

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

DEPARTMENT: Office of the Attorney General **STATE OF MINNESOTA**

OFFICE MEMORANDUM

DATE: December 21, 1990

TO: JANE A. NELSON
Rules Coordinator
Div. of Environmental Health

FROM: CHARLENE HATCHER
Special Assistant Attorney General
525 Park Street, Suite 500 (55103)

PHONE: 296-9422

SUBJECT: In the Matter of the Adopted Rule Relating to Environmental Health Rules

The above-referenced rule has been approved as to its legality by the Attorney General on December 20, 1990.

Enclosed is your copy of the approved rule. This office has already filed two copies with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth is being retained by this division of the Attorney General's Office for its records.

Also enclosed are any petitions, requests, submissions or comments along with any extra copies of documents which you submitted to the Attorney General.

Your next step is to arrange for publication of the Notice of Adoption in the State Register. In a day or two, you should receive from the Revisor's Office three copies of the notice of adoption of your rule. You should submit two copies of the Notice of Adoption to the State Register for publication. A permanent rule without a hearing does not become effective until five days after a notice of adoption is published in the State Register in accordance with Minn. Stat. § 14.27. An emergency rule becomes effective five working days after approval by the Attorney General; however, the agency must publish a notice in the State Register in accordance with Minn. Stat. § 14.34.

If you have any questions in this regard, please contact me.

CH:sc
Enclosures
cc: William Brown, Chief Judge
MaryAnn Hruby
Paul Zerby

RULE REVIEW CHECKLIST

File No. 1772
DATE RECEIVED 12-11-90
REVIEW DATE 12-20-90
DUE DATE 12-25-90
(DIS)APPROVED 12-20-90
WITHDRAWN

Docket No. 05.0009.1200
ADOPTED W/O HEARING
EMERGENCY RULE
TO REVISOR ON 12-13-90
REVISOR (DIS)APPROVED 12-19-90
FILED W/SEC. OF STATE 12-21-90
RETURNED TO AGENCY

✓ Rule as adopted (4 copies)

✓ Notice to Solicit Outside Information/Opinion (if applicable)
November 9, 1987 and January 22, 1990 Date published in State Register
Comments

~~Petition for Adoption of a Rule~~

~~Board's Authorizing Resolution~~
Date adopted

✓ Proposed Rule
✓ Revisor's Certificate

✓ Notice of Intent to Adopt Rule
14.05 subd 4 Statutory Authority – grant variance procedural rules
NA Small Business Statement
NA Expenditure of public money statement
Oct 11, 1990 Signature

✓ Statement of Need and Reasonableness (if applicable)
NA Small Business Statement
NA Fees - § 16A.128

✓ Affidavit of Mailing Notice of Intent to Adopt Rule
October 26, 1990 Dated 30/25 days before adoption
Notice attached indicates it is attached
Copy of rule or summary attached

✓ Publication in State Register
October 29, 1990 Date 30/25 days before adoption

✓ 180-day deadline from:
✓ Effective date of law requiring rule (14.12) (both rules) amendments don't apply not mandatory
✓ end of comment period (§ 14.26) (rules without hearing)
effective date of statutory authority (§ 14.29) (emergency rules)

Resolution Adopting
Date adopted

✓ Findings of Fact, Conclusions & Order Adopting
December 7, 1990 Date

✓ Written Requests, Submissions or Comments

✓ Declaration of Attorney
Paul Zerby Name of SAAG representing agency

Notice of Submission to Attorney General (if applicable)

Affidavit of Mailing Notice to Attorney General (if

Department of Health

Adopted Permanent Rules Governing Variances to Environmental Health Rules

Rules as Adopted

4620.1450 VARIANCE TO RULES RELATING TO CLEAN INDOOR AIR.

The commissioner shall grant variances to parts 4620.0100 to 4620.1500, except part 4620.0300, only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4620.1800 MAXIMUM PERMISSIBLE FORMALDEHYDE LEVEL IN HOUSING UNITS.

At the time of sale of a newly constructed housing unit, the ambient indoor air of any habitable room in the unit shall not contain more than 0.4 parts of formaldehyde per million parts of air as measured according to the procedures specified in parts 4620.1900 and 4620.2000. The seller is responsible for assuring that the unit complies with this level.

The installation of urea formaldehyde foam insulation in a housing unit which is not newly constructed shall not cause the indoor level of formaldehyde in any habitable room in the unit to exceed the higher of 0.4 parts per million or the preinstallation level as measured according to the procedures specified in parts 4620.1900 to 4620.2100. The installer of urea formaldehyde foam insulation is responsible for assuring that the installation complies with this level.

The commissioner shall grant a variance to this part only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4620.3500 STANDARDS FOR ASBESTOS RELATED WORK.

[For text of subps 1 to 3, see M.R.]

Subp. 4. **Required procedures for asbestos related work.** Asbestos related work must meet the following minimum criteria.

The criteria do not replace or supersede more stringent standards or contractual agreements.

[For text of item A, see M.R.]

B. Preparation of the work area must meet the following requirements:

(1) Removal, enclosure, or encapsulation of asbestos containing material is a major operation for purposes of compliance with Code of Federal Regulations, title 29, section 1926.58, and must be done, where feasible in industrial facilities, in a negative pressure enclosure with a contiguous decontamination enclosure system. However, for the portion of an asbestos related project that includes removal of less than ten feet of pipe lagging or less than six square feet of asbestos containing material per room, the asbestos abatement contractor may use, as an alternative, the glove bag or mini enclosure procedures in subpart 5. The commissioner may approve a variance to the procedures specified in this item, on a case by case basis, according to the procedures and criteria in parts 4717.7000 to 4717.7050, 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 gases are present in the area.

[For text of subitems (2) to (9), see M.R.]

[For text of items C to H, see M.R.]

[For text of subp 5, see M.R.]

4625.0900 SPACE REQUIREMENTS.

Every room occupied for sleeping purposes by one person shall contain at least 70 square feet of usable floor space, and every room occupied for sleeping purposes by more than one person shall contain not less than 60 square feet of usable floor space for each occupant thereof. Under no circumstances shall there be provided less than 400 cubic feet of air space per occupant. Beds shall be spaced at least three feet apart when placed side by side. No sleeping quarters shall be provided in any basement having more than half its clear floor

to ceiling height below the average grade of the adjoining ground.

4625.2355 VARIANCE TO RULES RELATING TO LODGING ESTABLISHMENTS.

The commissioner shall grant a variance to parts 4625.0400 to 4625.0600; 4625.0900; 4625.1200 to 4625.1600; 4625.2000, except the last sentence; and 4625.2200 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4625.2655 VARIANCE TO RULES RELATING TO FOOD AND BEVERAGE ESTABLISHMENTS.

The commissioner shall grant a variance to parts 4625.2901 to 4625.7801, except parts 4625.3601; 4625.3801, subpart 1; 4625.3901, subpart 3; 4625.4101, subpart 1; 4625.4301; 4625.4401; 4625.4601; 4625.5000; 4625.5101, subpart 7; 4625.5601; 4625.5701; 4625.6101, subparts 3 and 7; 4625.6601; 4625.6701; 4625.7101, subpart 7; 4625.7601; and 4625.7701 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.1801 VARIANCE TO RULES RELATING TO MOBILE HOME PARKS AND RECREATIONAL CAMPING AREAS.

The commissioner shall grant a variance to part 4630.0400 and parts 4630.0900 to 4630.1700 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.4750 VARIANCE TO RULES RELATING TO CHILDREN'S CAMPS.

The commissioner shall grant a variance to parts 4630.2300 to 4630.4700 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.6550 VARIANCE TO RULES RELATING TO MIGRANT LABOR CAMPS.

The commissioner shall grant a variance to parts 4630.5000 to 4630.6500 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4635.0200 ROLLER TOWELS.

In order to prevent the spread of communicable diseases, the use of the roller towels in public places, public conveyances, and public buildings is hereby prohibited, except that continuous towels dispensed from a cabinet which is so constructed as to provide complete separation between the clean and soiled portions of the towel on separate rolls within the cabinet and to provide that the soiled portion is taken up on the soiled towel roll at the same rate the clean portion is withdrawn from the clean roll shall not be within this prohibition. The commissioner shall grant a variance to this part only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4635.2100 VARIANCE TO RULES RELATING TO ENCLOSED SPORTS ARENAS.

The commissioner shall grant variances to parts 4635.1100 to 4635.2000, except part 4635.1500, only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4715.5600 VARIANCE.

If an installation cannot be made in conformance with the Minnesota Plumbing Code (parts 4715.0100 to 4715.2860) or with the provisions contained in parts 4715.5000 to 4715.6000, the water conditioning contractor or installer shall consult with the appropriate plumbing inspector, and obtain a variance from the state rules before the installation may proceed. Such a variance can be granted only if the nonconforming alternative will not create a risk to health. The commissioner shall grant variances to parts 4715.5000 to 4715.6000 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4717.0500 WATER SUPPLY.

The water supply serving the swimming pool and all plumbing fixtures including drinking fountains, lavatories, and showers shall meet the requirements of the commissioner of health.

All portions of the water distribution system serving the

swimming pool and auxiliary facilities shall be protected against backflow. Water introduced into the pool, either directly or to the recirculation system, shall be supplied through an air gap (Minnesota Plumbing Code, parts 4715.2000 to 4715.2170). When such connections are not possible, the supply shall be protected by a suitable backflow preventer (Minnesota Plumbing Code, parts 4715.2000 to 4715.2170) installed on the discharge side of the last control to the fixture, device, or appurtenance.

The pumps, filter, disinfectant and chemical feeders, and related appurtenances shall be kept in operation at all times during the swimming season unless approved by the commissioner of health.

