

9/26/90

State of Minnesota

Minnesota Department of Health

In the Matter of Proposed Rules  
and Amendments to Adopted Rules  
Governing Variances to  
Environmental Health Rules

Statement of Need  
and Reasonableness

The Minnesota Department of Health is proposing a new rule and amendments to various Environmental Health Division rules to specify the procedures for requesting and criteria for evaluating a variance to adopted standards.

Legal Authority.

The rules are proposed in accordance with Minnesota Statutes, section 14.05, subdivision 4 which requires that an agency:

adopt rules setting forth procedures and standards by which variances shall be granted and denied. An agency receiving a request for a variance shall set forth in writing its reasons for granting or denying the variance.

Purpose

The Commissioner of Health has authority to regulate a wide variety of areas in which environmental exposure potentially impacts human health. The authority to regulate carries with it the responsibility to set reasonable standards and enforce them fairly and equitably, to the extent necessary to assure that the health of the public is protected.

In the course of enforcing adopted standards there may be an occasion or situation where the applicable standard cannot be met. There may be instances where compliance with a particular standard is very difficult to achieve or where conditions or circumstances provide for meeting the same outcome with a means or method other than the one prescribed. The Department is then asked if the adopted standard can be varied so the project can still proceed legally and the establishment or party can continue to operate legally. In some cases, there may be alternatives which accomplish the same purpose as the original standard. If such alternatives exist they should be considered and perhaps substituted for the standard or outcome prescribed in the adopted rule.

There are several sets of rules enforced by the Commissioner of Health which contain standards to which regulated parties must adhere. These generally relate to the location of certain facilities, and the construction or operation of equipment or fixtures designed to assure sanitation and safety. The need for procedures and criteria to vary adopted standards arises when a party governed by the standard proposes to undertake or maintain an activity which cannot meet the standard. In cases where there are other means of achieving the same result as that intended by the standard, it is reasonable to grant a variance from the standard if all other conditions can be met. That is the purpose behind the proposed rules.

#### Notice of Solicitation

The Notice of Solicitation of Outside Information or Opinions on this matter was published in the State Register on January 22, 1990 at 14 S. R. 1879.

#### Fiscal impact: cost of implementation to state and local government

If the adoption of a rule by an agency will require the expenditure of public monies by local public bodies, Minnesota Statutes, section 14.11, subdivision 1 requires the Department to give a reasonable estimate of total costs to all local public bodies in the state to implement the rule for the two years immediately following adoption of the rule if the estimated costs exceed \$100,000 in either of the two years.

In Minnesota, local units of government may enter into a delegation of authority agreement with the Minnesota Department of Health under Minnesota Statutes, section 145A.07. Under these agreements, the Department delegates certain licensing, inspection and enforcement responsibilities to local health agencies.

There should be no fiscal impact to local units of government if these proposed rule parts are adopted. The proposed rules do not mandate program responsibilities or additional services for local units of government to provide. If a local unit has chosen to implement a department rule, then the proposed rule provides an additional enforcement tool that may be used to implement the rule.

#### Small business considerations

Minnesota Statutes, section 14.115 requires that an agency consider five factors for reducing the impact of proposed rules on small businesses. Small business is defined in section 14.115 as "...a business entity, including its affiliates that (a) is

independently owned and operated; (b) is not dominant in its field; and (c) employs fewer than 50 full time employees or has gross annual sales of less than four million dollars...." Many small businesses are governed by the rules proposed to be subject to variance.

The proposed rule imposes no burdens on small business as defined in Minnesota Statutes, section 14.115. To the contrary, small business should benefit by virtue of the fact that small businesses will now be more certain of the procedures and criteria involved when applying for a variance. The proposed rule contains no reporting or data gathering requirements, nor is there option for relaxing the proposed rule requirements, since what is being proposed is the minimum necessary for the Department to be able to conduct its business legally.

#### General arguments and specific rule considerations

The Environmental Health division has reviewed the rules under its enforcement jurisdiction for the need to provide variance procedures and criteria.

For format purposes, the department proposes to specify at this time in part 4717.7000 those adopted division rule provisions which will be subject to variance. The range of rule parts 4717.7000 to 4717.7050 specify the environmental health division's general variance procedures and criteria.

