy provides it the appropriate expertise to oversee radon reduction in existing buildings, and that general contractor license requirements are not well-suited to the task.[62]

43. The Administrative Law Judge concludes that the Department satisfied the requirement to describe any alternative methods for achieving the purpose of the proposed rules that were seriously considered by the Department and the reasons why they were rejected in favor of the proposed rules. The Department did not seriously consider the option that Standard Water and MARP mention because the Department believed that that option contradicted the Department's statutory mandate to promulgate rules under Minn. Stat. § 144.4961, subd. 3.

---

[56] *Id.* at 8.
[57] Comment of Standard Water and MARP at 3 (Aug. 6, 2018).
[58] *See* Minn. R. 1303.2400-.2402 (2017).
[59] Comment of Standard Water and MARP at 3-4 (Aug. 6, 2018).
[60] Department's Rebuttal Comment to Standard Water and MARP at 3 (Aug. 13, 2018).
[61] *Id.* at 4.
[62] *Id.* at 4-5.

(e) 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.

44. The Department states that there are a total of four classes of individuals and businesses that will be regulated by the proposed rules.[63] The classes of individuals to be regulated are radon measurement and radon mitigation professionals, and the classes of businesses to be regulated are radon mitigation companies and radon analysis laboratories.[64]

45. The Department acknowledges that individuals and businesses regulated by the proposed rules will incur additional expenses due to:

- statutory license and system tag costs;
- education expenses for initial training;
- initial licensing exam costs;
- continuing education costs;
- lost earning opportunity costs related to time spent traveling or training; and
- administrative costs filling out applications, developing quality assurance or control plans, recordkeeping, and submitting reports to the Department.[65]

46. The Department projects the first-year expenses incurred by a currently uncertified radon measurement professional as a result of the proposed rule to range from $510 on the low end to $4,269 on the high end.[66] For a currently certified measurement professional, the Department projects first-year expenses to range from $150 on the low end to $1,810 on the high end.[67] Costs after the initial year are expected to decline.[68]

47. The Department projects the first-year expenses for currently uncertified radon mitigation professionals as a result of the proposed rule to range from $1,070 on the low end to $6,826 on the high end.[69] First-year costs for currently certified mitigation

[63] Ex. D at 9.
[64] *Id*.
[65] *Id.*
[66] *Id.* at 9-10, Table 1.
[67] *Id.* at 10, Table 2.
[68] *Id.*
[69] *Id.* at 10-11, Table 3.

professionals are projected to range from $150 on the low end to $2,025 on the high end.[70] Costs after the initial year are expected to decline. [71]

48. The Department projects first-year costs for radon mitigation companies as a result of the proposed rule to range from $150 on the low end to $2,050 on the high end, and for those costs to remain constant in subsequent years.[72]

49. The Department projects first-year costs for radon analysis laboratories as a result of the proposed rule to be minimal because affected laboratories will only be affected so far as they have to make "minor edits" to their quality assurance and quality control plans to comport with the proposed standards.[73] The Department projects administrative costs associated with those edits to range from $150 to $600.[74]

50. At the public hearing, commenter Jeff Blixt questioned the Department's estimation of the costs of the proposed rule on businesses.[75] Mr. Blixt, the owner of a home inspection company called Inspecta-Homes, expressed frustration that no one from the Department involved home inspection professionals in discussions of this rule. Mr. Blixt stated he currently has ten home inspectors who work under his supervision doing radon testing. If those ten people have to get trained, and each takes a two-day, in-person training course, Mr. Blixt estimates that lost revenue to his company could be as high as $17,000 in two days.[76] Mr. Blixt also mentioned the exam fees and cost of radon monitoring devices as significant expenses.[77] Mr. Blixt said that the extra expenses would be passed along to customers, which, he predicted, would lead to a drop in radon testing.[78]

51. Mr. Blixt rejected the option of online training because he believes it would decrease the likelihood of inspectors passing the test.[79] He also rejected the idea of licensing only half of his staff, stating that half of his staff could not adequately cover his geographic territory.[80] Mr. Blixt stated he currently has 30 monitors, but he expressed concern about having to purchase additional monitors.[81]

52. The Department did not directly respond to Mr. Blixt's financial concerns. While the Administrative Law Judge agrees that Mr. Blixt's testimony supports a conclusion that the cost of providing training to all ten of his uncertified inspectors could cost his company in excess of $17,000 in the first year in which the rule is effective, Mr. Blixt did not demonstrate that compliance with the rules would require his company to spend that much. Mr. Blixt could provide some training in an online format for certain employees, especially those whom Mr. Blixt feels he has already trained thoroughly.

---

[70] *Id.*, Table 4.
[71] *Id.* at 10.
[72] *Id.* at 12, Table 5.
[73] *Id.* at 12.
[74] *Id.*
[75] Tr. at 68-72.
[76] *Id.* at 69.
[77] *Id.* at 69-70.
[78] *Id.* at 70.
[79] *Id.* at 69.
[80] *Id.* at 69-70.
[81] *Id.* at 69.

Mr. Blixt could provide training to fewer than all ten of his inspectors in the first year. Finally, Mr. Blixt did not explain why, when he already has 30 monitors, he will be required to purchase additional monitors in the first year after the rule becomes effective.

53. The Administrative Law Judge finds that the Department's calculations were careful, and amply supported. While there will be costs to all businesses involved in radon measurement and mitigation, the Department has structured the rules in such a way that business owners will have some control over the costs. The Administrative Law Judge concludes that the Department's estimates reflect a reasonable and well-considered range of the possible range of costs to individuals and businesses resulting from the implementation of the proposed rules.

(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.

54. The Department states that it is expressly directed by statute to adopt rules governing radon measurement and mitigation.[82] The Department asserts that if the proposed rules are not adopted, it "will not be able to carry out the legislature's mandate to protect the public from inadequate radon measurement and mitigation work with all their adverse consequences," and that "[h]ome and other building owners who seek relief from radon would suffer incalculable cost from increased health risk and false reassurance from improper work."[83]

(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.

55. The Department states that it knows of only one federal regulation that may be related to the proposed rule's specific purpose. Under the National Environmental Policy Act, the federal Housing and Urban Development Agency (HUD) has requirements for identifying and mitigating radon in new Fair Housing Act multifamily insured mortgage applications.[84] The Department states that its proposed rules are consistent with this federal regulation, and therefore, that there is no difference that warrants analysis.[85]

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

56. The Department states that it knows of only two federal and state laws that may relate to the specific purpose of the proposed rules. These two regulations would not

[82] Ex. D at 13.
[83] *Id*.
[84] *Id.* (*see also* 42 U.S.C. §§ 4321-4370; 24 C.F.R. 50.3(i)(1)).
[85] *Id*.

result in a cumulative effect on the entities and individuals that will be regulated by the proposed rules.[86]

57. Under the National Environmental Policy Act, the federal Housing and Urban Development Agency has requirement for identifying and mitigating radon in new Fair Housing Act multifamily insured mortgage applications.[87] The Department states that this does not create a cumulative effect with the proposed rules because it applies to a narrow subcategory of radon mitigation and measurement projects in Minnesota, and because the federal standards are equal to or less stringent than the proposed rules.[88]

58. Under Minnesota law, public schools eligible for long term facility maintenance revenue that have also chosen to test for radon must follow the state's radon testing plan and report results.[89] The Department states that there is no cumulative effect of this statute and the proposed rules.[90]

59. The Department has completed an assessment of the eight factors set forth in Minn. Stat. § 14.131, in the text of its SONAR.

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

60. As required by Minn. Stat. § 14.131, the Department certified that it consulted with MMB to evaluate the fiscal impact and benefit of the proposed rules on local units of government.[91] The Department's certification states that, on April 9, 2018, it emailed MMB copies of the Governor's Office Proposed Rule and SONAR Form, the March 3, 2018 draft proposed rules and the March 2018 draft SONAR. It further certified that Department staff met and consulted with MMB staff on April 26, 2018.[92]

iii. Performance-Based Regulation

61. The APA 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.[93]

62. The Department indicated that the proposed rules were developed in conjunction with an advisory committee and stakeholder meetings, and that those groups did not come up with alternative proposals to the nationally recognized ANSI/AARST standards presented in the draft rules.[94]

---

[86] *Id.*
[87] *Id.* at 14 (*see also* 42 U.S.C. §§ 4321-4370; 24 C.F.R. 50.3(i)(1)).
[88] *Id.* (*see also* Minn. Stat. § 123B.571 (2018)).
[89] *Id*
[90] *Id.*
[91] Ex. K.2.
[92] *Id.*
[93] Minn. Stat. §§ 14.002, .131 (2018).
[94] Ex. D at 14.