4717.7000 VARIANCE REQUEST.

Subpart 1. **Request.** A party may ask the commissioner of health to grant a variance from the following rules:

A. clean indoor air, parts 4620.0100 to 4620.1500, except part 4620.0300;

B. formaldehyde in housing, part 4620.1800;

C. asbestos abatement, part 4620.3500, subpart 4, item B, and part 4620.3700, subpart 3, item B, first sentence;

D. lodging establishments, parts 4625.0400 to 4625.0600; 4625.0900; 4625.1200 to 4625.1600; 4625.2000, except the last sentence; and 4625.2200;

E. food and beverage establishments, parts 4625.2901 to 4625.7801, except parts 4625.3601; 4625.3801, subpart 1; 4625.3901, subpart 3; 4625.4101, subpart 1; 4625.4301; 4625.4401; 4625.4601; 4625.5000; 4625.5101, subpart 7; 4625.5601; 4625.5701; 4625.6101, subparts 3 and 7; 4625.6601; 4625.6701; 4625.7101, subpart 7; 4625.7601; and 4625.7701;

F. manufactured home parks and recreational camping areas, parts 4630.0400 and 4630.0900 to 4630.1700;

G. children's camps, parts 4630.2300 to 4630.4700;

H. migrant labor camps, parts 4630.5000 to 4630.6500;

I. roller towels, part 4635.0200;

J. enclosed sports arenas, parts 4635.1100 to 4635.2000, except part 4635.1500;

K. water conditioning contractors and installers, parts 4715.5000 to 4715.6000;

L. public swimming pools, parts 4717.0100 to 4717.3900;

M. water haulers, parts 4720.4000 to 4720.4600;

N. wells and borings, parts 4725.0100 to 4725.7600;

O. explorers and exploratory borings, parts 4727.0100 to 4727.1300; and

P. ionizing radiation, parts 4730.0100 to 4730.3610, except parts 4730.0400 and 4730.0600.

Subp. 2. **Procedures for requesting a variance.** The procedures in this subpart apply to a request for a variance of the rules specified in subpart 1. Additional procedures may be specified in the rules listed in subpart 1 which also must be complied with. The party requesting the variance must submit the variance request in writing to the commissioner of health along with any applicable fee. A request must contain:

A. the specific language in the rule or rules from which the variance is requested;

B. the reasons why the rule cannot be met;

C. the alternative measures that will be taken to assure a comparable degree of protection to health or the environment if a variance is granted;

D. the length of time for which the variance is requested;

E. a statement that the party applying for the variance will comply with the terms of the variance, if granted; and

F. other relevant information the commissioner determines necessary to properly evaluate the request for the variance.

Subp. 3. **Applicant for a variance.** The applicant for a variance must be the party to whom the rule specified in subpart 1 applies.

4717.7010 CRITERIA FOR DECISION; CONDITIONS.

Subpart 1. **Criteria for granting a variance.** The commissioner may grant a variance if:

A. the variance was requested in a manner prescribed by part 4717.7000;

B. the variance will have no potential adverse effect on public health, safety, or the environment;

C. the alternative measures to be taken, if any, are equivalent to or superior to those prescribed in the rule;

D. strict compliance with the rule will impose an undue burden on the applicant; and

E. the variance does not vary a statutory standard.

Subp. 2. **Conditions for variance.** In granting a variance the commissioner may attach conditions the commissioner determines are needed to protect public health, safety, or the environment.

Subp. 3. **Future effect.** A variance shall have only future effect.

4717.7020 NOTIFICATION OF DECISION.

The commissioner of health shall notify the party in writing of the commissioner's decision to grant or deny the variance. If a variance is granted, the notification must specify the period of time for which the variance will be effective and the alternative measures or conditions, if any, the applicant must meet. If a variance is denied, the commissioner of health shall specify the reasons for the denial.

4717.7030 EFFECT OF ALTERNATIVE MEASURES OR CONDITIONS.

Alternative measures or conditions attached to a variance have the force and effect of the applicable rule. If the party violates the alternative measures or conditions attached to the variance, the party is subject to the enforcement actions and penalties provided in the applicable law or rule. The party to whom a variance has been issued must notify the commissioner of health in writing within 30 days of any material change in the

conditions upon which the variance was granted.

4717.7040 RENEWAL OF VARIANCE.

A request for the renewal of a variance must be submitted to the commissioner of health in writing 30 days before its expiration date. Renewal requests must contain the information specified in part 4717.7000, subpart 2. The commissioner shall renew a variance if the party continues to satisfy the criteria contained in part 4717.7010 and demonstrates compliance with the alternative measures or conditions imposed at the time the original variance was approved. This provision does not apply if there has been any material change in the conditions upon which the variance was granted.

4717.7050 DENIAL, REVOCATION, OR REFUSAL TO RENEW; APPEALS.

Subpart 1. **Action.** The commissioner shall deny, revoke, or refuse to renew a variance if the commissioner determines that the criteria in part 4717.7010 are not met.

Subp. 2. **Appeal procedure.** A party may appeal the denial, revocation, or refusal to renew a variance by requesting, in writing, a contested case hearing under the Administrative Procedure Act, Minnesota Statutes, chapter 14, within 30 days of receipt of the notice to deny, revoke, or refuse to renew the variance.

4725.0410 VARIANCE.

Subpart 1. **General.** The commissioner shall grant a variance to any provision of this chapter according to the procedures and criteria specified in parts 4717.7000 to 4717.7050. The variance request must be accompanied by the fee specified in Minnesota Statutes, section 103I.101, subdivision 6.

Subp. 2. **Additional standards for construction, repair, or sealing variance requests.** In addition to subpart 1, a request to vary a construction, repair, or sealing provision related to wells or borings in parts 4725.1860 and 4725.2300 to 4725.7600 must also include:

A. the location of the well or boring in terms of

township, range, and four-quarter sections;

B. the unique number, if assigned;

C. the name, address, and telephone number of the contractor doing work, the property owner, and the well owner;

D. a scaled map showing the location of the well or boring in relation to all property lines, structures, utilities, and contamination sources cited in part 4725.2000;

E. the proposed depth of the well or boring;

F. the casing type, its diameter, and its depth;

G. a description of the method of construction, grout materials, and method of emplacement;

H. a description of the anticipated geologic conditions; and

I. the depth to water, pumping rate, number of persons served by the well, and a description of the use of the well.

Subp. 3. **Additional standards for variance request from isolation distance.** In addition to the information in subparts 1 and 2, a variance request to parts 4725.1900 to 4725.2200 must include:

A. information on special construction methods or precautions proposed to prevent contamination of the well, boring, or groundwater;

B. a description of the age, design, size, and type of construction of any existing or potential contamination source as specified in part 4725.2000;

C. any testing, inspection, or certification data and the name and address of the person supplying the data;

D. information on soil type from a soil survey, percolation test, or soil boring report; and

E. a copy of any review of contamination sources done by a local or state unit of government under other applicable regulations.

4730.0850 VARIANCE TO RULES RELATING TO IONIZING RADIATION.

The commissioner shall grant a variance to parts 4730.0100

APPROVED AS TO LEGALITY

December 20, 1990

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BY Charlene H. Hatcher
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED

DEC 21 1990

Joan Anderson Growe
Secretary of State

11:05 A.M.

Comment period stated in Notice of Intent = Nov 28, 1970

Stat Auth 14.05, subd 4
Unless otherwise provided by law, an agency may grant a variance to a rule. Before an agency grants a variance it shall adopt rules setting forth procedures and standards by which variances shall be granted and denied. ...
This subdivision shall not constitute authority for an agency to grant variances to statutory standards.

Page 5 of rules where is 6120.3700 subpart 3 item B line 32

Rules

P7 lines 30-35 20-26 no limit when the commissioner must grant or deny a variance

P8 lines 6-8 party is subject to the enforcement actions and penalties provided in the applicable law or rule. what applicable law or penalties

12-14-90

Called Jane Nelson. I asked Jane about the Jan 30, 1990 letter from the Association of Minnesota Counties. Jane said she called Mulder and this letter. Mulder did not have any information as to why he felt it would impact counties $100,000 over 2 years. Jane said she ~~could not~~ did not think this would impact ~~counties~~ public entities over $100,000. I agree with Jane

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 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.

STATE OF MINNESOTA

DEPARTMENT OF HEALTH

In the Matter of the Proposed Rules and Amendments to Adopted Rules of the Minnesota Department of Health Governing Variances to Environmental Health Rules	**NOTICE OF INTENT TO ADOPT RULES WITHOUT A PUBLIC HEARING, NOTICE OF INTENT TO ADOPT RULES WITH A PUBLIC HEARING IF 25 OR MORE PERSONS REQUEST A HEARING, AND NOTICE OF INTENT TO CANCEL HEARING ON THE PROPOSED RULES IF FEWER THAN 25 PERSONS REQUEST A HEARING**

I.

EXPLANATION OF ALTERNATIVE NOTICES

The Minnesota Department of Health (hereinafter "Department") hereby proposes to adopt rules without a public hearing under the noncontroversial rulemaking procedure of Minnesota Statutes, sections 14.22 to 14.28. However, if 25 or more persons request a hearing on the proposed rules, one will be held according to Minnesota Statutes, section 14.25. To expedite the rulemaking process should that occur, the Department is at the same time giving notice of hearing on the proposed rules according to Minnesota Statutes, sections 14.131 to 14.20. The hearing on the proposed rules will be cancelled if 25 or more persons do not request that one be held. With the comment period closing on November 28, 1990, there will be seven days before the scheduled hearing date. This seven-day period will give interested persons time to contact the Department to find out whether the hearing will be cancelled.

II.

NOTICE OF INTENT TO ADOPT PROPOSED RULES WITHOUT A PUBLIC HEARING

NOTICE IS HEREBY GIVEN that the Minnesota Department of Health (hereinafter "Department") proposes to adopt the above-captioned rules without a public hearing unless 25 or more persons submit written requests for a public hearing with respect to the proposed rules. The Department has determined that the proposed rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minnesota Statutes, sections 14.22 to 14.28.

Interested persons shall have 30 days from the date this notice is published in the State Register to submit comments in support of or in opposition to the proposed rules. The 30 days will expire on November 28, 1990. Comment is encouraged. Each comment should identify the portions of the proposed rules being addressed, the reason for the comment, and any change proposed to the rules by the commentor. The proposed rules may be modified if the modifications are supported by the data and views submitted to the Department and do not result in a substantial change in the proposed language.

In addition to submitting comments, interested persons may request, in writing, during the 30-day comment period that a hearing be held on the proposed rules. Any person requesting a hearing should state his or her name, address, and telephone number and is encouraged to identify the portions of the proposed rules addressed, the reason for the request, and any changes the commentor wants made to the proposed rules. If a person desires that a hearing be held on only a portion of the proposed rules, it is requested that the Department be informed of the specific portion of the rules on which a hearing is being requested at the time that the hearing request is made. This will enable the Department to limit the hearing, if one is held, to the specific issues of concern. A public hearing will be held only if 25 or more persons submit in writing requests for a hearing on the

proposed amendments or a portion thereof by November 28, 1990, thus necessitating that one be held with respect to the proposed rules. If a hearing is required, it will be held in accordance with the provisions of Minnesota Statutes, sections 14.131 to 14.20 and the hearing notice provided in section III below.

Comments or written requests for a public hearing should be submitted to:

Jane A. Nelson, Rules Coordinator
Division of Environmental Health
Minnesota Department of Health
925 Southeast Delaware Street
P.O. Box 59040
Minneapolis, Minnesota 55459-0040
(612) 627-5038

The statutory authority of the Department to adopt the proposed rules is contained in Minnesota Statutes, section 14.05, subdivision 4.

The proposed rules are published immediately following this notice in the State Register on October 29, 1990, and a free copy of the rules may be obtained from the Department by writing or telephoning Jane A. Nelson at the address or telephone number listed above.