Simultaneously, adopted rule parts are proposed for amendment or additional rule parts are proposed to several adopted division rules to: (1) delete inappropriate, incorrect, inconsistent or inadequate variance language; and (2) cross reference to the general division variance procedure and criteria standards contained in parts 4717.7000 to 4717.7050.

All rules administered by the division are not automatically subject to variance.

\* Some rules of the division were adopted to implement federal law and code. They have specifically mandated federal variance criteria and procedures, are not referenced in part 4717.7000, and are not intended to be governed by parts 4717.7000 to 4717.7050.

\* Rules under development by the division will reference to parts 4717.7000 to 4717.7050 for variance procedures and criteria when proposed, but are not, at this time, included in part 4717.7000. Part 4717.7000 will be amended to include new rules as they are developed.

\* Rule provisions which are mandated by statute are not open to variance. To the extent that a rule provision is cited as open

to variance and the variance request varies or is in conflict with a statutory standard, the variance will not be granted. This proposed policy is consistent with Minnesota Statutes, section 14.05, subdivision 4 which states that a state agency does not have the authority to "grant variances to statutory standards."

\* Proposed part 4717.7000 does not open to variance those rule provisions which the department has determined cannot be varied. Frequently outcome measures are not subject to variance and have been established via lengthy study, public review and rule hearing.

#### 4620.1450 VARIANCE TO RULES RELATING TO CLEAN INDOOR AIR

Parts 4620.0100 to 4620.1500 govern the standards for smoking and non smoking areas in public places. The department proposes to specify variance procedures and criteria for these adopted rules by referencing to the proposed general division variance rule parts 4717.7000 to 4717.7050 so persons who request a variance from the adopted rules know the procedures and criteria by which a variance will be granted or denied.

#### 4620.1800 MAXIMUM PERMISSIBLE FORMALDEHYDE LEVEL IN HOUSING UNITS.

The department proposes that the provisions in parts 4717.7000 to 4717.7050 shall be the procedures and criteria by which a variance from the standards in this rule shall be granted or denied.

#### 4620.3500 STANDARDS FOR ASBESTOS RELATED WORK

Subp. 4. Item B. It is necessary to provide a procedure and criteria for variance of this item to allow for consideration of alternative methods to prepare a work area for abatement where space limitations prohibit the construction of the enclosure, or where the construction of a negative pressure enclosure would create a greater hazard, for example where toxic gasses are present in the area. If the department considers and approves alternative methods to those prescribed in rule, it is necessary and reasonable that the procedures and criteria for considering and approving the alternative methods be specified in rule, thus this item is being opened for amendment to provide for cross reference to the proposed general variance procedures and criteria for evaluating variance requests and alternative methods.

#### 4620.3700 REQUIREMENTS FOR MINNESOTA APPROVAL OF ASBESTOS ABATEMENT TRAINING COURSES

Subpart 3, item B, first sentence. It is necessary on some occasions to allow approved training courses to be given without the Commissioner being informed a full 30 days prior to the date the course is given. There are times when courses must be given on an emergency basis to provide adequate labor supply for needed asbestos abatement work.

#### 4625.0900 SPACE REQUIREMENTS

This rule part governs rooms in lodging houses. The current provision provides for a waiver of the requirements contained in the rule part. The department does not intend, and did not intend to allow for a waiver of, meaning an exception to all provisions of this part. Provision of space may not be totally disregarded. However, given structural and construction variabilities, a variance to this provision as well as to several other provisions within the lodging establishment rules, parts 4625.0100 to 4625.2300, are proposed. It is reasonable where the department is willing to consider and approve a variance to an adopted standard, that the procedures and criteria for considering and approving the alternative methods be specified in rule.

#### 4625.2355 VARIANCE TO RULES RELATING TO LODGING ESTABLISHMENTS

This proposed part provides for the consideration of a variance of many of the adopted rules governing the licensure of lodging establishments and for a cross reference to the proposed general division rule governing variance procedures and criteria. Department practice has been to grant variances to some of the adopted lodging establishment rules, particularly where structural or site variability, or differing methods necessitate some flexibility. It is thus necessary to adopt standards which specify the procedures and criteria for considering and approving variances to the specified rule parts so department practice is consistent with Minnesota Statutes, section 14.05, subdivision 4.