63. The Department states that its proposed standards are flexible in that they permit three different testing methods, options for testing location and building conditions, several approved testing devices, and several types of active soil depressurization during mitigation.[95]

64. The Department states that it incorporated flexibility into the proposed rules by taking a prescriptive approach to mitigation not requiring a certain specific level of radon concentration, noting that imposing such rigid standards could discourage consumers from mitigation efforts because mitigation below certain levels is often very costly to achieve marginal reductions.[96]

65. The Department further states that it incorporated performance-based elements into licensing rules, such as requiring continuing education for license renewal, requiring professionals to present a quality assurance plan and requiring them to demonstrate that their equipment is accurate and precise when following manufacturer recommendations. In the SONAR, the Department also mentioned its original requirement to have professionals whose licenses have lapsed to re-take a licensing exam.[97] However, as discussed in greater depth at section V.A.1. of this Report, in response to public comments during the hearing process, the Department added alternatives to re-taking the licensing exam, thus providing greater flexibility for license renewal for individuals whose licenses have lapsed.[98]

iv. Summary

66. The Department has complied with Minn. Stat. § 14.131 in 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.

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

67. Minn. Stat. §14.127, requires agencies 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.[99]

68. The Department determined that the cost of complying with the proposed rules will not exceed $25,000 for any business or any statutory or home rule charter city in the first year following adoption of the rules.[100]

---

[95] *Id.*
[96] *Id.* at 15.
[97] *Id.*
[98] Department's Response to Public Comments at 3 (Aug. 3, 2018).
[99] Minn. Stat. § 14.127, subds. 1, 2 (2018).
[100] Ex. D at 17-20.

69. The Department estimated the low- and high-end costs to businesses that conduct both radon measurement and radon mitigation.[101]

70. For businesses that conduct radon measurement, the Department estimated that the low-end cost would be $150, for a business consisting of one certified professional who is a sole proprietor.[102] On the high end, the Department estimated that the cost to the state's largest radon measurement company would be $20,054.[103] The Department based its high-end estimate on the fact that Minnesota's largest radon testing business employs 14 home inspectors, one of whom is currently certified; and under the assumptions that that business would license half its inspectors to meet demand for radon testing (because about 50% of home inspections reportedly include a radon test), that travel costs would be minimal because this business is located in the Twin Cities area, and that the company currently has several continuous monitors and would reasonably need to purchase one new radon monitor at most to meet additional testing needs.[104]

71. For businesses that conduct radon mitigation, the Department estimated that the low-end cost would be $300, for a business consisting of one certified professional who is a sole proprietor.[105] On the high end, the Department estimated that the cost to the state's largest radon mitigation company (Healthy Homes LLC) would be $11,745.[106] This estimate was made under the assumption that Health Homes LLC, which employs seven people who conduct radon work, would choose to license three individuals as mitigation professionals and two as measurement professionals, leaving two to work under the supervision of licensed professionals.[107]

72. Standard Water and MARP comment that the Department's calculation is flawed, arguing that the Department should have calculated the cost to the state's largest measurement company at over $31,000, which would mean that the estimated cost to at least one business of under 50 full-time employees would be in excess of $25,000.[108] The difference of over $10,000 between the calculations is attributable to the fact that Standard Water and MARP suggest that that company would be required to license three uncertified mitigation professionals and two uncertified measurement professionals.[109] The commenters then apply the Department's high-end estimate for the cost of licensing those individuals to arrive at a number exceeding $25,000.[110]

---

[101] *Id.* at 17-19.
[102] *Id.* at 18.
[103] *Id.* at 18-19.
[104] *Id.*
[105] *Id.* at 19.
[106] *Id.*
[107] *Id.* at 19-20.
[108] Comment of Standard Water and MARP at 1-2 (Aug. 6. 2018).
[109] Standard Water and MARP's mistakenly label the cost of licensing for measurement professionals in their example as "Licensing two certified measurement professionals." *Id.* at 2. However, as their discussion, and the table from which they draw their numbers makes clear, they apparently intended the table to apply to "Licensing two uncertified measurement professionals." *Id.*; *see also* Ex. D at 9-10, Table 1. The Department repeats Standard Water and MARP's error in the text of its Rebuttal Comments. Department's Rebuttal Comment to Standard Water and MARP at 1 (Aug. 13, 2018).
[110] Comment of Standard Water and MARP at 2 (Aug. 6, 2018); *see also* Department's Rebuttal Comment to Standard Water and MARP at 1 (Aug. 13, 2018).

73. The Department's rebuttal refutes Standard Water and MARP's methodology. The Department points out that its numbers are based on an analysis of the likely licensing needs of Healthy Homes, LLC, the largest Minnesota radon mitigation business to the Department's knowledge.[111] The Department contends that it "explained its analysis in precise detail, drawing from the cited sources and its comprehensive actual knowledge of the radon-mitigation industry," and thus, that it "stands by its analysis."[112] The Department states that Standard Water and MARP's estimate relies on unsound assumptions and speculation.[113] The Department contends that it knows of no company that would need to license three currently uncertified radon professionals.[114] The Department contends that the typical business model of the industry suggests that most businesses in Minnesota will need only one or two licenses, and that even the largest mitigation company will not have to license more than three radon professionals, most of whom are already certified.[115]

74. The Administrative Law Judge first notes that the Department appears to be assuming that Standard Water and MARP are positing a situation where a company has to license three uncertified radon professionals, when in fact, the commenters' total estimate of $31,066 is based on an example where a company has to license five uncertified radon professionals. The Department's projections are based on its knowledge of actual companies, their personnel, and their likely licensing needs. Standard Water and MARP's estimate appears to be based on a hypothetical company. The commenters provide no basis for their assertion that any radon mitigation company in Minnesota is likely to have to license five uncertified radon professionals in the year after the rules take effect.

75. Upon a review of the Department's careful and amply supported calculations, the Administrative Law Judge concludes that the Department's estimates reflect a reasonable and well-considered upper bound to the costs that business will incur as a result of the implementation of the proposed rule. Although Standard Water and MARP have constructed a scenario in which a business might have to spend more than $25,000, the Administrative Law Judge concludes that the assumptions underlying the commenters' estimate are less credible than the assumptions underlying the Department's estimate.

76. The Department has made the determinations required by Minn. Stat. § 14.127 (2018), and the Administrative Law Judge approves those determinations.

---

[111] Department's Rebuttal Comment to Standard Water and MARP at 1 (Aug. 13, 2018); *see* Ex. D at 19.
[112] Department's Rebuttal Comment to Standard Water and MARP at 1 (Aug. 13, 2018).
[113] *Id.*
[114] As discussed at footnote 107, above, the Department apparently picked up on Standard Water and MARP's mistaken characterization of the measurement professionals in the commenters' example as "certified" when the cost attributed to them was the "uncertified" cost. Thus, the Administrative Law Judge will assume that the Department's discussion here should refer to 5 uncertified radon professionals – 3 uncertified radon mitigation professionals and 2 uncertified radon measurement professionals.
[115] Department's Rebuttal Comment to Standard Water and MARP at 1 (Aug. 13, 2018).

G. Adoption or Amendment of Local Ordinances

77. Under Minn. Stat. § 14.128 (2018), 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.[116]

78. The Department concluded that the proposed rule does not require amendment or adoption of local ordinances, and that the statutory framework allows local governments to continue operating without amendment or adoption of ordinance in related areas such as building permitting, building codes, and inspection.[117]

79. The Department has made the determination required by Minn. Stat. § 14.128 and the Administrative Law Judge approves that determination.