The proposed rules include provisions relating to the criteria and procedures for requesting and granting a variance to rules administered by the Environmental Health Division. Part 4717.7000 specifies what rules shall be subject to variance. Parts 4717.7010 to 4717.7050 specify the procedures for requesting a variance; the criteria and conditions to be considered when reviewing a variance; notification of the decision; the effect of alternative measures or conditions; and provisions for renewal, denial, revocation, and appeal. Reference to the general standards are amended into division rules. Language within adopted division rules that is not consistent with the proposed provisions in parts 4717.7000 to 4717.7050 is deleted. A copy of the proposed rules are attached to this notice as mailed.

A statement of need and reasonableness that describes the need for and reasonableness of each provision of the proposed

rules and identifies the data and information relied upon to support the proposed rules has been prepared and may be obtained from the Department by writing or telephoning Jane A. Nelson at the address or telephone number listed above.

(9) After the close of the comment period on the proposed rules, if no hearing is required, the Department will submit to the Attorney General the proposed rules and notice as published, the rules as proposed for adoption, any written comments received by the Department, the statement of need and reasonableness, and a statement explaining any modifications to the proposed rules. The Attorney General will approve or disapprove the rules as to their legality and their form, including the issue of substantial change and determine whether the Department has the authority to adopt the rules and whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rules. The Department will give notice to all persons who request to be informed that these materials have been submitted to the Attorney General. Persons who wish to be advised of the submission of these materials to the Attorney General should submit a written request to Jane A. Nelson at the address listed above. If the proposed rule has been modified, the notice will also state that fact and will state that a free copy of the proposed rule, as modified, will be available upon request from the Department.

(13) LOCAL GOVERNMENT CONSIDERATIONS

The Department's evaluation of the impact of the proposed rules on the expenditure of public monies by local public bodies is addressed in the statement of need and reasonableness. There will be no direct cost to local units of government resulting from these proposed rules.

AGRICULTURAL LAND

(13) The proposed rule amendments will not have an impact on agricultural land; therefore, no further information need be provided under Minnesota Statutes, section 14.11.

SMALL BUSINESS CONSIDERATIONS

(14) The Department is subject to Minnesota Statutes, section 14.115 regarding small business considerations in rulemaking. The Department's evaluation of the applicability of the methods contained in Minnesota Statutes, section 14.115, subdivision 2, for reducing the impact of the proposed rules is addressed in the statement of need and reasonableness.

III.

NOTICE OF INTENT TO ADOPT RULES WITH A PUBLIC HEARING IF 25 OR MORE PERSONS REQUEST A HEARING ON THE PROPOSED RULES

PLEASE NOTE THAT IF 25 OR MORE PERSONS SUBMIT WRITTEN REQUESTS FOR A PUBLIC HEARING ON THE PROPOSED RULES WITHIN THE 30-DAY COMMENT PERIOD PURSUANT TO THE NOTICE GIVEN IN PART II ABOVE, A HEARING WILL BE HELD ON DECEMBER 6, 1990, IN ACCORDANCE WITH THE FOLLOWING NOTICE OF PUBLIC HEARING.

NOTICE IS HEREBY GIVEN that a public hearing in the above-captioned matter will be held under Minnesota Statutes, sections 14.131 to 14.20, in Room 500 North, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota, on December 6, 1990, commencing at 9:00 a.m. The hearing will continue, if necessary, at additional times and places determined during the hearing by the Administrative Law Judge.

All interested or affected persons, including representatives of associations or other interested groups, will have an opportunity to participate. Such persons may present their views either orally at the hearing or in writing at any time prior to the close of the hearing record. All evidence presented should be pertinent to the matter at hand. Written material not submitted at the time of hearing which is to be included in the hearing record may be mailed to Peter C. Erickson, Administrative Law Judge, Office of Administrative Hearings, 500 Flour Exchange Building, 310 Fourth Avenue South, Minneapolis, Minnesota 55415, telephone (612) 341-7606.

Unless a longer period not to exceed 20 calendar days is ordered by the administrative law judge at the hearing, the hearing record will remain open for the inclusion of written material for five working days after the hearing ends. Written material received during this period will be available for review at the Office of Administrative Hearings. The Department and interested persons may respond in writing within three business days after the submission period ends to any new information submitted. No additional evidence may be submitted during the three-day period. This rule hearing procedure is governed by Minnesota Statutes, sections 14.131 to 14.20 and by Minnesota Rules, parts 1400.0200 to 1400.1200. Questions about procedure may be directed to the administrative law judge.

The statutory authority for the Department to adopt the proposed rules is contained in Minnesota Statutes, section 14.05, subdivision 4.

The proposed rules are published immediately following this notice in the State Register on October 29, 1990, and a free copy of the rule amendments may be obtained from the Department by writing or telephoning Jane A. Nelson at the address and telephone number listed above in Part II of this notice.

The proposed rules include provisions relating to the criteria and procedures for requesting and granting a variance to rules administered by the Environmental Health Division. Part 4717.7000 specifies what rules shall be subject to variance. Parts 4717.7010 to 4717.7050 specify the procedures for requesting a variance; the criteria and conditions to be considered when reviewing a variance; notification of the decision; the effect of alternative measures or conditions; and provisions for renewal, denial, revocation, and appeal. Reference to the general standards are amended into division rules. Language within adopted division rules that is not consistent with the proposed provision in parts 4717.7000 to 4717.7050 is deleted. A copy of the proposed rules are attached to this notice as mailed.

The proposed rules may be modified as a result of the rule hearing process. Persons who are potentially affected in any manner by the substance of the proposed rules are therefore advised to participate in the process.

Minnesota Statutes, Chapter 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minnesota Statutes, section 10A.01, subdivision 11 as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 625 North Robert Street, St. Paul, Minnesota 55101-2520, telephone: (612) 296-5148.

Notice is hereby given that a statement of need and reasonableness is now available for review at the Department and at the Office of Administrative Hearings. This statement of need and reasonableness includes a summary of all the evidence which the Department anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rules. Copies of the statement of need and reasonableness may be reviewed at the Department or the Office of Administrative Hearings and copies may be obtained from the Office of Administrative Hearings at the cost of reproduction.

Please note that any person may request notification of the date on which the administrative law judge's report will be available, after which date the Department may not take any final action on the proposed rules for a period of five working days.

If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the administrative law judge. Any person may request notification of the date on which the rules were adopted and filed with the Secretary of State. The notice must be mailed on the same day that the rules are filed. If you want to be so notified, you may so indicate at the hearing or send a request in writing to the Department at any time prior to the filing of the rules with the Secretary of State.

LOCAL GOVERNMENT CONSIDERATIONS

The Department's evaluation of the impact of the proposed rules on the expenditure of public monies by local public bodies is addressed in the statement of need and reasonableness. There will be no direct cost to local units of government resulting from these proposed rules.

AGRICULTURAL LAND

The proposed rule amendments will not have an impact on agricultural land; therefore, no further information need to be provided under Minnesota Statutes, section 14.11.

SMALL BUSINESS CONSIDERATIONS

The Department is subject to Minnesota Statutes, section 14.115, regarding small business considerations in rulemaking. The Department's evaluation of the applicability of the methods contained in Minnesota Statutes, section 14.115, subdivision 2, for reducing the impact of the proposed rules is addressed in the statement of need and reasonableness.

IV.

NOTICE OF INTENT TO CANCEL HEARING ON THE PROPOSED RULES IF FEWER THAN 25 PERSONS REQUEST A HEARING ON THE PROPOSED RULES

PLEASE NOTE THAT THE HEARING, NOTICE OF WHICH IS GIVEN IN PART III ABOVE, WILL BE CANCELLED ON THE PROPOSED RULES IF FEWER THAN 25 PERSONS REQUEST A HEARING ON THE PROPOSED RULES IN RESPONSE TO THE NOTICE GIVEN IN PART II ABOVE.

To be informed whether a hearing noticed in Part III above will be held, please call or write Jane A. Nelson at the address or telephone number listed above before November 28, 1990, and leave your name, address, and telephone number. You will notified after November 28, 1990, if the hearing has been cancelled. You may also call Jane A. Nelson at (612) 627-5038 after November 28, 1990, for oral confirmation regarding the scheduled hearing.

Dated: October 11, 1990

Sister Mary Madonna Ashton

SISTER MARY MADONNA ASHTON
COMMISSIONER OF HEALTH

SF-00006-05 (4/86)

DEPARTMENT : Health

STATE OF MINNESOTA

Office Memorandum

DATE : December 10, 1990

TO : Patricia Nolte, Legal Assistant
Public Finance Division
Capitol Office Building

FROM : Jane A. Nelson, Rules Coordinator
Environmental Health Division

PHONE : 627-5038

SUBJECT : Review of a Rule Adopted Without a Public Hearing Governing Variances to Environmental Health Rules

Enclosed are the documents required to be submitted under Minnesota Rules, part 2010.03400 for your review of a rule adopted without a public hearing.

Official documents in this submittal include:

A. A copy or photocopy of the notice of solicitation of outside information or opinions as published in the State Register.

B. A copy of the proposed rule with a certificate of approval as to form by the Revisor of Statutes attached.

C. The notice of intent to adopt a rule without a public hearing as mailed.

D. The statement of need and reasonableness in support of the proposed rule complying with part 2010.0700.

E. Notice of mailing the Statement of Need and Reasonableness to the Legislative Commission to Review Administrative Rules.

F. The affidavit of mailing the notice of intent to adopt a rule without a public hearing. The affidavit states that the mailing list maintained by the Department pursuant to Minnesota Statutes, section 14.14 and 14.22 is accurate, complete, and current and that the notice of intent to adopt the rule was mailed to all persons and groups whose names appear on the list.

G. A copy or photocopy of the notice of intent to adopt the rule without a public hearing as published in the State Register.

H. Four copies of the rule as adopted. Any modification made to the proposed rule is reflected on the rule as adopted and is approved as to form by the Revisor of Statutes.

I. The Findings of Fact, Conclusions, and Order Adopting the Rule.

J. All written requests, submissions, or comment on the rule received by the Department except requests solely for copies of the rule or for the statement of need and reasonableness.

K. The Declaration of Counsel of the Attorney General-Health.

No requests to be notified of submittal of the rule to the Attorney General were received.

If you have any questions on this submittal, please call me at 627-5038.

JAN:mq

SF-00006-05 (4/86)

DEPARTMENT : Health

STATE OF MINNESOTA

Office Memorandum

DATE : December 10, 1990

TO : Paul Zerby
Special Assistant to the Attorney General

RECEIVED
DEC 10 1990
Office of the Attorney General
Government Services Section
Capitol Office Bldg. & Suite 500
525 Park Street
St. Paul, MN 55103

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

PHONE : 627-5038

SUBJECT : Submission of Proposed Permanent Rules of the Minnesota Department of Health Governing Variances to Environmental Health Rules; Declaration of Counsel Review

The proposed rules governing variances to environmental health rules are ready to submit to the Attorney General-Administration.

