

MAINE STATE LEGISLATURE

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Regulations APA
Oil Burner Regulations
APA (Regulation)

32 M.R.S.A. 2353
5 M.P.A. 802.9

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 19, 1978

Honorable Sherry Huber
430 Blackstrap Road
Falmouth, Maine 04105

Re: Policies of the Oil Burner Men's Licensing Board.

Dear Representative Huber:

This is in response to your letter of December 7, 1978, to Attorney General Brennan in which you requested an opinion as to whether the Oil Burner Men's Licensing Board (hereinafter sometimes referred to as "the Board") has the authority to require a manufacturer to meet a requirement that has not been adopted as a Board standard in a manner consistent with the Maine Administrative Procedure Act, and whether the Board can remove a product from their "approved equipment" list if it does not meet such a standard. Based on the facts which you have supplied in your letter and the correspondence attached thereto, it does not appear that the Board has authority to take either action.

Pursuant to Title 32 M.R.S.A. § 2353, the Board is authorized "to adopt standards and rules and regulations as it shall deem necessary, pursuant to the Maine Administrative Procedure Act, Title 5, Section 8051, et seq., for the holding of examinations and for carrying out of this chapter. . . ." (emphasis supplied). Title 32 M.R.S.A. § 2303 provides that no oil burning equipment will be installed in the State of Maine "unless it is approved by the Board and installed in accordance with the standards adopted by the Board." (emphasis supplied). This section further provides that:

"No installation of such equipment shall hereafter be made unless such installation complies with the then current edition of the National Fire Protection Association standard #31 and with all other standards and regulations adopted by the Board." (emphasis supplied).

The term "approved" is defined by the provisions of Title 32 M.R.S.A. § 2301.1-A as follows:

"'Approved' shall mean acceptable to the Oil Burner Men's Licensing Board as to design, construction, installation or intended use as required by the standards adopted by the Board. Devices listed for a specific purpose by Underwriters Laboratories, Inc., may be considered as meeting the requirements of the standard. All other equipment shall be submitted to the Board for review. The Board may require such equipment to be tested by either the Department of Industrial Cooperation, University of Maine, or Southern Maine Vocational Technical Institute." (emphasis supplied).

It is my understanding from your letter and from the rules, regulations and standards adopted by the Oil Burner Men's Licensing Board that heat reclaimers are governed by the provisions of § 13 of those regulations as it appears on page 10 of the pamphlet published by the Board entitled, "Rules, Regulations and Standards in Addition to Those in the Current Edition of N.F.P.A. #31." These standards do not appear to govern the use of a "clean-out door." The Board has adopted general rules concerning application for product approval, which rules appear as § 21-1 on page 4 of the same pamphlet. These provisions, unless there has been a change in name, design equipment installation or intended use, do not appear to allow for disapproval or removal of a product from the approved list based simply on Board policy.

The provisions of the statute quoted above clearly indicate the legislative intention that standards and rules governing oil burning equipment and equipment accessory thereto be adopted consistent with the Maine Administrative Procedure Act. That Act defines rules as:

"The whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets, or makes specific the law administered by the agency, or describes the procedures or practices of the agency.

"B. The term does not include: . . .

"4. Any form, instruction, or explanatory statement of policy which in itself is not judicially enforceable, and which is intended solely as advice to assist persons to determining, exercising or complying with their legal rights, duties or privileges," Title 5 M.R.S.A. § 8002.9.

The "policy" which you have described does not appear to fall within the applicable exceptions of the definition of "rule" since the Board apparently intends its policy regarding clean-out doors to be a legally enforceable standard rather than an "explanatory statement." The clean-out door requirement is thus a "rule" within the meaning of the Maine Administrative Procedure Act and subject to the requirements for adoption of rules as they appear in Title 5 M.R.S.A. § 8052. In this case, the requirement sought to be applied has not been adopted as a rule as required by the Maine Administrative Procedure Act and the Board's enabling statute, and, therefore, the Board may not use it as a legally enforceable standard or regulation.

If I can be of further assistance, please feel free to let me know.

Sincerely,



SARAH REDFIELD
Assistant Attorney General

SR/ec