IV. Rulemaking Legal Standards

80. A rulemaking proceeding under the APA must include the following inquiries: whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[118]

81. Under Minn. Stat. § 14.14, subd. 2 (2018), 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,[119] "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),[120] and the agency's interpretation of related statutes.[121]

82. 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."[122]

---

[116] Minn. Stat. § 14.128, subd. 1.
[117] Ex. D at 17.
[118] *See* Minn. R. 1400.2100.
[119] *See Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).
[120] *See United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[121] *See Mammenga v. Agency of Human Servs.*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[122] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

83. By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim or devoid of articulated reasons, or if it "represents its will and not its judgment."[123]

84. 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 selected by the agency is a rational one. 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.[124]

85. In its July 30, 2018 preliminary response to pre-hearing comments, the Department outlined a number of minor corrections and updates it will make to the proposed rules in response to suggestions made by Braun Intertec.[125] The corrections and updates are as follows:

(1) 4620.7500 C – reference to MAMF-2012 changed to MAMF-2017[126]

(2) 4620.7500 E – reference to SMG-SF-2017 changed to SGM-SF-2017[127]

(3) 4620.7500 F – reference to RMS-MF-2014 changed to RMS-MF-2018[128]

(4) 4620.7500 G - reference to RMS-LB-2014 changed to RMS-LB-2018[129]

86. In addition, the Department proposed changes to Minn. R. 4620.7200, subp. 4, .7300, subp. 4.[130] These proposed changes are discussed in detail at paragraphs 97 to 119, below.

87. Because the Department proposed further changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary to address whether this new language is substantially different from the language as originally proposed.

88. Minn. Stat., § 14.05, subd. 2(b) (2018), details the standards used to determine whether any changes to proposed rules create a substantially different rule. A modification does not make a proposed rule substantially different if:

---

[123] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).
[124] *Minn. Chamber of Commerce*, 469 N.W.2d at 103; *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[125] Department Response to Pre-hearing Comments (July 30, 2018); *see* Ex. I (Letter from Braun Intertec (July 5, 2018)).
[126] *See* Ex. C at 16.25.
[127] *See id.* at 17.7.
[128] *See id.* at 17.10.
[129] *See id.* at 17.13.
[130] Department Response to Comments at 3, Att. A (July 13, 2018).

(1) the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;

(2) the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice"; and

(3) the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."[131]

89. When determining whether modifications result in a rule that is substantially different, the Administrative Law Judge must consider whether:

(1) persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;

(2) subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing; and

(3) the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.[132]

90. The Department's proposed changes and updates to 7500 C, E, F and G are minor and technical in nature. They meet the criteria outlined at Minn. Stat. § 14.05, subd. 2 (2018), and do not result in rules that are substantially different than the rules as originally proposed and noticed. The Department's approved proposed changes to Minn. R. 4620.7200, subp. 4, 7300, subp. 4 are discussed below in paragraphs 97 to 103.

V. Rule by Rule Analysis

91. The role of the Administrative Law Judge during a legal review of rules is to determine whether the agency has made a reasonable selection among the regulatory options that it has available. A judge does not fashion requirements that the judge regards as best suited for the regulatory purpose. The delegation of rulemaking authority is drawn from the Minnesota Legislature and is conferred by the Legislature upon the agency. The legal review under the APA begins with this important premise.[133]

[131] Minn. Stat. § 14.05, subd. 2(b).
[132] *See id.*, subd. 2(c) (2018).
[133] *See Manufactured Housing Institute,* 347 N.W.2d at 244 (The Court instructs the state courts to restrict the review of agency rulemaking to a "narrow area of responsibility, lest [the court] substitute its judgment for that of the agency"); *see also In re the Proposed Rules of the Minn. Pollution Control Agency Governing Permits for Greenhouse Gas Emissions, Minnesota Rules Chapters 7005, 7007 and 7011*, No. 8-2200-22910-1, REPORT OF THE ADMINISTRATIVE LAW JUDGE at 20 (Minn. Office Admin. Hearings Nov. 9, 2012).

92. The Department received a number of comments objecting to the rules generally, or objecting to rules or rule parts which are explicitly authorized or required by statute. For the most part, these rules or rule parts are not addressed in this Report.

93. This Report does address the portions of the proposed rules that prompted genuine dispute by commentators as to the reasonableness of the Department's regulatory choice or issues raised in this proceeding that otherwise require closer examination.

94. As to any proposed rule that is not specifically addressed and analyzed in this Report, the Administrative Law Judge finds that the Department has demonstrated by an affirmative presentation of facts the need for and reasonableness of all such rule provisions.

95. The Administrative Law Judge further finds that all proposed rule provisions 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. Radon Measurement and Mitigation Professionals: License expiration, continuing education, renewal application. Minn. R. 4620.7200, .7300, subps. 4, 5.[134]

96. Minn. R. 4620.7200, subps. 4, 5 address radon measurement professionals, and Minn. R. 4620.7300, subps. 4, 5 address radon mitigation professionals. The two rule parts are very similar. The most important difference between them for purposes of this discussion is that the language at 4620.7200, subp. 4 C, which requires a measurement professional to complete a set number of hours of continuing education within 12 months after the license is issued, does not appear in any portion of the radon mitigation professional license rule, part 4620.7300. Other than subp. 4 C, and some very minor wording variations, the remaining differences between the rules are the number of continuing education hours required, and that radon mitigation professionals must also be trained as radon measurement professionals. As discussed in detail in section 1, below, the Administrative Law Judge concludes that the changes proposed by the Department to both rule parts providing several options for measurement or mitigation professionals to renew a lapsed license are needed and reasonable. However, as explained in section 2, below, the Administrative Law Judge has determined that a change to the radon measurement licensure rule eliminating a 30-day grace period to report continuing education compliance requires disapproval of the proposed change to part 4620.7200, due to the language at subpart 4 C. Section 3, below, makes recommended, but not required, changes to both subparts.

i. Approved Changes to Minn. R. 4620.7200 and .7300, subps.4 and 5 for Radon Measurement and Mitigation Professional Licenses

97. Minn. R. 4620.7200, subp.4 as originally proposed, states:

[134] Ex. C at 4.17-5.20 and 9.21-10.20.

Subp. 4. Expiration; renewal; continuing education.

A. A radon measurement professional license is valid for one year from the date of issuance.

B. A radon measurement professional may apply to renew a license after completing eight hours of continuing education approved by the commissioner under part 4620.7700.

C. A radon measurement professional must complete eight hours of continuing education, approved by the commissioner under part 4620.7700, within 12 months after the date on the last-issued radon measurement professional license.

D. An individual who fails to complete eight hours of approved continuing education 30 days after the individual's license expires must:

(1) complete the continuing education required under item C; and

(2) pass an examination as specified in subpart 2 to qualify for a license.

98. Minn. R. 4620.7200, subp.5 as originally proposed, states:

Subp. 5. Renewal application.

A. An individual choosing to renew a radon measurement professional license must submit to the commissioner at least 30 days before the license expires:

(1) a completed renewal application on a form provided by the commissioner;

(2) a nonrefundable annual fee according to Minnesota Statutes, section 144.4961, subdivision 8, payable to the Department of Health;

(3) documentation of completed continuing education required under subpart 4; and

(4) documentation required under subpart 3, items E, F, and G.

B. If a license expires while a renewal application is pending approval, the radon measurement professional may continue to perform regulated radon measurement activities under the expired license until the commissioner issues a new license or denies the renewal application.

99. Approximately a dozen commenters opposed provisions in Minn. R. 4620.7200, subp. 4 D, .7300, subp. 4 C as originally proposed. These provisions would have required a licensed radon mitigation or measurement professional who failed to complete the required number of annual hours of continuing education training within 30 days after the expiration of the professional's license to retake and pass the initial licensure examination.[135]

100. After reviewing the commenters' concerns, the Department proposes the following amendments to the proposed radon measurement professionals' rule, Minn. R. 4620.7200, subp. 4, as follows:[136]

~~D. An individual who fails to complete eight hours of approved continuing education 30 days after the individual's license expires must:~~

~~(1) complete the continuing education required under item C; and~~

~~(2) pass an examination as specified in subpart 2 to qualify for a license~~

D. To renew an expired license, an applicant must submit a renewal application by submitting the information required under subpart 5 and must:

(1) complete 8 hours of continuing education, approved by the commissioner under part 4620.7700, for every year or part of a year that the license has lapsed;

(2) complete an initial radon measurement course approved by the commissioner under part 4620.7700; or

(3) pass a radon measurement examination as approved by the commissioner under part 4620.7700.