Adopted parts within the lodging establishment rules proposed to be subject to variance are building requirements (4625.0400), floor requirements (4625.0500), wall and ceiling requirements (4625.0600), space requirements (4625.0900), toilet requirements (4625.1200), hand washing requirements (4625.1400), eating utensils and drinking vessels provided in guest rooms (4625.1500), waste disposal (4625.1600), fire protection except the provision that all fire protection measures shall be in accordance with requirements of the state fire marshal (4625.2000 except last sentence), and the sanitary dispensing of ice (4625.2200).

#### 4625.2655 VARIANCE TO RULES RELATING TO FOOD AND BEVERAGE ESTABLISHMENTS

This part provides for variance to adopted rules governing requirements for food and beverage establishments, parts 4625.2401 to 4625.7801. Within this range, the department is proposing to repeal adopted part 4625.2650 VARIANCES AND WAIVERS to provide for a consistent variance procedure and criteria standard throughout the division. The proposed criteria and procedures in parts 4717.7000 to 4717.7050 are specified in proposed part 4625.2655 as a cross reference and are very similar to those provisions in adopted part 4625.2650.

Proposed part 4625.2655 does not provide for variance to the entire range of rules governing food and beverage establishments. Not open for variance are parts governing definitions (4625.2401), scope (4625.2501), administration (4625.2601), plan review of future construction (4625.2701), and misrepresentation of food (4625.2801).

For general food and beverage establishments, additional parts not open are those governing disease prevention and control and employee practices (4625.3601), cleaning, sanitization, and storage of equipment and utensils (4625.3801, subpart 1), physical facilities and sanitation (4625.3901, subpart 3), insect, rodent and animal control (4625.4101, subpart 1), lighting (4625.4301), ventilation (4625.4401), and poisonous or toxic materials (4625.4601).

For itinerant food service, parts not open are initial and renewal license fees, license expiration dates (4625.5000), equipment (4625.5101, subpart 7), insect control (4625.5601), and employee practices (4625.5701).

For mobile food services or pushcarts, parts not open are equipment (4625.6101, subparts 3 and 7), insect control (4625.6601), and employee practices (4625.6701).

And for special event food stands, parts not open are equipment (4625.7101, subpart 7), insect control (4625.7601) and employee practices (4625.7701).

#### 4630.1801 VARIANCE TO RULES RELATING TO MANUFACTURED HOME PARKS AND RECREATIONAL CAMPING AREAS

This provision is necessary to provide variance procedures and criteria for the adopted standards governing licensure of manufactured home parks and recreational camping areas. The department has granted variances to these adopted provisions via part 4630.1800 which, because it is not as complete as the proposed division variance procedures and criteria, parts 4717.7000 to 4717.7050, is thus proposed for repeal. It is necessary, however, to continue to provide for variances, thus the new proposed part 4630.1801 cross references to the proposed general division variance rules. It is necessary to provide for

consistent procedures and criteria for the consideration of variance requests, and reasonable to propose and adopt procedures and criteria for considering and approving them. Part 4625.1801 would be added to the range of rule parts governing manufactured home parks and recreational camping areas and reference to the general variance standards in parts 4717.7000 to 4717.7050 so parties governed by the manufactured home park and recreational camping area rules are aware of the procedures and criteria for requesting a variance.

Manufactured home park and recreational camping area rules not open to variance are those governing location (4630.0200), caretaker (4630.0300), domestic animals (4630.0500), water supply (4630.0600), plumbing (4630.0700), sewage discharge, (4630.0800), licensing, definitions (4630.1900), fees (4630.2000), license expiration dates (4630.2100) and license renewals (4630.2200).

#### 4630.4750 VARIANCE TO RULES RELATING TO CHILDREN'S CAMPS

Parts 4630.2300 to 4630.4700 govern the inspection and licensure of children's camps. The department proposes to specify variance procedures and criteria for these rules by referencing to the proposed general division variance rule, parts 4717.7000 to 4717.7050, so persons who request a variance from the adopted children's camp standards know the procedures and criteria by which a variance will be granted or denied.