Contained in this folder are the cover memo for submission to the Attorney General and the necessary rule documents.

Please review, sign the Declaration of Counsel which is the last document, and deliver to the Attorney General-Administration. If you need a copy of the declaration for your records, please make one but keep the original with the rule record.

If you have any questions, do not hesitate to call. Please advise me when you have signed the declaration and the date the record is submitted to the Attorney General-Administration.

JAN:mq

Rec 12-11-90

Subd. 3. CONTESTED CASE; REPORT. The hearing and all matters after the hearing are a contested case under chapter 14. Within 45 days from the commencement of the hearing and within 15 days of the completion of the hearing the administrative law judge shall submit a report to the commissioner of commerce. The parties, or the administrative law judge, if the parties cannot agree, shall adjust all time requirements under the contested case procedure to conform with the 45-day requirement.

Subd. 4. DECISION. The commissioner shall make a decision within ten days of the receipt of the administrative law judge's report.

Subd. 5. WAIVER OR MODIFICATION. If all parties to the proceeding agree, any of the requirements of this section may be waived or modified.

Subd. 6. CASE PRESENTATION. The department of commerce, upon request by small businesses as defined by section 14.115, subdivision 1, shall assist small businesses in any specific class requesting continuation of coverage beyond the 180-day period, in coordinating the class and presenting the case in the contested hearing.

Environmental Quality Board

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rules Governing Pipeline Routing

Notice is hereby given that the Minnesota Environmental Quality Board is seeking information or opinions from sources outside the Minnesota Environmental Quality Board in preparing to propose the adoption of rules for pipeline routing. The adoption of rules is authorized by *Minnesota Statutes*, section 116I.015 subd. 3 (Supp. 1987), which requires the Minnesota Environmental Quality Board to adopt rules governing the routing of pipelines.

The Minnesota Environmental Quality Board requests information and opinions concerning the subject matter of the rules. Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to: Larry B. Hartman, 380 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155. Oral statements will be received during regular business hours over the telephone at 612-296-5089 and in person at the above address.

All statements of information and opinions shall be accepted until 4:30 p.m., December 18, 1987. Any written material received by the Minnesota Environmental Quality Board shall become part of the rulemaking record to be submitted to the attorney general or administrative law judge in the event that the rule is adopted.

Dated: 2 November 1987

John C. Ditmore, Chairman
Minnesota Environmental Quality Board

Department of Health

Division of Environmental Health

Notice of Intent to Solicit Outside Opinion on Various Proposed Rules

Notice is hereby given that the State Department of Health is seeking information or opinions from sources outside the agency in preparing to propose the adoption or amendment of the rules listed below.

Subject of Rule	Statutory Authority	Contact Person
Procedure for Variances (New Rule)	*Minnesota Statutes*, § 144.05	P. Bouchard 612/623-5331
Food Service Establishments (*Minnesota Rules* 4625.2400-4625.5000)	*Minnesota Statutes*, Chap. 157	M. F. Mitchell 612/623-5341
Children's Camps (*Minnesota Rules* 4630.2300-4630.4700)	*Minnesota Statutes*, § 144.74	C. B. Schneider 612/623-5335
Enclosed Sports Arenas (*Minnesota Rules* 4635.1100-4635.2000)	*Minnesota Statutes*, § 144.12	M. Thompson 612/623-5336
Water Wells (*Minnesota Rules*, Chap. 4725	*Minnesota Statutes*, Chap. 156A	J. Nye 612/623-5339
Formaldehyde (*Minnesota Rules* 4620.1600-4620.2100)	*Minnesota Statutes*, § 144.495	L. Oatman 612/623-5219

Sources of Radiation (*Minnesota Rules*, Chap. 4730)	*Minnesota Statutes*, § 144.121	W. Breitenstein 612/623-5346

The State Department of Health requests information and opinions concerning the subject matter of these rules. Interested persons or groups may submit data or views on the rule of concern in writing or orally. Written statements should be addressed to the contact person identified above for the rule in question, and mailed to the Minnesota Department of Health, Division of Environmental Health, 717 Delaware Street S.E., Minneapolis, Minnesota 55440. Oral statements will be received during regular business hours over the telephone at the number of the appropriate contact person, and in person at the above address.

All statements of information and opinion shall be accepted until January 1, 1988. Any written material received by the State Department of Health shall become part of the rulemaking record to be submitted to the Attorney General or Administrative Law Judge in the event that the rule is adopted.

Dated: 28 October 1987

Raymond W. Thron, Ph.D., P.E., Director
Division of Environmental Health

Sentencing Guidelines Commission

Notice of Public Hearing to Consider Modifications to the Sentencing Guidelines

The Minnesota Sentencing Guidelines Commission will hold a public hearing on Thursday, December 10, 1987, at 6:00 p.m. in Hearing Room 5, Ground Floor, State Office Building, 100 Constitution Ave., St. Paul, Minnesota. The public hearing is to consider proposed modifications to the sentencing guidelines regarding the presumptive sentence for offenders to the right of the dispositional line at severity levels I through VI, an additional aggravating factor for offenders with extensive criminal history, and the ranking for Sale of Cocaine and Sale of Heroin when the amount of drug involved is at least 10 grams over a 90 day period.

Additional copies of the proposed modifications that include proposed modifications to the Commentary are available, free of charge, by contacting the Minnesota Sentencing Guidelines Commission at 51 State Office Building, St. Paul, MN 55155, or by calling (612) 296-0144.

All interested persons are encouraged to attend the hearing and offer comments. Persons wishing to speak may register in advance by contacting the Commission staff at the above address/telephone number.

The Commission will hold the record open for five days after the public hearing to accept additional written comment on the proposed modifications. On December 15, 1987, the Commission will meet in Room 10, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota to formally adopt or reject the proposed modifications. If adopted, the modifications as indicated will become effective December 16, 1987. Those requiring legislative review will become effective August 1, 1988 absent legislative action to the contrary.

Proposed Modifications Effective December 16, 1987

Proposed Change to Section V. **Offense Severity Reference Table** are as follows:

VII	Sale of Cocaine—152.15, subd. 1(1), (i), (ii), (v), & (vi) Sale of Heroin—152.15, subd. 1(1) (ii), (v) & (vi)

Proposed Modifications Effective August 1, 1988 Barring Legislative Action to the Contrary

Proposed Change to Section II.C. (Presumptive Sentence)

C. Presumptive Sentence: The offense of conviction determines the appropriate severity level on the vertical axis. The offender's criminal history score, computed according to section B above, determines the appropriate location on the horizontal axis. The presumptive fixed sentence for a felony conviction is found in the Sentencing Guidelines Grid cell at the intersection of the column defined by the criminal history score and the row defined by the offense severity level. The offenses within the Sentencing Guidelines Grid are presumptive with respect to the duration of the sentence and whether imposition or execution of the felony sentence should be stayed.

The line on the Sentencing Guidelines Grid demarcates those cases for whom the presumptive sentence is executed from those for whom the presumptive sentence is stayed. ~~For cases contained in cells below and to the right of the line, the sentence should be executed.~~ For cases contained in cells above and to the left of the line, the sentence should be stayed, unless the conviction offense carries a mandatory minimum sentence. For cases contained in cells below and to the right of the line, the sentence should be executed unless any one of the following circumstances exist:

1) the current conviction offense is at severity level I or II and the offender has had less than three prior interventions; or

State of Minnesota

STATE REGISTER

Department of Administration—Print Communications Division

JAN 1990
E.H.



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Official Notices

Pursuant to the provisions of Minnesota Statutes §14.10, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Minnesota Health Care Access Commission

Notice of Meeting of the Health Care Access Commission

The Meeting of the Health Care Access Commission will be held on Thursday, February 1, 1990 from 1:00 to 4:00 p.m. in the State Office Building, Room 500 South.

Department of Health

Division of Environmental Health

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rules Governing Various Subjects

NOTICE IS HEREBY GIVEN that the Minnesota Department of Health is seeking information or opinions from sources outside the department in preparing to propose the adoption of new rules and revision of existing rules governing the subjects listed below. The adoption of the rules is authorized by the statutory provisions listed. The Department of Health requests information and opinions on the subject matter of the rules. Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to the contact person listed at the Minnesota Department of Health, Division of Environmental Health, 717 Delaware Street Southeast, P.O. Box 59040, Minneapolis, Minnesota, 55459-0040. Oral statements will be received during regular business hours over the telephone at the number listed for the particular subject matter and in person at the above address.

All statements of information and opinions will be accepted until the rules are formally proposed for adoption. Any written material received by the Department of Health will become part of the rulemaking record to be submitted to the Office of the Attorney General or the Office of Administrative Hearings in the event that a rule is adopted.

Subject Matter of Rule	Statutory Authority	Contact Person
• Variance Procedures for Environmental Health Rules (New rule)	*Minnesota Statutes*, section 144.05	Jane A. Nelson 612/623-5749
• Lead abatement (Permanent rule)	*Laws 1989*, Chap. 282 Art. 2, sec. 20	Douglas Benson 612/623-5653
• Health Supervision Services in Lodging Establishments	*Minnesota Statutes*, section 157.031, subd. 5	C.B. Schneider 612/623-5337
• Fines for Uncorrected Deficiencies in Food, Beverage and Lodging Establishments; and Manufactured Home Parks and Recreational Camping Areas	*Minnesota Statutes*, section 157.081	C.B. Schneider 612/623-5337
• License Fees, Sewer and Water Standards for Manufactured Home Parks and Recreational Camping Areas	*Minnesota Statutes*, sections 327.14-327.28	C.B. Schneider 612/623-5337
• Children's Camps	*Minnesota Statutes*, section 144.74	C.B. Schneider 612/623-5337

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

• Infectious Waste Generators	*Minnesota Statutes*, section 116.81	Darrell Anderson 612 623-5333
• Health Risk Limits for Groundwater	*Laws 1989*, Chap. 326 Art. 1, sec. 8	David Gray 612 623-5352
• Asbestos (Revision)	*Minnesota Statutes*, sections 326.70-326.82	Wm. Fetzner 612 623-5380
• Public Water Supplies	*Minnesota Statutes*, section 144.383	Richard Clark 612 623-5227
• Wells and Borings at grade wells, casings bore holes, construction	*Minnesota Statutes*, chapter 1031	Ronald Thompson 612 623-5264

Raymond W. Thron, Ph.D., P.E., Director
Division of Environmental Health

Department of Labor and Industry

Workers' Compensation Division

Notice of Solicitation of Outside Information or Opinions in the Matter of the Proposed Amendment of Rules of the Minnesota Department of Labor and Industry Governing Charges for Copies of Medical Records

NOTICE IS HEREBY GIVEN that the Minnesota Department of Labor and Industry, Workers' Compensation Division is seeking information or opinions from sources outside the agency in preparing to propose the amendment of rules governing charges for copies of medical records in workers' compensation cases. The adoption of the rules is authorized by *Minnesota Statutes* § 176.135, subd. 7 (Supp. 1989) and § 176.83 (1988).