101. The Department proposes nearly identical language in Minn. R. 4620.7300, subp. 4, to apply to radon mitigation professionals whose licenses have expired, as follows:[137]

D. To renew an expired license, an applicant must submit a renewal application by submitting the information required under subpart 5 and must:

[135] Ex. I (Comments of Mark Anderson (June 29, 2018), Debbie Danich (June 28, 2018), Patrick Brennan (June 28, 2018), Ron Larson (June 28, 2018), Andrew Costigan (June 29, 2018), Walt Fitzmaurice (July 1, 2018), Jen Weestrand (July 3, 2018), Rob Green (July 4, 2018), Jennifer Green (July 6, 2018), Daryl Festa (July 6, 2018), George Booth (July 6, 2018)); Comment of Randy Weestrand (eComment, Aug. 5, 2018).
[136] Department's Response to Comments, Ex. A (Aug. 3, 2018).
[137] *Id.*

(1) complete 12 hours of continuing education, approved by the commissioner under part 4620.7700, for every year or part of a year that the license has lapsed;

(2) complete an initial radon measurement course and an initial radon mitigation course approved by the commissioner under part 4620.7700; or

(3) pass a radon measurement examination and a radon mitigation examination approved by the commissioner under part 4620.7700.

102. The Department explains that, with its new proposed language, it hopes to address several concerns. First, it addresses the commenters' concerns about a mandatory requirement to retake the initial licensure examination by making an examination one of three options to requalify for licensure. Second, by offering the options of completing coursework required for initial licensure, or coursework that would have been required for every year, or part of a year that the license has lapsed, the Department offers each professional the opportunity to choose what best fits that professional's circumstances, considering how long an individual's license has been expired, and personal preference for coursework versus taking an exam. Finally, by removing the 30-day grace period after license expiration during which a professional could report continuing education credits, the Department maintains it will eliminate possible confusion as to the expiration date of the license. The Department also plans to remove professionals with expired licenses from the list of professionals on its website, which serves as an important public information source, as well as a marketing tool for radon professionals.[138]

103. The Administrative Law Judge finds that the Department's proposed modifications to Minn. R. 4620.7200, subp. 4, .7300, subp. 4 are needed and reasonable, to the extent that they allow professionals whose licenses expire reasonable alternatives to retaking the initial licensure exam. They meet the requirements of Minn. Stat. § 14.05, subd. 2, and thus are not substantial changes from the rules as originally proposed, and they are within the scope of the rulemaking noticed.

ii. Disapproved Changes to Minn. R. 4620.7200, subps. 4 and 5[139]

104. For the reasons discussed in the following paragraphs, the Administrative Law Judge finds that part of the Department's proposed changes to Minn. R. 4620.7200, subp. 4 D results in requirements which contradict some of those at 4620.7200, subp. 5. Because of the ambiguity and uncertainty created by the contradictions, the rule must be disapproved pursuant to Minn. R. 1400.2100.E.

105. As stated at paragraph 97, above, Minn. R. 4620.7200, subp. 4 C requires a radon measurement professional to "complete eight hours of continuing education,

[138] *Id.* at 3.
[139] *Id.*; Ex. C at 4.17-5.20.

approved by the commissioner under Minn. R. 4620.7700, within 12 months after the date on the last-issued radon measurement professional license."[140]

106. As part of the Department's proposed change, it will eliminate the language, originally at Minn. R. 4620.7200, subp. 4 D, which would have allowed a radon professional a 30-day grace period after the professional's license expired before the professional would have had to cure a failure to complete the required continuing education hours.[141] As a result of the elimination of the 30-day grace period, Minn. R. 4620.7200, subp. 4 will include only the following requirements relating to completion of continuing education:

1) Minn. R. 4620.7200, subp. 4 B permits a radon measurement professional to "apply to renew a license after completing eight hours of continuing education . . . ."[142]

2) Minn. R. 4620.7200, subp. 4 C requires the eight hours of continuing education to be completed "within 12 months after the due date on the last-issued radon measurement professional license."[143]

107. At the same time, Minn. R. 4620.7200, subp. 5 requires a radon measurement professional license renewal application to be submitted to the Commissioner of the Department of Health (Commissioner) at least 30 days before the license expires. Included in the materials required to be submitted at least 30 days before the license expires is "documentation of completed continuing education required under subpart 4."[144]

108. Based on Minn. R. 4620.7200, subps. 4 and 5 as proposed by the Department in its August 3, 2018 Response to Comments, a radon measurement professional will not know whether she has 12 months from the expiration of her license to complete her continuing education, consistent with subpart 4 B and C; or 11 months, consistent with subpart 4 B and subpart 5 A.

109. This contradictory language in Minn. R. 4620.7200, subparts 4 and 5, requires that these subparts be disapproved. Read together, these subparts are unconstitutionally void for vagueness. "A rule, like a statute, is void for vagueness, if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement."[145]

110. The Administrative Law Judge recommends that the Department cure the defect in Minn. R. 4620.7200, subparts 4 and 5 in one of two ways. The Administrative

---

[140] Ex. C at 5.1-5.3 (Proposed Minn. R. 4620.7200, subp. 4 C (Mar. 8, 2018)).
[141] Department's Response to Comments, Ex. A (Aug. 3, 2018).
[142] Ex. C at 4.20-4.21 (Proposed Minn. R. 4620.7200 subp. 4 B (Mar. 3, 2018)).
[143] *Id.* at 5.1- 5.3 (Proposed Minn. R. 4620.7200 subp. 4 C (Mar. 3, 2018)). The rule uses the phrase "due date on the last-issued . . . license" rather than "expiration date." "Due date" is not defined in the rules. In the absence of any guidance to the contrary, the Administrative Law Judge assumes that the phrase means "license expiration date."
[144] *Id.* at 5.9 - 5.14 (Proposed Minn. R. 4620.7200, subp. 5 (Mar. 3, 2018)).
[145] *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).

Law Judge recommends that the Department delete Minn. R. 4620.7200, subp. 4 C, which requires that continuing education be completed within 12 months after the due date on the most recent license. The Administrative Law Judge notes that the paragraph designated as subpart 4 D in the Department's August 1, 2018, letter proposing the changes to subpart 4 would then be re-designated as subpart 4 C.

111. Further, the Administrative Law Judge recommends that the Department add one of the two following paragraphs as clarifying the language in a new subpart 5 B. Subpart 5 B would then be redesignated as subpart 5 C. The alternative paragraphs set forth below would each implement a different approach, reflecting the Department's choice. The first possible approach would read as follows:

> 5 B. Notwithstanding the requirements at Minn. R. 4620.7200, subps. 4 B and 5 A(3), a radon measurement professional may submit documentation of completed continuing education until the expiration date on the license.

The second possible approach would read as follows:

> 5 B. A radon measurement professional must complete eight hours of continuing education, approved by the commissioner under part 4620.7200, within 1<u>1</u> months after the date the radon measurement professional license first <u>expires</u>. Continuing education hours may be accrued beginning in the month immediately after they are reported, and must be reported annually with the license application thereafter.

112. The deletion of Minn. R. 4620.7200, subp. 4 C and the addition of either of the alternative amendments to Minn. R. 4620.7200, subp. 5 discussed above would be needed and reasonable and would cure the change to the proposed rule of the ambiguity requiring disapproval. The modifications meet the requirements of Minn. Stat. § 14.05, subd. 2, and are thus not a substantial change from the rules as originally proposed, and are within the scope of the rulemaking noticed.

iii. Recommended Technical Changes to Minn. R. 4620.7200 and 4620.7300

113. The recommendations in paragraphs 114 to 119 are recommendations only. The Administrative Law Judge makes these recommendations to improve the clarity of the rule. Approval of the rule does not depend on the Department's acceptance of these recommendations.