#### 4630.6550 VARIANCE TO RULES RELATING TO MIGRANT LABOR CAMPS

Parts 4630.5000 to 4630.6500 govern the inspection and licensure of migrant labor camps. The department proposes to specify variance procedures and criteria for these adopted rules by referencing to the proposed general division variance rule parts 4717.7000 to 4717.7050 so persons who request a variance from the adopted migrant labor camp standards know the procedures and criteria by which a variance will be granted or denied.

#### 4635.0200 ROLLER TOWELS

This rule part sets the standards for roller towels used in public places. The department proposes to add a reference to the general division rules governing variances, parts 4717.7000 to 4717.7050 so a party who may request a variance from the adopted standard knows the procedure and criteria by which a variance will be granted or denied.

#### 4635.2100 VARIANCE TO RULES RELATING TO ENCLOSED SPORTS ARENAS

Parts 4635.1100 to 4635.2000 set standards relating to air quality in enclosed arenas. The department proposes to add parts 4635.2100 which references to the general division rules governing variances, parts 4717.7000 to 4717.7050 so a party who

may request a variance from the adopted standards knows the procedures and criteria by which a variance will be granted or denied.

#### 4715.5600 VARIANCE TO RULES RELATING TO WATER CONDITIONING CONTRACTORS

The department proposes to add a reference to this rule so a party who wants to request a variance from the adopted water conditioning standards knows the procedure and criteria by which a variance will be granted or denied.

#### 4717.0500 WATER SUPPLY

This rule provision is part of the division's public swimming pool regulations, parts 4717.0100 to 4717.3900. Deletion of the last sentence of the first paragraph of part 4717.0500 is necessary to provide administrative consistency with the proposed division variance procedures and criteria. The department proposes to replace the adopted language in part 4717.0500 with the division variance procedures and criteria contained in parts 4717.7000 to 4717.7050 so persons who request a variance from the adopted public swimming pool standards know the procedures and criteria by which the request will be granted or denied. The public swimming pool rules are contained in part 4717.7000 as subject to variance. Cross reference within the public swimming pool regulations is not being proposed at this time, however, because these rules are currently undergoing revision. Cross reference will be proposed within the swimming pool regulations later along with the revisions to those rules.

#### 4717.7000 VARIANCE REQUEST

Subpart 1. Request. This subpart indicates the scope of coverage of the proposed general variance rules to which the proposed variance procedures and criteria apply. It is reasonable to specify variance procedures and criteria for these rules so persons requesting a variance from the specified standards know the procedures and criteria for considering a variance.

Subp. 2. Procedures for requesting a variance. The elements of a variance request are stipulated in this subpart. Items A to F are necessary to assure that the Department has sufficient information to make a well founded determination and make it without having to make numerous other inquiries. In some cases, a program area may need additional specific information before a variance request can be granted. Such additional information is specified in proposed part 4725.0410 governing wells and borings. The requirement for a written request assures that there is a hard copy record of the request and that no errors occur because terms are not heard correctly. All information is requested at once so the amount of time required to prepare a response is as



short as possible. In some cases such as variance requests to rules governing wells and borings, a fee for a variance request has been set in statute. It is thus reasonable to make the public aware that such a requirement may exist and that consideration of a variance is conditional on receipt of the fee.

Items A to D are necessary so department staff may determine if the request is appropriate and whether the need for a variance has been sufficiently documented. The types of information requested are necessary if the department is to be assured that the public health purpose underlying the original standard can still be met. The information in item E is necessary so the department can be assured that the party applying for the variance understands how the variance will work and that the party bears responsibility for complying with the terms of the variance, if granted. The party shall provide the additional information in item F, if such information would help the department arrive at a decision.

Subp. 3. Applicant for a variance. Since different persons, firms, corporations, and entities may be involved in the applicability of the various division rules, for purposes of requesting a variance it is necessary to clarify that the party who applies for the variance must be the party to whom the rule which is to be varied, applies. This ensures that the party that has the duty to comply with an adopted standard is the party who is responsible for satisfying the terms of the variance.