The Minnesota Department of Labor and Industry, Workers' Compensation Division, requests information and opinions concerning the subject matter of these rules. Interested or affected persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to:

Gloria Gebhard
Rehabilitation and Medical Affairs
Department of Labor and Industry
1st Floor, 443 Lafayette Road
St. Paul, Minnesota 55155-4304

Any written material received by the Minnesota Department of Labor and Industry, Workers' Compensation Division, shall become part of the rulemaking record to be submitted to the Attorney General or Administrative Law Judge in the event that the rule is adopted.

Dated: 12 January 1990

Ken Peterson, Commissioner
Department of Labor and Industry

Metropolitan Council

Public Hearing on the Revision of Plan Amendment Guidelines

The Metropolitan and Community Development Committee of the Metropolitan Council will hold a public hearing on the proposed revision of the guidelines it uses for review of plans and plan amendments of local units of government submitted to it pursuant to the Metropolitan Land Planning Act. The hearing will be held on Thursday, February 15, 1990 at 2:00 p.m. in the Council Chambers, Mears Park Centre, 230 E. Fifth St., St. Paul.

All interested persons are encouraged to attend the hearing and offer comments. People may register in advance to speak by calling the Community Outreach Division at 291-6500. Copies of the revised guidelines are available for public inspection at designated libraries throughout the region. For information on the location of these libraries or a free copy of the document, call 291-8140.

Mailed Oct 12

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT : Health

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

PHONE : 627-5038

SUBJECT : Submissioner 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

STATE OF MINNESOTA

MINNESOTA DEPARTMENT OF HEALTH

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

AFFIDAVIT OF MAILING NOTICE OF INTENT TO ADOPT A RULE WITHOUT A PUBLIC HEARING AND NOTICE OF INTENT TO ADOPT A RULE WITH A PUBLIC HEARING IF TWENTY-FIVE OR MORE PERSONS REQUEST A HEARING

Mary Quam, being sworn, says:

That on the 26th day of October, 1990, in the City of Minneapolis, County of Hennepin, State of Minnesota, I mailed the attached Notice of Intent to Adopt a Rule Without a Public Hearing and Notice of Intent to Adopt a Rule With a Public Hearing if Twenty-five or More Persons Request a Hearing by depositing in the State of Minnesota Central Mail System for United States mailing, a copy thereof, with postage prepaid, to all persons and associations on the attached Department list.

Mary Quam
(name)

Clerk Typist III
(title)

Environmental Health
(division)

Subscribed and sworn to before me
this 30th day of October, 1990.

Janice E. Wiehle

JANICE E. WIEHLE
NOTARY PUBLIC-MINNESOTA
ANOKA COUNTY
MY COMMISSION EXPIRES JANUARY 20, 1993

STATE OF MINNESOTA

DEPARTMENT OF HEALTH

In the Matter of the Proposed Rules and Amendments to Adopted Rules of the Minnesota Department of Health Governing Variances to Environmental Health Rules	NOTICE OF INTENT TO ADOPT RULES WITHOUT A PUBLIC HEARING, NOTICE OF INTENT TO ADOPT RULES WITH A PUBLIC HEARING IF 25 OR MORE PERSONS REQUEST A HEARING, AND NOTICE OF INTENT TO CANCEL HEARING ON THE PROPOSED RULES IF FEWER THAN 25 PERSONS REQUEST A HEARING

I.

EXPLANATION OF ALTERNATIVE NOTICES

The Minnesota Department of Health (hereinafter "Department") hereby proposes to adopt rules without a public hearing under the noncontroversial rulemaking procedure of Minnesota Statutes, sections 14.22 to 14.28. However, if 25 or more persons request a hearing on the proposed rules, one will be held according to Minnesota Statutes, section 14.25. To expedite the rulemaking process should that occur, the Department is at the same time giving notice of hearing on the proposed rules according to Minnesota Statutes, sections 14.131 to 14.20. The hearing on the proposed rules will be cancelled if 25 or more persons do not request that one be held. With the comment period closing on November 28, 1990, there will be seven days before the scheduled hearing date. This seven-day period will give interested persons time to contact the Department to find out whether the hearing will be cancelled.

II.

NOTICE OF INTENT TO ADOPT PROPOSED RULES WITHOUT A PUBLIC HEARING

NOTICE IS HEREBY GIVEN that the Minnesota Department of Health (hereinafter "Department") proposes to adopt the above-captioned rules without a public hearing unless 25 or more persons submit written requests for a public hearing with respect to the proposed rules. The Department has determined that the proposed rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minnesota Statutes, sections 14.22 to 14.28.

Interested persons shall have 30 days from the date this notice is published in the State Register to submit comments in support of or in opposition to the proposed rules. The 30 days will expire on November 28, 1990. Comment is encouraged. Each comment should identify the portions of the proposed rules being addressed, the reason for the comment, and any change proposed to the rules by the commentor. The proposed rules may be modified if the modifications are supported by the data and views submitted to the Department and do not result in a substantial change in the proposed language.

In addition to submitting comments, interested persons may request, in writing, during the 30-day comment period that a hearing be held on the proposed rules. Any person requesting a hearing should state his or her name, address, and telephone number and is encouraged to identify the portions of the proposed rules addressed, the reason for the request, and any changes the commentor wants made to the proposed rules. If a person desires that a hearing be held on only a portion of the proposed rules, it is requested that the Department be informed of the specific portion of the rules on which a hearing is being requested at the time that the hearing request is made. This will enable the Department to limit the hearing, if one is held, to the specific issues of concern. A public hearing will be held only if 25 or more persons submit in writing requests for a hearing on the

proposed amendments or a portion thereof by November 28, 1990, thus necessitating that one be held with respect to the proposed rules. If a hearing is required, it will be held in accordance with the provisions of Minnesota Statutes, sections 14.131 to 14.20 and the hearing notice provided in section III below.

Comments or written requests for a public hearing should be submitted to:

Jane A. Nelson, Rules Coordinator
Division of Environmental Health
Minnesota Department of Health
925 Southeast Delaware Street
P.O. Box 59040
Minneapolis, Minnesota 55459-0040
(612) 627-5038

The statutory authority of the Department to adopt the proposed rules is contained in Minnesota Statutes, section 14.05, subdivision 4.

The proposed rules are published immediately following this notice in the State Register on October 29, 1990, and a free copy of the rules may be obtained from the Department by writing or telephoning Jane A. Nelson at the address or telephone number listed above.

The proposed rules include provisions relating to the criteria and procedures for requesting and granting a variance to rules administered by the Environmental Health Division. Part 4717.7000 specifies what rules shall be subject to variance. Parts 4717.7010 to 4717.7050 specify the procedures for requesting a variance; the criteria and conditions to be considered when reviewing a variance; notification of the decision; the effect of alternative measures or conditions; and provisions for renewal, denial, revocation, and appeal. Reference to the general standards are amended into division rules. Language within adopted division rules that is not consistent with the proposed provisions in parts 4717.7000 to 4717.7050 is deleted. A copy of the proposed rules are attached to this notice as mailed.

A statement of need and reasonableness that describes the need for and reasonableness of each provision of the proposed

rules and identifies the data and information relied upon to support the proposed rules has been prepared and may be obtained from the Department by writing or telephoning Jane A. Nelson at the address or telephone number listed above.

After the close of the comment period on the proposed rules, if no hearing is required, the Department will submit to the Attorney General the proposed rules and notice as published, the rules as proposed for adoption, any written comments received by the Department, the statement of need and reasonableness, and a statement explaining any modifications to the proposed rules. The Attorney General will approve or disapprove the rules as to their legality and their form, including the issue of substantial change and determine whether the Department has the authority to adopt the rules and whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rules. The Department will give notice to all persons who request to be informed that these materials have been submitted to the Attorney General. Persons who wish to be advised of the submission of these materials to the Attorney General should submit a written request to Jane A. Nelson at the address listed above. If the proposed rule has been modified, the notice will also state that fact and will state that a free copy of the proposed rule, as modified, will be available upon request from the Department.

LOCAL GOVERNMENT CONSIDERATIONS

The Department's evaluation of the impact of the proposed rules on the expenditure of public monies by local public bodies is addressed in the statement of need and reasonableness. There will be no direct cost to local units of government resulting from these proposed rules.

AGRICULTURAL LAND

The proposed rule amendments will not have an impact on agricultural land; therefore, no further information need be provided under Minnesota Statutes, section 14.11.

SMALL BUSINESS CONSIDERATIONS

The Department is subject to Minnesota Statutes, section 14.115 regarding small business considerations in rulemaking. The Department's evaluation of the applicability of the methods contained in Minnesota Statutes, section 14.115, subdivision 2, for reducing the impact of the proposed rules is addressed in the statement of need and reasonableness.

III.

NOTICE OF INTENT TO ADOPT RULES WITH A PUBLIC HEARING IF 25 OR MORE PERSONS REQUEST A HEARING ON THE PROPOSED RULES

PLEASE NOTE THAT IF 25 OR MORE PERSONS SUBMIT WRITTEN REQUESTS FOR A PUBLIC HEARING ON THE PROPOSED RULES WITHIN THE 30-DAY COMMENT PERIOD PURSUANT TO THE NOTICE GIVEN IN PART II ABOVE, A HEARING WILL BE HELD ON DECEMBER 6, 1990, IN ACCORDANCE WITH THE FOLLOWING NOTICE OF PUBLIC HEARING.

NOTICE IS HEREBY GIVEN that a public hearing in the above-captioned matter will be held under Minnesota Statutes, sections 14.131 to 14.20, in Room 500 North, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota, on December 6, 1990, commencing at 9:00 a.m. The hearing will continue, if necessary, at additional times and places determined during the hearing by the Administrative Law Judge.

All interested or affected persons, including representatives of associations or other interested groups, will have an opportunity to participate. Such persons may present their views either orally at the hearing or in writing at any time prior to the close of the hearing record. All evidence presented should be pertinent to the matter at hand. Written material not submitted at the time of hearing which is to be included in the hearing record may be mailed to Peter C. Erickson, Administrative Law Judge, Office of Administrative Hearings, 500 Flour Exchange Building, 310 Fourth Avenue South, Minneapolis, Minnesota 55415, telephone (612) 341-7606.