114. With the proposed elimination of the 30-day grace period that was originally provided for radon mitigation professionals to complete continuing education requirements when seeking to renew their licenses, the Administrative Law Judge recommends that the Department clarify when a mitigation professional must provide such information in conjunction with a license renewal.

115. There is no parallel provision at Minn. R. 4620.7300 to the originally proposed Minn. R. 4620.7200, subp. 4 C, providing for 12 months to complete continuing education requirements. Therefore, the radon mitigation professional's licensing rule

does not contain the apparent contradiction of allowing 12 months to complete such training, but requiring reporting of completed training in an 11-month time frame.

116. Nonetheless, for the sake of consistency and clarity, the Administrative Law Judge recommends that the Department amend Minn. R. 4620.7300, subp. 5, to include a new paragraph B which is parallel to new language the Department inserts at its proposed Minn. R. 4620.7200, subp. 5 B.

117. The addition of either of the alternative amendments to Minn. R. 4620.7300, subp. 5 discussed above would be needed and reasonable. The modifications meet the requirements of Minn. Stat. § 14.05, subd. 2, and are thus not a substantial change from the rule as originally proposed, and are within the scope of the rulemaking noticed.

118. The Administrative Law Judge recommends the additional technical corrections to the proposed changes to Minn. R. parts 4620.7200 and 4620.7300: (a) the paragraphs the Department has designated as Minn. R. 4620.7200 and .7300 subp. 4 D should be designated as subpart 4 C rather than subpart 4 D; and (b) to clarify that the Department intends that subitems (1), (2), and (3) are alternative options, add the word "or" after the semi-colon at the end of subitem (1) in the proposed changes to both Minn. R. 4620.7200, subp. 4 C and Minn. R. 4620.7300, subp. 4 C.

119. These recommended changes are needed and reasonable. The modifications meet the requirements of Minn. Stat. § 14.05, subd. 2, and are thus not a substantial change from the rule as originally proposed, and are within the scope of the rulemaking noticed.

B. Disapproval Required: Minn. R. 4620.7600, subp. 1: Radon System Tag Requirements

120. The Department's Proposed Minn. R. 4620.7600, subp. 1 requires that a "radon mitigation company must purchase radon system tags . . . ."[146]

121. In the Statement of Need and Reasonableness (SONAR), the Department notes that its Radon System Tag Requirements rule is based on the statutory requirement that "[a]ll radon mitigation systems installed in Minnesota on or after January 1, 2019, must have a radon mitigation system tag provided by the commissioner."[147] The SONAR goes on to explain:

> To ensure tags are connected to companies rather than individuals who might change their company association, the department proposes to permit only licensed radon mitigation companies to purchase tags. Doing so will help MDH track and manage the tags. The agency will direct mitigation companies to purchase tags through an online application by selecting the number of tags and the company to which the tags are issued.[148]

[146] Ex. C at 17.18-17.19 (Proposed Minn. R. 4620.7600, subp. 1 (Mar. 3, 2018)).
[147] Ex. D at 59 (SONAR (May 21, 2018)).
[148] *Id.*

122. Proposed Minn. R. 4620.7250, subp. 1 A requires "[a] business or government entity that employs individuals to perform regulated radon mitigation work" to be licensed "as a radon mitigation company."[149]

123. In addition to employing individuals, the radon company licensing rules require evidence that the company carries workers' compensation insurance, or a written statement from the applicant saying why the company is exempt from workers' compensation insurance requirements.[150] A licensed radon company must also "employ or contract with a responsible individual who is licensed as a radon mitigation professional."[151] The Commissioner must be notified if the responsible individual ceases to serve in that capacity.[152]

124. Minn. Stat. § 144.4961, subd. 8(a)(3) defines "mitigation company" as "any business or government entity that performs or authorizes employees to perform radon mitigation." A mitigation company, as defined by the statute, is exempt from paying a mitigation company license fee "if the mitigation company employs only one licensed mitigation professional."[153]

125. The Department's planned implementation of the radon system tag requirements rule appears to exclude a radon mitigation professional who works as a sole proprietor and does not have any employees who perform regulated radon mitigation work. Based on the statutory definition of "mitigation company," it appears that a sole proprietor would not be eligible to be licensed as a mitigation company. Therefore, a licensed mitigation professional who works as a sole proprietor would be barred from purchasing radon system tags from the Department. The language of the rule itself refers to a radon mitigation company, without reference to licensure. The statutory definition of radon mitigation company includes "any business . . . entity" which could include an unlicensed, unincorporated sole proprietorship with no employees. However, the text of the SONAR limits authorized tag purchasers to "licensed radon mitigation companies."[154] If the Department interprets the rule consistent with the SONAR, it would force a radon mitigation professional who works as a sole proprietor to obtain a radon mitigation company license, in addition to the radon mitigation professional license the individual is already required to have.

126. Requiring a licensed mitigation professional who works for herself to apply for a second license presents an initial problem because it appears to require licensure in a circumstance not contemplated by Minn. Stat. § 144.4961, subd. 8(a)(3), which allows for a no-fee mitigation company license for a company that employs only one licensed mitigation professional. But a sole proprietor may well not have any employees at all, licensed or not. Furthermore, even if the Department were to interpret the statute to allow a sole proprietor to be licensed, presumably for no fee, imposing such a requirement solely for the purpose of qualifying the sole proprietor to purchase the required mitigation system tags places an unreasonable burden on individuals who choose to work for

[149] Ex. C at 6.14-6.15 (Proposed Minn. R. 4620.7250, subp. 1 A (Mar. 8, 2018)).
[150] *Id.* at 7.1-7.5 (Proposed Minn. R. 4620.7250, subp. 2 C (Mar. 8, 2018)).
[151] *Id.* at 6.16-6.17 (Proposed Minn. R. 4620.7250, subp. 1 B (Mar. 8, 2018)).
[152] *Id.* at 8.7-8.9 (Proposed Minn. R. 4620.7250, subp. 5 (Mar. 8, 2018)).
[153] Minn. Stat. § 144.4961, subd. 8(a)(3).
[154] Ex. D at 59 (SONAR (May 21, 2018)) (emphasis added).

themselves. The Department's concern that a tag be connected to the company for which an individually licensed radon professional is working does not apply to a mitigation professional working only for herself.

127. To the extent that the Department intends to interpret proposed Minn. R. 4620.7600, subp. 1 to require a solo licensed radon mitigation professional to apply for a radon company mitigation license in order to purchase required system mitigation tags, such an interpretation of the rule would render it unreasonable, and not rationally related to the Department's objective of connecting system tags to the entities responsible for the mitigation work done, regardless of personnel changes. The Department's proposed implementation of proposed Minn. R. 4620.7600, subp. 1 requires that the rule be disapproved under Minn. R. 1400.2100 B, because it is not rationally related to the agency's objective, and the record does not demonstrate the need for or reasonableness of the rule.

128. The Department can cure the defect created by its interpretation set forth in the SONAR, and by any confusion arising from the language of the rule, by adding a paragraph C to clarify Minn. R. 4620.7600, subp.1, as follows:

> C. A licensed radon mitigation professional engaged as a sole proprietor with no employees and no subcontractors who are licensed radon mitigation professionals may purchase radon system tags as described in this rule without becoming a licensed radon mitigation company.

129. This change would be needed and reasonable. The change meets the requirements of Minn. Stat. § 14.05, subd. 2, and is thus not a substantial change from the rule as originally proposed, and is within the scope of the rulemaking noticed.

C. Recommended Changes to Denial of License Application provisions: Minn. R. 4620.7200, subp. 6, .7250, subp. 4, .7300, subp. 6, .7350, subp. 4

130. The recommendation in paragraph 136 is a recommendation only. The Administrative Law Judge makes these recommendations to improve the clarity of the rule. Approval of the rule does not depend on the Department's acceptance of these recommendations.