#### 4717.7010 CRITERIA FOR DECISION

Subpart 1. Criteria for granting a variance. Stating the criteria contained in this rule part serves two purposes: it commits the Department to weighing each request according to a set of minimum criteria, all of which underlie the public health protection goals of the adopted standard; and it makes the process visible and helps assure that every request is fairly reviewed while assuring that protection of the public health remains as the ultimate goal in applying certain standards.

Subpart 2. Conditions for variance. It may be necessary for the commissioner to attached conditions to a variance that are necessary to ensure the protection of public health, safety, or the environment. Such conditions may be other than those initially proposed by the party requesting the variance.

Subpart 3. Future effect. It is necessary to clarify that the variance shall apply to situations and conditions that may or shall occur. A variance shall not be granted retroactively to situations or conditions where noncompliance or nonconformance with adopted standards has already occurred.

#### 4717.7020 NOTIFICATION OF DECISION

Notification of the commissioner's decision on a variance request needs to be in writing so all parties concerned have a clear understanding of what is expected of each and also to specify with certainty what the terms and conditions of the variance are. If a variance is denied, it is reasonable that the reasons for the denial be stated so the applying party may understand the department's concerns and the potential adverse effect on public health, safety, or the environment which were not adequately protected.

#### 4717.7030 EFFECT OF ALTERNATIVE MEASURES OR CONDITIONS

This part states the effect of a variance. It is as binding on the applying party as is the adopted standard. It is reasonable to inform the applying party of this effect so the party who gets involved in the variance process clearly understands what the legal consequences are of being granted a variance.

It is necessary to specify that the party to whom a variance has been granted notify the department within 30 days of any material change in the conditions upon which the variance was granted so the department can reevaluate the conditions and assure that continuation of the variance, given the changed conditions, does not have a potential adverse effect on public health, safety, or the environment.

#### 4717.7040 RENEWAL OF VARIANCE

This rule part specifies the procedures for renewal of a variance. Some variances may have a finite end point. This part serves to remind the party that any variance which is subject to expiration, and which the party wants to continue, must be renewed prior to the expiration of the existing variance. The provision also serves notice that variances are not automatically renewed. Thirty days written notice assures that the department has a hard copy record of the request and that no errors occur because terms are not heard correctly. Thirty days prior notice is reasonable as a timeframe to allow the department to evaluate the request. This proposed part specifies the criteria for extension of the variance. It is reasonable that a variance be renewed if there has been no change in the original conditions, including no adverse effect to public health, safety or the environment, and there is demonstrated compliance with the alternative measures or conditions imposed by the variance. Conversely, if there has been any material change in the conditions, the variance renewal may be subject to additional review, different conditions, or possible denial.

#### 4717.7050. DENIAL, REVOCATION, REFUSAL TO RENEW, APPEAL

Subpart. 1. Action. This provision specifies the actions which apply if the Department determines that a variance cannot be granted or is not warranted.

Subp. 2. Appeal procedure. The procedure for appeal is the one used in other like circumstances and is the one which the Legislature has created to assure adequate notice and opportunity for hearing by a claimant. It is appropriate that procedures be used if a complainant thinks the department's decision results in a denial of one's rights.

#### 4725.0410 VARIANCE

Subpart 1. General. This part applies to the adopted well and boring standards contained in chapter 4725. The department proposes to repeal the variance provisions in adopted part 4725.0400 so that the procedures and criteria for variance consideration are consistent within the division. The proposed language in part 4725.0410 is necessary to cross reference to the proposed division variance criteria and procedures in parts 4717.7000 to 4717.7050 so that parties seeking a variance from the adopted well and borings rules know the procedures and criteria the department will use to consider the request.

Subp. 2. Additional standards for construction, repair or sealing variance requests. This subpart is necessary because in addition to the general information specified in the division variance rule, the well and boring unit needs additional specific information to evaluate a variance request to adopted standards governing the construction standards for wells and borings (parts 4725.1860 and 4725.2300 to 4725.7600).

A. The department needs to know the exact location of the well or boring in order to examine geology and existing land uses where the well or boring is to be constructed. Location may have a bearing on construction suitability.

B. The unique number is needed to speed locating the well or boring in the filing and tracking system for wells and borings used by the department.