Unless a longer period not to exceed 20 calendar days is ordered by the administrative law judge at the hearing, the hearing record will remain open for the inclusion of written material for five working days after the hearing ends. Written material received during this period will be available for review at the Office of Administrative Hearings. The Department and interested persons may respond in writing within three business days after the submission period ends to any new information submitted. No additional evidence may be submitted during the three-day period. This rule hearing procedure is governed by Minnesota Statutes, sections 14.131 to 14.20 and by Minnesota Rules, parts 1400.0200 to 1400.1200. Questions about procedure may be directed to the administrative law judge.

The statutory authority for the Department to adopt the proposed rules is contained in Minnesota Statutes, section 14.05, subdivision 4.

The proposed rules are published immediately following this notice in the State Register on October 29, 1990, and a free copy of the rule amendments may be obtained from the Department by writing or telephoning Jane A. Nelson at the address and telephone number listed above in Part II of this notice.

The proposed rules include provisions relating to the criteria and procedures for requesting and granting a variance to rules administered by the Environmental Health Division. Part 4717.7000 specifies what rules shall be subject to variance. Parts 4717.7010 to 4717.7050 specify the procedures for requesting a variance; the criteria and conditions to be considered when reviewing a variance; notification of the decision; the effect of alternative measures or conditions; and provisions for renewal, denial, revocation, and appeal. Reference to the general standards are amended into division rules. Language within adopted division rules that is not consistent with the proposed provision in parts 4717.7000 to 4717.7050 is deleted. A copy of the proposed rules are attached to this notice as mailed.

The proposed rules may be modified as a result of the rule hearing process. Persons who are potentially affected in any manner by the substance of the proposed rules are therefore advised to participate in the process.

Minnesota Statutes, Chapter 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minnesota Statutes, section 10A.01, subdivision 11 as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 625 North Robert Street, St. Paul, Minnesota 55101-2520, telephone: (612) 296-5148.

Notice is hereby given that a statement of need and reasonableness is now available for review at the Department and at the Office of Administrative Hearings. This statement of need and reasonableness includes a summary of all the evidence which the Department anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rules. Copies of the statement of need and reasonableness may be reviewed at the Department or the Office of Administrative Hearings and copies may be obtained from the Office of Administrative Hearings at the cost of reproduction.

Please note that any person may request notification of the date on which the administrative law judge's report will be available, after which date the Department may not take any final action on the proposed rules for a period of five working days.

If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the administrative law judge. Any person may request notification of the date on which the rules were adopted and filed with the Secretary of State. The notice must be mailed on the same day that the rules are filed. If you want to be so notified, you may so indicate at the hearing or send a request in writing to the Department at any time prior to the filing of the rules with the Secretary of State.

LOCAL GOVERNMENT CONSIDERATIONS

The Department's evaluation of the impact of the proposed rules on the expenditure of public monies by local public bodies is addressed in the statement of need and reasonableness. There will be no direct cost to local units of government resulting from these proposed rules.

AGRICULTURAL LAND

The proposed rule amendments will not have an impact on agricultural land; therefore, no further information need to be provided under Minnesota Statutes, section 14.11.

SMALL BUSINESS CONSIDERATIONS

The Department is subject to Minnesota Statutes, section 14.115, regarding small business considerations in rulemaking. The Department's evaluation of the applicability of the methods contained in Minnesota Statutes, section 14.115, subdivision 2, for reducing the impact of the proposed rules is addressed in the statement of need and reasonableness.

IV.

NOTICE OF INTENT TO CANCEL HEARING ON THE PROPOSED RULES IF FEWER THAN 25 PERSONS REQUEST A HEARING ON THE PROPOSED RULES

PLEASE NOTE THAT THE HEARING, NOTICE OF WHICH IS GIVEN IN PART III ABOVE, WILL BE CANCELLED ON THE PROPOSED RULES IF FEWER THAN 25 PERSONS REQUEST A HEARING ON THE PROPOSED RULES IN RESPONSE TO THE NOTICE GIVEN IN PART II ABOVE.

To be informed whether a hearing noticed in Part III above will be held, please call or write Jane A. Nelson at the address or telephone number listed above before November 28, 1990, and leave your name, address, and telephone number. You will notified after November 28, 1990, if the hearing has been cancelled. You may also call Jane A. Nelson at (612) 627-5038 after November 28, 1990, for oral confirmation regarding the scheduled hearing.

Dated: October 11, 1990

Sr Mary Madonna Ashton

SISTER MARY MADONNA ASHTON
COMMISSIONER OF HEALTH

Department of Health

Proposed Permanent Rules Governing Variances to Environmental Health Rules

Rules as Proposed

4620.1450 VARIANCE TO RULES RELATING TO CLEAN INDOOR AIR.

The commissioner shall grant variances to parts 4620.0100 to 4620.1500, except part 4620.0300, only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4620.1800 MAXIMUM PERMISSIBLE FORMALDEHYDE LEVEL IN HOUSING UNITS.

At the time of sale of a newly constructed housing unit, the ambient indoor air of any habitable room in the unit shall not contain more than 0.4 parts of formaldehyde per million parts of air as measured according to the procedures specified in parts 4620.1900 and 4620.2000. The seller is responsible for assuring that the unit complies with this level.

The installation of urea formaldehyde foam insulation in a housing unit which is not newly constructed shall not cause the indoor level of formaldehyde in any habitable room in the unit to exceed the higher of 0.4 parts per million or the preinstallation level as measured according to the procedures specified in parts 4620.1900 to 4620.2100. The installer of urea formaldehyde foam insulation is responsible for assuring that the installation complies with this level.

The commissioner shall grant a variance to this part only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4620.3500 STANDARDS FOR ASBESTOS RELATED WORK.

[For text of subps 1 to 3, see M.R.]

Subp. 4. **Required procedures for asbestos related work.** Asbestos related work must meet the following minimum criteria.

Approved by Revisor

The criteria do not replace or supersede more stringent standards or contractual agreements.

[For text of item A, see M.R.]

B. Preparation of the work area must meet the following requirements:

(1) Removal, enclosure, or encapsulation of asbestos containing material is a major operation for purposes of compliance with Code of Federal Regulations, title 29, section 1926.58, and must be done, where feasible in industrial facilities, in a negative pressure enclosure with a contiguous decontamination enclosure system. However, for the portion of an asbestos related project that includes removal of less than ten feet of pipe lagging or less than six square feet of asbestos containing material per room, the asbestos abatement contractor may use, as an alternative, the glove bag or mini enclosure procedures in subpart 5. The commissioner may approve ~~exceptions~~ a variance to the procedures specified in this ~~subitem~~ item, on a case by case basis, according to the procedures and criteria in parts 4717.7000 to 4717.7050, 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 gases are present in the area.

[For text of subitems (2) to (9), see M.R.]

[For text of items C to H, see M.R.]

[For text of subp 5, see M.R.]

4625.0900 SPACE REQUIREMENTS.

Every room occupied for sleeping purposes by one person shall contain at least 70 square feet of usable floor space, and every room occupied for sleeping purposes by more than one person shall contain not less than 60 square feet of usable floor space for each occupant thereof. Under no circumstances shall there be provided less than 400 cubic feet of air space per occupant. Beds shall be spaced at least three feet apart when placed side by side. No sleeping quarters shall be

Approved by Revisor _____

provided in any basement having more than half its clear floor to ceiling height below the average grade of the adjoining ground. ~~When strict compliance herewith is impracticable, the commissioner may waive any of the provisions of this part subject to such conditions as may be deemed desirable in the individual case.~~

4625.2355 VARIANCE TO RULES RELATING TO LODGING ESTABLISHMENTS.

The commissioner shall grant a variance to parts 4625.0400 to 4625.0600; 4625.0900; 4625.1200 to 4625.1600; 4625.2000, except the last sentence; and 4625.2200 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4625.2655 VARIANCE TO RULES RELATING TO FOOD AND BEVERAGE ESTABLISHMENTS.

The commissioner shall grant a variance to parts 4625.2901 to 4625.7801, except parts 4625.3601; 4625.3801, subpart 1; 4625.3901, subpart 3; 4625.4101, subpart 1; 4625.4301; 4625.4401; 4625.4601; 4625.5000; 4625.5101, subpart 7; 4625.5601; 4625.5701; 4625.6101, subparts 3 and 7; 4625.6601; 4625.6701; 4625.7101, subpart 7; 4625.7601; and 4625.7701 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.1801 VARIANCE TO RULES RELATING TO MOBILE HOME PARKS AND RECREATIONAL CAMPING AREAS.

The commissioner shall grant a variance to part 4630.0400 and parts 4630.0900 to 4630.1700 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.4750 VARIANCE TO RULES RELATING TO CHILDREN'S CAMPS.

The commissioner shall grant a variance to parts 4630.2300 to 4630.4700 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.6550 VARIANCE TO RULES RELATING TO MIGRANT LABOR CAMPS.

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The commissioner shall grant a variance to parts 4630.5000 to 4630.6500 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4635.0200 ROLLER TOWELS.

In order to prevent the spread of communicable diseases, the use of the roller towels in public places, public conveyances, and public buildings is hereby prohibited, except that continuous towels dispensed from a cabinet which is so constructed as to provide complete separation between the clean and soiled portions of the towel on separate rolls within the cabinet and to provide that the soiled portion is taken up on the soiled towel roll at the same rate the clean portion is withdrawn from the clean roll shall not be within this prohibition. The commissioner shall grant a variance to this part only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4635.2100 VARIANCE TO RULES RELATING TO ENCLOSED SPORTS ARENAS.

The commissioner shall grant variances to parts 4635.1100 to 4635.2000, except part 4635.1500, only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4715.5600 VARIANCE.

If an installation cannot be made in conformance with the Minnesota Plumbing Code (parts 4715.0100 to 4715.2860) or with the provisions contained in parts 4715.5000 to 4715.6000, the water conditioning contractor or installer shall consult with the appropriate plumbing inspector, and obtain a variance from the state rules before the installation may proceed. Such a variance can be granted only if the nonconforming alternative will not create a risk to health. The commissioner shall grant variances to parts 4715.5000 to 4715.6000 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4717.0500 WATER SUPPLY.

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The water supply serving the swimming pool and all plumbing fixtures including drinking fountains, lavatories, and showers shall meet the requirements of the commissioner of health. ~~Where strict compliance with the requirement that the water supply serving the swimming pool be of potable quality is not possible or reasonable, the commissioner of health may grant a variance which does not endanger the health and safety of the users of the pool.~~

All portions of the water distribution system serving the swimming pool and auxiliary facilities shall be protected against backflow. Water introduced into the pool, either directly or to the recirculation system, shall be supplied through an air gap (Minnesota Plumbing Code, parts 4715.2000 to 4715.2170). When such connections are not possible, the supply shall be protected by a suitable backflow preventer (Minnesota Plumbing Code, parts 4715.2000 to 4715.2170) installed on the discharge side of the last control to the fixture, device, or appurtenance.

The pumps, filter, disinfectant and chemical feeders, and related appurtenances shall be kept in operation at all times during the swimming season unless approved by the commissioner of health.