131. The Department's proposed rule parts 4620.7200, .7250, .7300, and .7350 each contain a subpart that addresses denial of a license application.[155] Minn. R. 4620.7200, subp. 6 concerns denial of an application for a radon measurement professional license.[156] Minn. R. 4620.7250, subp. 4 concerns denial of an application for a radon mitigation company license.[157] Minn. R. 4620.7300, subp. 6 concerns denial of

[155] Ex. C at 6.1-6.11 (Proposed Minn. R. 4620.7200 subp. 6 (Mar. 3, 2018)), 7.19-8.6 (Proposed Minn. R. 4620.7250 subp. 4 (Mar. 3, 2018)), 11.1-11.11 (Proposed Minn. R. 4620.7300 subp. 6 (Mar. 3, 2018)), 13.1-13.10 (Proposed Minn. R. 4620.7350 subp. 4 (Mar. 3, 2018)).
[156] *Id.* at 6.1-6.11 (Proposed Minn. R. 4620.7200 subp. 6 (Mar. 3, 2018)).
[157] *Id.* at 7.19-8.6 (Proposed Minn. R. 4620.7250 subp. 4 (Mar. 3, 2018)).

an application for a radon mitigation professional license[158]; and Minn. R. 4620.7350, subp. 4 concerns denial of an application for a radon analysis laboratory license.[159]

132. Paragraph A of each denial provision states that the denial shall be made pursuant to Minn. Stat. § 144.99, subd. 8 (2018), "or if the applicant fails to comply with the requirements of" the applicable rule subparts.[160]

133. Minn. Stat. § 144.99, subd. 8 authorizes the Commissioner, in relevant part, to deny an application for a license, if the applicant fails to meet or maintain the minimum qualifications necessary for the license, or if the applicant has a persistent pattern of violations related to the application, or submitted false material information in connection with the application.

134. Minn. Stat. § 144.99, subd. 10 (2018) requires the Commissioner to provide written notice to a license applicant of the applicant's right to "request a hearing under the contested case provisions of chapter 14" if the Commissioner proposes to deny the license application.

135. Paragraph B of each denial provision requires the Department to provide written notice of the application denial, including reasons for the denial. Applicants are also permitted to submit a second application within 30 days of receipt of the first denial, without paying an additional fee.[161]

136. The Administrative Law Judge recommends a technical amendment to Minn. R. 4620.7200, subp. 6 B, .7250, subp. 4 B, .7300, subp. 6 B, .7350, subp. 4 B as proposed. The technical amendment would add a sub-item (3) to paragraph B of each of the "Denial of license application" subparts, to read as follows:

> (3) must provide notice of the opportunity to appeal a denial, as required by Minn. Stat. § 144.99, subd. 10.

137. While adding this language will not add an appeal right, or an obligation of the Department to provide the notice at the time of a license denial that is not already required by the statute, it will ensure that applicants and potential applicants who may not be familiar with statutes governing the Commissioner's enforcement authority are aware of their options when they read the licensing rules.[162]

---

[158] *Id.* at 11.1-11.11 (Proposed Minn. R. 4620.7300 subp. 6 (Mar. 3, 2018)).
[159] *Id.* at 13.1-13.10 (Proposed Minn. R. 4620.7350 subp. 4 (Mar. 3, 2018)).
[160] Ex. C at 6.2-6.4 (Proposed Minn. R. 4620.7200 subp. 6 A (Mar. 3, 2018)), 7.20-7.22 (Proposed Minn. R. 4620.7250 subp. 4 A (Mar. 3, 2018)), 11.2-11.4 (Proposed Minn. R. 4620.7300 subp. 6 A (Mar. 3, 2018)), 13.2-13.4 (Proposed Minn. R. 4620.7350 subp. 4 A (Mar. 3, 2018)).
[161] Ex. C at 6.5-6.11 (Proposed Minn. R. 4620.7200 subp. 6 B (Mar. 3, 2018)), 7.23-8.6 (Proposed Minn. R. 4620.7250 subp. 4 B (Mar. 3, 2018)), 11.3-11.11 (Proposed Minn. R. 4620.7300 subp. 6 B (Mar. 3, 2018)), 13.5-13.10 (Proposed Minn. R. 4620.7350 subp. 4 B (Mar. 3, 2018)).
[162] The Administrative Law Judge notes that Proposed Minn. R. 4620.7900, subp. 2 (Ex. C at 22.1-22.4) does refer to the notice and appeal provisions. However, it refers to those provisions only in the context of violations of the requirements of the licensing rules, and authority to take enforcement actions based on such violations. Thus, it does not explicitly refer to appeal provisions in license application denial cases.

138. This change would be needed and reasonable. The change meets the requirements of Minn. Stat. § 14.05, subd. 2, and is thus not a substantial change from the rules as originally proposed, and is within the scope of the rulemaking noticed.

D. Responses to Controversial Rules

i. Minn. R. 4620.7400 and 4620.7900

139. Proposed rule 4620.7900 requires radon measure and mitigation professionals, radon mitigation companies, and operators of radon laboratories to make the following available to the Commissioner:

- Records or equipment of activities regulated by the rules
- Addresses where radon is being tested or mitigation work is scheduled, in progress, or completed
- Names of owners and residents where radon is or has been tested or where radon mitigation is scheduled, in progress, or completed.

The Commissioner is then permitted to examine equipment, sketch or photograph a site where radon is being measured or mitigated, and interview employees or representatives or a licensee or applicant under the rules.

140. Proposed rule 4620.7400 H requires radon measurement and mitigation professionals to "not interfere with the commissioner's inspection or audit of any radon measurement or mitigation project."

141. One commenter suggests that it would be more efficient and less costly for the Department to conduct audits based entirely in response to complaints, rather than hiring staff and conducting regular audits of mitigation work done throughout the state.[163]

142. The Department responds to this comment, stating that the public would not be protected if the Department had to rely upon complaints, because the public does not have the knowledge to determine whether radon measurement or mitigation professionals have done their jobs properly. Inspection and audits are the tools the Department has to ensure that building owners receive the work that they pay for, and that that work protects them from radon gas. The Department points to Minn. Stat. § 144.4961, subd. 9, which requires the Department to enforce the Radon Licensing Act pursuant to Minn. Stat. § 144.989-144.993 (2018), which is the Health Enforcement Consolidation Act.[164]

143. The Administrative Law Judge agrees that Minn. R. 4620.7900, and 4620.7400 H are needed and reasonable to ensure that members of the public receive the services they pay for, and that they are protected from radon gas. Because radon gas is colorless and odorless, and mitigation may involve making alterations to an existing building, it is not reasonable to assume that members of the general public will have the knowledge and expertise to be aware when a problem arises with measurement or

[163] Tr. at 91 (R. Weestrand).
[164] Department's Response to Comments at 2 (Aug. 3, 2018).

mitigation. Moreover, the consequences of undetected inaccurate measurement, or inept mitigation are potentially life-threatening. Therefore, it is reasonable for the Department to engage in a process of enforcement and audits of licensed radon professionals, companies, and laboratories, rather than to wait and respond to complaints.

ii. Reporting Requirements: Minn. R. 4620.7800

144. Several commenters object to the requirements in the proposed rules that radon measurement and mitigation professionals submit quarterly reports to the Department detailing all the radon tests and mitigation projects completed for that quarter.[165] A radon measurement professional expresses concerns about having to provide the names of individual homeowners, which is information the commenter said she does not collect.[166] The Department points out that radon measurement professionals are not required to report names and contact information of property owners in their reports, and that radon mitigation companies are only required to do so "if the information is available."[167] Furthermore, the Department notes that Minn. Stat. § 13.3805, subd. 5 (2018) protects data that identify the address of a radon testing or mitigation site, along with resident and property owner data, as not public under the Minnesota Government Data Practices Act.[168]

145. Another commenter views the Department's collection of the names and street addresses, as well as the quarterly reports, as unnecessary, unreasonable, and beyond the authority provided to the Department in Minn. Stat. § 144.4961.[169] This commenter makes many of the same arguments regarding reporting that he makes regarding enforcement, stressing that complaint-based rather than audit-based enforcement is most appropriate for radon measurement and mitigation work.[170]

146. The Department disagrees, maintaining that the reporting requirements, including the identifying information required with the reports, will assist it not only with enforcement, but also with training, outreach, and research.[171] According to the Department, the reports required by Minn. R. 4620.7800 will enable it to more effectively respond to complaints, as well as to conduct routine inspections. The Department asserts that all of these activities fall within the ambit of the authority the Minnesota Radon Licensing Act provides so that the Department can accomplish its statutory mandate to "coordinate, oversee, and implement all state functions in matters concerning the presence, effects, measurement, and mitigations of risks of radon in dwellings and other buildings."[172]

---

[165] Ex. C at 19.22-21.7. (Proposed Minn. R. 4620.7800 (Mar. 8, 2018)).
[166] Tr. at 82-83 (K. Laurt); Comment of R. Weestrand at 13 (Aug. 3, 2018); Ex. I (Comments of D. Danich (June 28, 2018), G. Booth (July 6, 2018)).
[167] Department's Response to Comments at 5 (Aug. 3, 2018).
[168] *Id.*
[169] Comments of R. Weestrand at 12-14 (Aug. 3, 2018).
[170] *Id.*
[171] Ex. D. at 65.
[172] *Id.*; *see also* Minn. Stat. § 144.4961, subd. 3.

