

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

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April 23, 2008

Mr. Bruce Nelson
Office of Energy Security
Department of Commerce
85 7th Place East, Suite 500
St. Paul, Minnesota 55101-2198

RE: Review of the Proposed Rules of the Minnesota Department of Commerce Governing Minnesota Thermal Insulation Standards; *Minnesota Rules*, Chapter 7640.

OAH Docket No. 70-1000-19605-1;
Governor's Tracking No. AR 377.

Dear Mr. Nelson:

Following a review of the above-referenced rules, as modified by the agency on March 28, 2008, the Administrative Law Judge makes two negative procedural findings. Both of these findings, however, are determined to be harmless errors under Minn. Stat. § 14.26, subd. 3(d)(1). Accordingly, the proposed rules are approved as to legality.

Procedural Defects – Harmless Errors

The Administrative Law Judge notes that the Department of Commerce failed to comply with two of the notice requirements of Minnesota Statutes, Chapter 14. Minnesota law requires contemporaneous mailing of both the Notice of Intent to Adopt Rules to designated legislators and the Statement of Need and Reasonableness (SONAR) to the Legislative Reference Library, on the day that these materials are mailed to others. See, Minn. Stat §§ 14.116, 14.23 (2006). In these proceedings, however, the Department mailed the Notice of Intent to Adopt Rules to legislators on February 4, 2008, five days after the general mailing of the Notice of Intent to Adopt Rules. Similarly, the Department hand-delivered the Statement of Need and Reasonableness (SONAR) to the Legislative Reference Library on February 4, 2008 – five days after the Notice of Intent to Adopt Rules was mailed.

Because in each instance a comment period of more than 30 days followed the belated notice, the Administrative Law Judge finds that these errors are harmless errors under Minn. Stat. § 14.26. Neither lapse deprived a person or entity of a meaningful opportunity to participate in the rulemaking process.

Revisions to the Proposed Rules

The agency received written comments and submissions on the rules from eight persons, one of whom requested a public hearing. In response to the public comments, the Department made thirteen changes to the proposed rules. These changes, which are discussed in the Order Adopting Rules, are needed and reasonable. Moreover, the changes do not result in a substantially different rule from the rule as originally published on February 4, 2008.

Further, the Administrative Law Judge recommends two technical revisions to the rules. These recommendations do not reflect defects in the proposed rules, but are merely suggestions that the agency may find helpful in clearly stating its regulatory purposes.

Minn. R. 7640.0110

The Administrative Law Judge recommends the following changes to the March 28, 2008 proposed rule amendment to more clearly reflect the intent expressed in the SONAR:

Delete the language at line 2.6, following the word "Exception:"

Add the following new language at line 2.6, following the word "Exception:" Manufactured buildings constructed in accordance with the Code of Federal Regulations at 24 C.F.R. Part 3280.

Delete the language at line 2.17, following the words "Exception: insulation used in"

Add the following language at line 2.17, following the words "Exception: insulation used in": manufactured buildings, appliances, and doors constructed in accordance with the Code of Federal Regulations at 24 C.F.R., Part 3280.

These changes clarify that the stated exceptions are meant to apply only to manufactured homes which are governed by federal Housing and Urban Development regulations. By referencing the applicable federal regulation, such a rule makes clear that the regulatory exceptions apply both to new homes and to any remodeling of these homes. These changes are needed and reasonable and would not constitute a substantial change to the rules as originally published in the State Register.

Minn. R. 7640.0130

The Administrative Law Judge recommends one of the following alternatives as a revision to the March 28, 2008 proposed rule:

A. Insert at line 6.22 a new subpart 2.A. consisting of the language at lines 6.20 through 7.10 which was proposed to be deleted in the January 4, 2008 draft of the rule amendments. Re-number the remainder of subpart 2 of the March 28, 2008 draft accordingly; or,

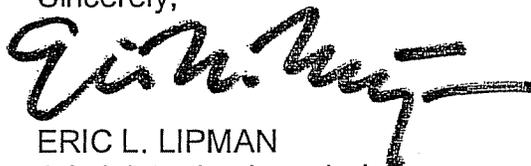
B. Insert the following language at line 6.22 as a new subpart 2.A.: When ASTM amends, reorganizes, or modifies a standard test method and the manufacturer or testing laboratory desires to use the new version, the department may be petitioned to adopt the new test method version. Until the department adopts or decides not to adopt the new version, the petitioner may request a temporary variance, pursuant to Minn. Stat. §§14.055 and 14.056, to use the new test method version. Re-number the remainder of subpart 2 of the March 28, 2008 draft accordingly.

The alternatives recognize and reflect the Department's obligation under Chapter 14 to grant variances to its rules under certain circumstances. Such a revision would be needed and reasonable because it is authorized by Chapter 14 and alerts members of the public to the procedure for requesting a variance.

As required by Minn. Stat. § 14.127, the agency has made its determination regarding the effect of the rules on small businesses and small cities. The Administrative Law Judge reviewed the agency's determination and concurs with the agency's finding that complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any one small business or any one small city.

With the approval of the adoption of these rules, our office is sending this letter to the agency for its consideration of the suggested technical revisions. OAH will hold the agency rule record at this time. **Please contact Laura Schlatter at (651) 361-7847 with any questions and to inform OAH whether the agency intends to adopt any of the recommendations discussed above.**

Sincerely,


ERIC L. LIPMAN
Administrative Law Judge

cc: Office of the Governor
Office of the Attorney General
Legislative Coordinating Commission
Revisor of Statutes