Rules as Proposed (all new material)

4717.7000 VARIANCE REQUEST.

Subpart 1. **Request.** A party may ask the commissioner of health to grant a variance from the following rules:

A. clean indoor air, parts 4620.0100 to 4620.1500, except part 4620.0300;

B. formaldehyde in housing, part 4620.1800;

C. asbestos abatement, part 4620.3500, subpart 4, item B, and part 4620.3700, subpart 3, item B, first sentence;

D. lodging establishments, parts 4625.0400 to 4625.0600; 4625.0900; 4625.1200 to 4625.1600; 4625.2000, except the last sentence; and 4625.2200;

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E. food and beverage establishments, parts 4625.2901 to 4625.7801, except parts 4625.3601; 4625.3801, subpart 1; 4625.3901, subpart 3; 4625.4101, subpart 1; 4625.4301; 4625.4401; 4625.4601; 4625.5000; 4625.5101, subpart 7; 4625.5601; 4625.5701; 4625.6101, subparts 3 and 7; 4625.6601; 4625.6701; 4625.7101, subpart 7; 4625.7601; and 4625.7701;

F. manufactured home parks and recreational camping areas, parts 4630.0400 and 4630.0900 to 4630.1700;

G. children's camps, parts 4630.2300 to 4630.4700;

H. migrant labor camps, parts 4630.5000 to 4630.6500;

I. roller towels, part 4635.0200;

J. enclosed sports arenas, parts 4635.1100 to 4635.2000, except part 4635.1500;

K. water conditioning contractors and installers, parts 4715.5000 to 4715.6000;

L. public swimming pools, parts 4717.0100 to 4717.3900;

M. water haulers, parts 4720.4000 to 4720.4600;

N. wells and borings, parts 4725.0100 to 4725.7600;

O. explorers and exploratory borings, parts 4727.0100 to 4727.1300; and

P. ionizing radiation, parts 4730.0100 to 4730.3610, except parts 4730.0400 and 4730.0600.

Subp. 2. **Procedures for requesting a variance.** The procedures in this subpart apply to a request for a variance of the rules specified in subpart 1. Additional procedures may be specified in the rules listed in subpart 1 which also must be complied with. The party requesting the variance must submit the variance request in writing to the commissioner of health along with any applicable fee. A request must contain:

A. the specific language in the rule or rules from which the variance is requested;

B. the reasons why the rule cannot be met;

C. the alternative measures that will be taken to assure a comparable degree of protection to health or the environment if a variance is granted;

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D. the length of time for which the variance is requested;

E. a statement that the party applying for the variance will comply with the terms of the variance, if granted; and

F. other relevant information the commissioner determines necessary to properly evaluate the request for the variance.

Subp. 3. **Applicant for a variance.** The applicant for a variance must be the party to whom the rule specified in subpart 1 applies.

4717.7010 CRITERIA FOR DECISION; CONDITIONS.

Subpart 1. **Criteria for granting a variance.** The commissioner may grant a variance if:

A. the variance was requested in a manner prescribed by part 4717.7000;

B. the variance will have no potential adverse effect on public health, safety, or the environment;

C. the alternative measures to be taken, if any, are equivalent to or superior to those prescribed in the rule;

D. strict compliance with the rule will impose an undue burden on the applicant; and

E. the variance does not vary a statutory standard.

Subp. 2. **Conditions for variance.** In granting a variance the commissioner may attach conditions the commissioner determines are needed to protect public health, safety, or the environment.

Subp. 3. **Future effect.** A variance shall have only future effect.

4717.7020 NOTIFICATION OF DECISION.

The commissioner of health shall notify the party in writing of the commissioner's decision to grant or deny the variance. If a variance is granted, the notification must specify the period of time for which the variance will be effective and the alternative measures or conditions, if any,

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the applicant must meet. If a variance is denied, the commissioner of health shall specify the reasons for the denial.

4717.7030 EFFECT OF ALTERNATIVE MEASURES OR CONDITIONS.

Alternative measures or conditions attached to a variance have the force and effect of the applicable rule. If the party violates the alternative measures or conditions attached to the variance, the party is subject to the enforcement actions and penalties provided in the applicable law or rule. The party to whom a variance has been issued must notify the commissioner of health in writing within 30 days of any material change in the conditions upon which the variance was granted.

4717.7040 RENEWAL OF VARIANCE.

A request for the renewal of a variance must be submitted to the commissioner of health in writing 30 days before its expiration date. Renewal requests must contain the information specified in part 4717.7000, subpart 2. The commissioner shall renew a variance if the party continues to satisfy the criteria contained in part 4717.7010 and demonstrates compliance with the alternative measures or conditions imposed at the time the original variance was approved. This provision does not apply if there has been any material change in the conditions upon which the variance was granted.

4717.7050 DENIAL, REVOCATION, OR REFUSAL TO RENEW; APPEALS.

Subpart 1. **Action.** The commissioner shall deny, revoke, or refuse to renew a variance if the commissioner determines that the criteria in part 4717.7010 are not met.

Subp. 2. **Appeal procedure.** A party may appeal the denial, revocation, or refusal to renew a variance by requesting, in writing, a contested case hearing under the Administrative Procedure Act, Minnesota Statutes, chapter 14, within 30 days of receipt of the notice to deny, revoke, or refuse to renew the variance.

4725.0410 VARIANCE.

Subpart 1. **General.** The commissioner shall grant a

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variance to any provision of this chapter according to the procedures and criteria specified in parts 4717.7000 to 4717.7050. The variance request must be accompanied by the fee specified in Minnesota Statutes, section 103I.101, subdivision 6.

Subp. 2. **Additional standards for construction, repair, or sealing variance requests.** In addition to subpart 1, a request to vary a construction, repair, or sealing provision related to wells or borings in parts 4725.1860 and 4725.2300 to 4725.7600 must also include:

A. the location of the well or boring in terms of township, range, and four-quarter sections;

B. the unique number, if assigned;

C. the name, address, and telephone number of the contractor doing work, the property owner, and the well owner;

D. a scaled map showing the location of the well or boring in relation to all property lines, structures, utilities, and contamination sources cited in part 4725.2000;

E. the proposed depth of the well or boring;

F. the casing type, its diameter, and its depth;

G. a description of the method of construction, grout materials, and method of emplacement;

H. a description of the anticipated geologic conditions; and

I. the depth to water, pumping rate, number of persons served by the well, and a description of the use of the well.

Subp. 3. **Additional standards for variance request from isolation distance.** In addition to the information in subparts 1 and 2, a variance request to parts 4725.1900 to 4725.2200 must include:

A. information on special construction methods or precautions proposed to prevent contamination of the well, boring, or groundwater;

B. a description of the age, design, size, and type of construction of any existing or potential contamination source as specified in part 4725.2000;

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C. any testing, inspection, or certification data and the name and address of the person supplying the data;

D. information on soil type from a soil survey, percolation test, or soil boring report; and

E. a copy of any review of contamination sources done by a local or state unit of government under other applicable regulations.

4730.0850 VARIANCE TO RULES RELATING TO IONIZING RADIATION.

The commissioner shall grant a variance to parts 4730.0100 to 4730.3610, except parts 4730.0400 and 4730.0600 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

REPEALER. Minnesota Rules, parts 4625.2650; 4630.1800; 4725.0400; and 4727.0300 are repealed.

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Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Governing Variances to Environmental Health Rules

AGENCY: Department of Health

MINNESOTA RULES: Chapters 4620; 4625; 4630; 4635; 4715; 4717; 4725; 4727; and 4730

The attached rules are approved for publication in the State Register

Kathleen T. Harrington
Assistant Revisor

STATE OF MINNESOTA

MINNESOTA DEPARTMENT OF HEALTH

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

CERTIFICATE

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minnesota Statutes, section 14.14, subdivision 1a, that their names be placed on file with, and maintained by, the Minnesota Department of Health for the purpose of receiving notice of rule hearings, is accurate and complete as of

2:00 p.m., this 22 day of October, 1990.

Dee Woodard

Dee Woodard

The Notice and Rule were also copied and distributed to all members of the Minnesota House and Senate (201 members).

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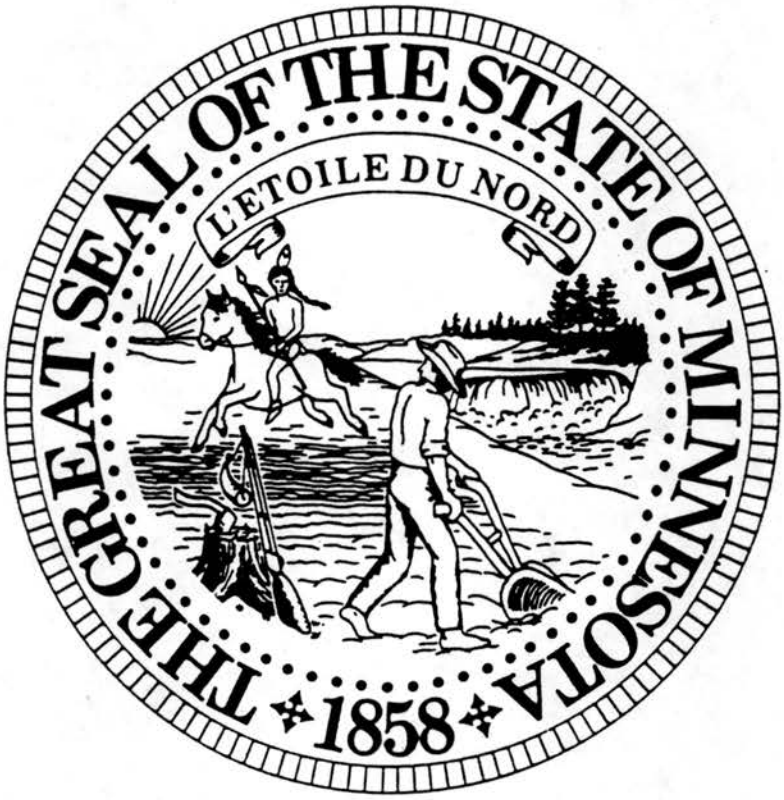

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Proposed Rules

Pursuant to Minn. Stat. §§ 14.22, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless 25 or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules; and
4. that the rule may be modified if the modifications are supported by the data and views submitted.

If, during the 30-day comment period, 25 or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of §§ 14.14-14.20, which state that if an agency decides to hold a public hearing, it must publish a notice of intent in the *State Register*.