147. The Administrative Law Judge agrees that the reporting requirements at proposed Minn. R. 4620.7800 are needed and reasonable, and within the Department's statutory rulemaking authority.

iii. Radon Measurement Testing Requirements: Proposed Minn. R. 4260.7100, subp. 5[173]

148. A number of commenters object to the requirements that radon measurement professionals be licensed to place and to remove testing equipment.[174]

149. Mr. Blixt, who owns a home inspection company, points out that he trains his inspectors to examine heating, ventilation, and air-conditioning (HVAC) systems, plumbing systems, structural components and roofing, as well as to diagnose electrical issues. He believes he is fully capable of training those inspectors to place and retrieve radon monitors, and has been doing so for a number of years. Mr. Blixt characterizes the placement of a radon monitor as "simple" and involving "a few very simple steps and pushing a button. You put the monitor where it is supposed to be. There is precise directions where that location is. You hit two buttons, come back two days later. Essentially, you are making sure windows are closed." Mr. Blixt maintains that, in comparison to the other work that home inspectors do, placement of a radon monitor requires "very little technical skill."[175]

150. Randy Weestrand argues that it is not reasonable to require that a licensed radon measurement professional personally place and retrieve monitoring devices.[176] He asserts that "a person of average intelligence can be trained by a licensee to follow the critical, but simple steps of placing and retrieving a radon test."[177]

151. Mr. Weestrand argues that it is not clear that the American Association of Radon Scientists and Technologists (AARST) standards require that a credentialed person place and retrieve radon tests.[178] The Department wrote to the AARST, National Radon Proficiency Program (NRPP), and National Radon Safety Board (NRSB) asking for each organization's position regarding a licensure requirement for "any radon measurement professional that places or retrieves a radon measurement device . . . ."[179] The Department listed the proposed licensure requirements, and asked the three organizations: 1) whether a professional who retrieves a radon measurement device should be credentialed, "either by a governmental agency licensure or voluntarily through NRPP or NRSB?"; and 2) whether it is acceptable for an individual to place or retrieve a radon measurement device if that individual: a) has received 4 hours of training; b) is an employee or subcontractor of a licensed measurement professional; and c) "works under

---

[173] Ex. C at 1.23 -1.25.

[174] Ex. I (Comments of Mark Anderson (June 29, 2018), Patrick Brennan (June 28, 2018), Ron Larson (June 28, 2018), Andrew Costigan (June 29, 2018), Walt Fitzmaurice (July 1, 2018), Terri Corn (July 3, 2018), Jeff Corn (July 3, 2018), Daniel Costigan (July 3, 2018), Robert Green (July 4, 2018), Jeni Green (July 6, 2018), Daryl E. Festa (July 6, 2018); Comment of R. Weestrand at 8-9, App. A (Aug. 5, 2018); Tr. at 71-72 (J. Blixt).

[175] Tr. at 71 (J. Blixt).

[176] Comment of R. Weestrand at 8-9, 16- 35 (Aug. 5, 2018).

[177] *Id.* at 16.

[178] *Id.*

[179] Ex. D, App. A at 12.

the professional's [quality assurance] plan or certification, but with no direct on-site supervision of measurement work by the licensed professional."[180]

152. The proposed rules require licensed radon professionals measuring radon in single-family homes to "comply with ANSI/AASRST Protocol for Conducting Measurements of Radon and Radon Decay Products in Homes (ANSI/AARST MAH-2014) . . . ."[181] Mr. Weestrand criticizes the Department for not asking whether "MAH 2014 require[s] . . . a credentialed person . . . " to place and retrieve a radon test.[182] Mr. Weestrand provides a copy of the ANSI/AARST MAH-2014 standards and guidelines, and argues that it is clear that "the home inspector who inspects your furnace and electrical system can be trained to follow this checklist."[183]

153. AARST's president, Dr. Phillip Jenkins, responded to the Department's letter, cautioning that "people's lives are at stake" when performing radon measurement, which involves airborne radioactive materials.[184] Dr. Jenkins stated that "the time needed to learn the essential knowledge-set for performing reliable, verifiable and defensible radon tests in homes is considerably more than four hours."[185] Dr. Jenkins opined that a two-day course might be too short "to fully comprehend the complexities of performing measurements, and the associated quality control procedures for verifying consistent accuracy and precision, without the continuing education required by certification programs." In addition, Dr. Jenkins stated that AARST "strongly advises against allowing poorly trained individuals, working under the company's lone certified professional, to be turned loose on an unsuspecting public without ever verifying their capabilities with a competency exam."[186]

154. NRPP's executive director, Dallas Jones, provided a similar response. In addition to the issues raised by Dr. Jenkins, Mr. Jones raised concerns about how a person without sufficient training would handle a situation if, on arrival, the individual with the monitoring device discovered that the pre-test closed-building conditions were not maintained. Further, Mr. Jenkins expressed doubt that a person who took a four-hour in-house training course would know how to properly perform and document quality assurance tasks. According to Mr. Jenkins, "obtaining a valid measurement is all about the person at the property, for both placement and pick-up."[187]

155. Michelle Wunderlich, the Certification Coordinator of the NRSB responded to the Department's inquiry by stating that radon measurement technicians require 8 hours of classroom training "on the nature of radon, radon entry in buildings, fundamental radon health risks, occupational health and safety, measurement devices and techniques, and current radon protocols . . . ."[188] Ms. Wunderlich continued, stating that a

---

[180] *Id.*

[181] Ex. C at 16.18-16.19 (Proposed Rule 4620.7500 B(1) (Mar. 8, 2018)).

[182] Comment of R. Weestrand at 22 (Aug. 5, 2018); *see* Ex. C at 16.19 (Proposed Rule 4620.7500 B(1) (Mar. 8, 2018)).

[183] Comment of R. Weestrand at 17-18 (Aug. 5, 2018).

[184] Ex. D, App. A at 13.

[185] *Id.*

[186] *Id.*

[187] *Id.* at 14-15.