C. The name and address and telephone number of the specified individuals are requested to allow the department to contact them on questions that arise associated with the evaluation of the variance. The well contractor may need to be contacted for clarification of how the work would be done, or procedures to be used if the written information provided is unclear or insufficient. The property owner and the well owner may be different people. Both may need to be contacted to verify communication between them on the request, and to verify understanding of each person's responsibilities under rules and law.

D. The department must consider those things that effect water and the sanitary quality of wells and borings. The adopted well and boring standards specify distances from such factors that may effect quality or access to the well or boring such as structures, utilities and contamination sources.

E., F., G. H. and I. The information in these items is necessary because they are factors that may be varied in conjunction with other conditions subject to variance. The conditions such as casing type, depth and grout are also adopted standards. If one factor is varied, others may also be subject to variance. For example, if a request is received to construct a well closer to a sewer line than the separation distance specified in rule, the request may be granted if other protective measures such as additional grout around the well casing, are implemented.

Subp. 3. Additional standards for variance request from isolation distance. The additional information in this subpart is necessary to allow the department to adequately evaluate a variance request from the isolation distances specified in parts 4725.1900 to 4725.2200.

A. The adopted rules specify distances from contamination sources (isolation distances) to prevent any contamination of the well by the source. A request to vary these protective distances may increase the likelihood of contamination occurring. Knowing what special construction or procedures will be used to reduce the risk of contamination will allow the Department to better evaluate whether the request adequately protects public health.

B. The information in this item is necessary because the department is better able to evaluate the public health and environmental impact of a variance to the isolation distance when it is supplied with good, site specific data on the source.

D. Information on soil type is necessary because the adopted standards specify average isolation distances. The type of soil surrounding a contamination source or proposed well or boring will effect how water and contaminants seep and flow. The capacity of soils varies greatly in ability to retard contaminant movement and attenuate contaminants. Soil surveys, percolation tests or soil boring reports are methods of determining the type of soil around a site and aid the department in determining whether sufficient protection is provided.

E. Other reviews of contamination sources done by other agencies are requested so the department can determine whether there are other extenuating circumstances that may impact granting of a variance request. In some cases, for example, there may be good reason to vary the standards consistently for an entire geographical area as determined by a study of the area by another

agency, rather than consider variances separately for each individual property owner.

4730.0850 VARIANCE TO RULES RELATING TO IONIZING RADIATION

Minnesota Rules, chapter 4730 establishes standards governing sources of ionizing radiation. The department proposes to specify variance procedures and criteria for these rules by referencing to the proposed general division variance rule parts 4717.7000 to 4717.7050 so a party who requests a variance from the adopted rules knows the procedures and criteria by which a variance will be granted or denied. The excepted parts govern the requirements for registration and fees.

Repealer. Part 4625.2650 is proposed for repeal and replacement by part 4625.2655 for the reasons stated in SNR for part 4625.2655. Part 4630.1800 is proposed for repeal and replacement by part 4630.1801 for the reasons stated in SNR for part 4630.1801. Part 4725.0400 is proposed for repeal and replacement by part 4725.0410 for the reasons stated in SNR for part 4725.0410. Part 4727.0300 is proposed for repeal so there is a consistent variance standard for all provisions governing wells and borings.

Effective date. The proposed rules shall be effective five working days after publication of the adopted rules in the State Register.

DEPARTMENT : Health

STATE OF MINNESOTA

# Office Memorandum

DATE : October 15, 1990

TO : Legislative Committee to Review Administrative Rules  
Room 55 State Office Building  
100 Constitution Avenue, St. Paul, Minnesota

FROM : Jane A. Nelson, Rules Coordinator  
Environmental Health Division  
Minnesota Department of Health JN

PHONE : 627-5038

SUBJECT : Submission of Statement of Need and Reasonableness pursuant to  
Minnesota Statutes, sections 14.131 and 14.23

In accordance with the above matter, the Minnesota Department of Health is submitting to you the Statement of Need and Reasonableness on proposed rules governing variances to environmental health rules. These rules are scheduled for publication in the State Register on October 29, 1990, and would go to hearing, if necessary, December 6, 1990.

JAN:mq  
Enclosure