[188] *Id.* at 16.

measurement technician must pass an examination based on the training, participate in 8 hours of continuing education training biennially, and adhere to the NRSB code of ethics.[189]

156. Mr. Weestrand disputes the responses from AARST, NRPP, and NRSB. In response to the AARST letter, Mr. Weestrand comments that "Dr. Jenkins . . . does not state that MAH 2014 has explicit language requiring that a credentialed person place and retrieve radon tests."[190] Mr. Weestrand disagrees with Mr. Jones' interpretation of MAH 2014, and characterized NRSB's certification for individuals who place and retrieve radon measurement devices as "low level," while asserting that Ms. Wunderlich did not state that either NRSB or MAH 2014 requires certification.[191]

157. Mr. Weestrand queried a number of other individuals associated with the ANSI/AARST MAH 2014 protocol for radon measurement in homes. Mr. Weestrand received a variety of responses, many of which were that the individuals were uncertain of how to interpret the MAH 2014 requirements. Several people referred him to Gary Hodgden, with AARST's Standards Assistance Team.[192] Mr. Hodgden responded that Mr. Weestrand's question was a legal question, rather than a standards question.[193] Mr. Hodgden's written response to Mr. Weestrand primarily focused on who would be found responsible in various legal contexts – litigation, regulatory, and contract.[194]

158. In its response to the comments regarding the licensing requirement for placement and retrieval of radon monitoring devices, the Department first focuses on its concern with unreliable outcomes that can result "when untrained real estate agents, home inspectors, or others improperly place testing devices." According to the Department, the unreliable measurements that may occur in such situations may cause harm, in addition to failing to protect public health. Inappropriate or unneeded mitigation systems may be installed, or mitigation systems may not be installed when they are needed.[195]

159. Moreover, the Department maintains, retrieving as well as placing devices are technical procedures, requiring understanding about placement of the measuring device in connection with room use, physical proximity to other structures, and room temperature. The Department states that the measurement device retrieval process involves verification that the device has not been moved or tampered with in any way, that it has operated properly, and that it is stopped correctly. On the other hand, the Department contends that the licensure requirements are not burdensome, because they require only a 16-hour class, an exam, and a written quality assurance/quality control (QA/QC) plan. The Department reiterates that this licensure is authorized by the Radon Licensing Act, and is well within the Department's authority.[196]

---

[189] *Id.*
[190] Comment of R. Weestrand at 23 (Aug. 5, 2018).
[191] *Id.* at 25 -26.
[192] *Id.* at 27-32.
[193] *Id.* at 33.
[194] *Id.* at 33-34.
[195] Department's Response to Comments at 4 (Aug. 3, 2018).
[196] *Id.* at 5.

160. The requirements that radon measurement devices be both placed and retrieved by a licensed radon measurement professional are well-supported by the Department's reasoning and by the training and professional organizations with which the Department consulted regarding these requirements. The requirements are reasonably crafted to protect the health and well-being of Minnesota residents. Furthermore, the Department's authority to enact this requirement is derived from its rulemaking authority under Minn. Stat. § 144.4961 and is not reliant on the requirements of AARST MAH-2014, alone. The Administrative Law Judge finds that the requirements of proposed Minn. R. 4620.7100, subp. 5 are needed and reasonable and within the scope of the Department's rulemaking authority.

iv. Licensure versus Certification Generally

161. Several commenters generally object to licensing of radon professionals, stating that NRPP certification should be sufficient to protect the public.[197]

162. The Department replies that the licensing rules will ensure that those who would not otherwise meet minimum standards will do so, without unduly restricting those who are already certified and doing a good job. The Department points out that NRPP certification alone does not require certified professionals to submit a QA/QC plan. In addition, the Department maintains that the licensing rules ensure that information otherwise required by state law, such as worker's compensation information and business identification numbers or social security numbers, is collected. Furthermore, the Department asserts, licensing brings radon professionals within the ambit of the Department's enforcement authority, allowing it to deny or discipline licenses. Finally, the Department notes that licensed radon professionals will not be required to pay NRPP certification fees.

163. The Administrative Law Judge concludes that licensing, rather than just NRPP certification, is not only needed and reasonable, but that it is required under Minn. Stat. § 144.4961. The legislature instructed the Commissioner to adopt rules "establishing licensure requirements and work standards relating to indoor radon in dwellings and other buildings . . . ." Had the legislature wanted to rely on existing certification, it could have chosen to simply require radon professionals in Minnesota to be certified.

v. Minn. R. 4620.7500: Appropriate Standards

164. One commenter objects to the incorporation of the ANSI/AARST standards, stating they are excessively cumbersome, and an alternative should be permitted.[198]

165. The Department replies that it proposes to incorporate standards that are generally accepted by the industry as a matter of administrative economy. The Department understands the ANSI/AARST standard-setting process to be a consensus process and states that the standards themselves are updated as the relevant science evolves.[199] The Department notes that the commenter offered no suggestions for

[197] Tr. at 88 (R. Weestrand)); Ex. I (Comments of Bruce Shaepe (July 5, 2018), Kathy Laurent (June 29, 2018), Douglas Laurent (June 29, 2018), Ron Larson (June 28, 2018)).
[198] Ex. I (Comment of Michelle Festa (July 6, 2018)).
[199] Department's Response to Comments at 7 (Aug. 3, 2018).

alternative standards. The Department explains in the SONAR that the standards are copyrighted and available for purchase, but that it will obtain a duplication license from ANSI/AARST to distribute and lend copies of the standards, by request, through its library.[200] Administrative Law Judge agrees that the Department has demonstrated that adoption of the ANSI/AARST standards is needed and reasonable.

vi. Classification of Certain Radon Measurement Devices

166. Several commenters object to the proposed rules based on their concern that a particular radon measurement company, Radalink, would not be able to be licensed in Minnesota as a radon analysis laboratory and would thus be precluded from doing business in Minnesota. [201] Radalink manufactures a measurement device called a "blind continuous radon monitor" and its laboratory provides associated analytical services. The Radalink device uses electricity and transmits data to the Radalink laboratory for the analysis of radon concentration. Radalink, and those who utilize it, state there is no access to the data or calibration factors by field users. Thus, Radalink believes its measurement devices are not passive measurement devices under the rules. But, according to Minn. Stat. § 144.4691, subd. 8 (a) (4), a radon analysis laboratory is a business or government entity that analyzes passive radon devices, giving rise to Radalink's concerns about its eligibility for licensure.[202]

167. The Department responds to Radalink's concerns, stating that Radalink's devices are approved measurement devices as required by Minn. R. 4620.7400, subp. 1 B (2017). Furthermore, the Department concludes that the definitions of passive and continuous measurement devices are not necessarily mutually exclusive, and that the Radalink measurement device meets both definitions.[203] Therefore, according to the Department, Radalink's laboratory will be eligible for licensure in Minnesota as long as it meets the applicable requirements.[204]

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 Department gave notice to interested persons in this matter and fulfilled its additional notice requirements.

2. The Department fulfilled the procedural requirements of Minn. Stat. § 14.14 (2018) and all other procedural requirements of law or rule.

---

[200] Ex. D at 57.

[201] Ex. I (Comments of Terry Howell (July 5, 2018), Kevin Schutte (July 3, 2018), Debbie Danich (July 3, 2018), Jennifer Decker (July 3, 2018), John Kaiser (July 3, 2018), Kevin Schick (July 3, 2018), Mark Slotvig (July 3, 2018), Rob Timm (July 3, 2018), Richard Brammer (July 3, 2018), Kimball Martin (July 3, 2018)).

[202] *Id.*

[203] Department comment (July 30, 2018); *see* Ex. C at 1.18-1.20, 2.20-2.21 (Proposed Minn. R. 4620.7100, subps.3, 13 (Mar. 8, 2018)).

[204] Department Comment (July 30, 2018).

3. The Department of Health demonstrated it has statutory authority to adopt the proposed rules, and it fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i), (ii) (2018).

4. The Notice of Hearing, the proposed rules, and the SONAR complied with Minn. R. 1400.2080, subp. 5 (2017).

5. The Department 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 and 14.50 (2018), with the exception of Minn. R. 4620.7200, subp. 4 and Minn. R. 4620.7600, subp. 1.

6. The modifications to the proposed rules suggested by the Department of Health after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3 (2018).

7. The modifications to the proposed rules recommended by the Administrative Law Judge in this Report are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3 (2018).

8. During the public comment process, a number of stakeholders urged the Department to adopt other revisions to the proposed rules. In each instance where the Department declined, the Department's rationale in declining to make the requested revisions to its rules was well-grounded in the record and reasonable.

9. A Finding or Conclusion that a proposed rule is needed and reasonable does not preclude, and should not discourage, the Department of Health from further modification of the proposed rules – provided that the rules finally adopted are based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

The proposed amended rules should be adopted, except as otherwise noted at Findings 104, 109, and 127, and with any further modifications the Department may choose consistent with this Report.

Dated: September 12, 2018

LAURASUE SCHLATTER
Administrative Law Judge

NOTICE

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

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Department of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Department may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Agency's submission.

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

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