Pursuant to Minn. Stat. §§ 14.29 and 14.30, agencies may propose emergency rules under certain circumstances. Proposed emergency rules are published in the *State Register* and, for at least 25 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Department of Health

Proposed Permanent Rules Governing Variances to Environmental Health Rules

Notice of Intent to Adopt Rules Without a Public Hearing, Notice of Intent to Adopt Rules With a Public Hearing If 25 or More Persons Request a Hearing, and Notice of Intent to Cancel Hearing on the Proposed Rules If Fewer than 25 Persons Request a Hearing

I. Explanation of Alternative Notices

The Minnesota Department of Health (hereinafter "Department") hereby proposes to adopt rules without a public hearing under the noncontroversial rulemaking procedure of *Minnesota Statutes*, sections 14.22 to14.28. However, if 25 or more persons request a hearing on the proposed rules, one will be held according to *Minnesota Statutes*, section 14.25. To expedite the rulemaking process should that occur, the Department is at the same time giving notice of hearing on the proposed rules according to *Minnesota Statutes*, sections 14.131 to 14.20. The hearing on the proposed rules will be cancelled if 25 or more persons do not request that one be held. With the comment period closing on November 28, 1990, there will be seven days before the scheduled hearing date. This seven-day period will give interested persons time to contact the Department to find out whether the hearing will be cancelled.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." **ADOPTED RULES SECTION** — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

II. Notice of Intent to Adopt Proposed Rules Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Department of Health (hereinafter "Department") proposes to adopt the above-captioned rules without a public hearing unless 25 or more persons submit written requests for a public hearing with respect to the proposed rules. The Department has determined that the proposed rules will be noncontroversial in nature and has elected to follow the procedures set forth in *Minnesota Statutes*, sections 14.22 to 14.28.

Interested persons shall have 30 days from the date this notice is published in the *State Register* to submit comments in support of or in opposition to the proposed rules. The 30 days will expire on November 28, 1990. Comment is encouraged. Each comment should identify the portions of the proposed rules being addressed, the reason for the comment, and any change proposed to the rules by the commentor. The proposed rules may be modified if the modifications are supported by the data and views submitted to the Department and do not result in a substantial change in the proposed language.

In addition to submitting comments, interested persons may request, in writing, during the 30-day comment period that a hearing be held on the proposed rules. Any person requesting a hearing should state his or her name, address, and telephone number and is encouraged to identify the portions of the proposed rules addressed, the reason for the request, and any changes the commentor wants made to the proposed rules. If a person desires that a hearing be held on only a portion of the proposed rules, it is requested that the Department be informed of the specific portion of the rules on which a hearing is being requested at the time that the hearing request is made. This will enable the Department to limit the hearing, if one is held, to the specific issues of concern. A public hearing will be held only if 25 or more persons submit in writing requests for a hearing on the proposed amendments or a portion thereof by November 28, 1990, thus necessitating that one be held with respect to the proposed rules. If a hearing is required, it will be held in accordance with the provisions of *Minnesota Statutes*, sections 14.131 to 14.20 and the hearing notice provided in section III below.

Comments or written requests for a public hearing should be submitted to:

Jane A. Nelson, Rules Coordinator
Division of Environmental Health
Minnesota Department of Health
925 Southeast Delaware Street
P.O. Box 59040
Minneapolis, Minnesota 55459-0040
(612) 627-5038

The statutory authority of the Department to adopt the proposed rules is contained in *Minnesota Statutes*, section 14.05, subdivision 4.

The proposed rules are published immediately following this notice in the *State Register* on October 29, 1990, and a free copy of the rules may be obtained from the Department by writing or telephoning Jane A. Nelson at the address or telephone number listed above.

The proposed rules include provisions relating to the criteria and procedures for requesting and granting a variance to rules administered by the Environmental Health Division. Part 4717.7000 specifies what rules shall be subject to variance. Parts 4717.7010 to 4717.7050 specify the procedures for requesting a variance; the criteria and conditions to be considered when reviewing a variance; notification of the decision; the effect of alternative measures or conditions; and provisions for renewal, denial, revocation, and appeal. Reference to the general standards are amended into division rules. Language within adopted division rules that is not consistent with the proposed provisions in parts 4717.7000 to 4717.7050 is deleted. A copy of the proposed rules are attached to this notice as mailed.

A STATEMENT OF NEED AND REASONABLENESS that describes the need for and reasonableness of each provision of the proposed rules and identifies the data and information relied upon to support the proposed rules has been prepared and may be obtained from the Department by writing or telephoning Jane A. Nelson at the address or telephone number listed above.

After the close of the comment period on the proposed rules, if no hearing is required, the Department will submit to the Attorney General the proposed rules and notice as published, the rules as proposed for adoption, any written comments received by the Department, the statement of need and reasonableness, and a statement explaining any modifications to the proposed rules. The Attorney General will approve or disapprove the rules as to their legality and their form, including the issue of substantial change and determine whether the Department has the authority to adopt the rules and whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rules. The Department will give notice to all persons who request to be informed that these materials have been submitted to the Attorney General. Persons who wish to be advised of the submission of these materials to the Attorney General should submit a written request to Jane A. Nelson at the address listed above. If the proposed rule has been modified, the notice will also state that a free copy of the proposed rule, as modified, will be available upon request from the Department.

Local Government Considerations

The Department's evaluation of the impact of the proposed rules on the expenditure of public monies by local public bodies is

addressed in the statement of need and reasonableness. There will be no direct cost to local units of government resulting from these proposed rules.

Agricultural Land

The proposed rule amendments will not have an impact on agricultural land; therefore, no further information need be provided under *Minnesota Statutes*, section 14.11.

Small Business Considerations

The Department is subject to *Minnesota Statutes*, section 14.115 regarding small business considerations in rulemaking. The Department's evaluation of the applicability of the methods contained in *Minnesota Statutes*, section 14.115, subdivision 2, for reducing the impact of the proposed rules is addressed in the statement of need and reasonableness.

III. Notice of Intent to Adopt Rules With a Public Hearing If 25 or More Persons Request a Hearing on the Proposed Rules

PLEASE NOTE that If 25 or More Persons Submit Written Requests for a Public Hearing on the Proposed Rules Within the 30-Day Comment Period Pursuant to the Notice Given in Part II Above, a Hearing Will Be Held on December 6, 1990, in Accordance With the Following Notice of Public Hearing.

NOTICE IS HEREBY GIVEN that a public hearing in the above-captioned matter will be held under *Minnesota Statutes*, sections 14.131 to 14.20, in Room 500 North, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota, on December 6, 1990, commencing at 9:00 a.m. The hearing will continue, if necessary, at additional times and places determind during the hearing by the Administrative Law Judge.

All interested or affected persons, including representatives of associations or other interested groups, will have an opportunity to participate. Such persons may present their views either orally at the hearing or in writing at any time prior to the close of the hearing record. All evidence presented should be pertinent to the matter at hand. Written material not submitted at the time of the hearing which is to be included in the hearing record may be mailed to Peter C. Erickson, Administrative Law Judge, Office of Administrative Hearings, 500 Flour Exchange Building, 310 Fourth Avenue South, Minneapolis, Minnesota 55415, telephone (612) 341-7606.

Unless a longer period not to exceed 20 calendar days is ordered by the administrative law judge at the hearing, the hearing record will remain open for the inclusion of written material for five working days after the hearing ends. Written material received during this period will be available for review at the Office of Administrative Hearings. The Department and interested persons may respond in writing within three business days after the submission period ends to any new information submitted. No additional evidence may be submitted during the three-day period. This rule hearing procedure is governed by *Minnesota Statutes*, sections 14.131 to 14.20 and by *Minnesota Rules*, parts 1400.0200 to 1400.1200. Questions about procedure may be directed to the administrative law judge.

The statutory authority for the Department to adopt the proposed rules is contained in *Minnesota Statutes*, section 14.05, subdivision 4.

The proposed rules are published immediately following this notice in the *State Register* on October 29, 1990, and a free copy of the rule amendments may be obtained from the Department by writing or telephoning Jane A. Nelson at the address and telephone number listed above in Part II of this notice.

The proposed rules include provisions relating to the criteria and procedures for requesting and granting a variance to rules administered by the Environmental Health Division. Part 4717.7000 specifies what rules shall be subject to variance. Parts 4717.7010 to 4717.7050 specify the procedures for requesting a variance; the criteria and conditions to be considered when reviewing a variance; notification of the decision; the effect of alternative measures or conditions; and provisions for renewal, denial, revocation, and appeal. Reference to the general standards are amended into division rules. Language within adopted division rules that is not consistent with the proposed provision in parts 4717.7000 to 4717.7050 is deleted. A copy of the proposed rules are attached to this notice as mailed.

The proposed rules may be modified as a result of the rule hearing process. Persons who are potentially affected in any manner by the substance of the proposed rules are therefore advised to participate in the process.

Minnesota Statutes, Chapter 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in *Minnesota Statutes*, section 10A.01, subdivision 11 as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." **ADOPTED RULES SECTION** — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 625 North Robert Street, St. Paul, Minnesota 55101-2520, telephone: (612) 296-5148.

NOTICE IS HEREBY GIVEN that a statement of need and reasonableness is now available for review at the Department and at the Office of Administrative Hearings. This statement of need and reasonableness includes a summary of all the evidence which the Department anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rules. Copies of the statement of need and reasonableness may be reviewed at the Department or the Office of Administrative Hearings and copies may be obtained from the Office of Administrative Hearings at the cost of reproduction.

Please note that any person may request notification of the date on which the administrative law judge's report will be available, after which date the Department may not take any final action on the proposed rules for a period of five working days. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the administrative law judge. Any person may request notification of the date on which the rules were adopted and filed with the Secretary of State. The notice must be mailed on the same day that the rules are filed. If you want to be so notified, you may so indicate at the hearing or send a request in writing to the Department at any time prior to the filing of the rules with the Secretary of State.

Local Government Considerations

The Department's evaluation of the impact of the proposed rules on the expenditure of public monies by local public bodies is addressed in the statement of need and reasonableness. There will be no direct cost to local units of government resulting from these proposed rules.

Agricultural Land

The proposed rule amendments will not have an impact on agricultural land; therefore, no further information need to be provided under *Minnesota Statutes*, section 14.11.

Small Business Considerations

The Department is subject to *Minnesota Statutes*, section 14.115, regarding small business considerations in rulemaking. The Department's evaluation of the applicability of the methods contained in *Minnesota Statutes*, section 14.115, subdivision 2, for reducing the impact of the proposed rules is addressed in the statement of need and reasonableness.

IV. Notice of Intent to Cancel Hearing on the Proposed Rules If Fewer than 25 Persons Request a Hearing on the Proposed Rules

PLEASE NOTE that the Hearing, Notice of Which Is Given in Part III Above, Will Be Cancelled on the Proposed Rules If Fewer than 25 Persons Request a Hearing on the Proposed Rules in Response to the Notice Given in Part II Above.

To be informed whether a hearing noticed in Part III above will be held, please call or write Jane A. Nelson at the address or telephone number listed above before November 28, 1990, and leave your name, address, and telephone number. You will be notified after November 28, 1990, if the hearing has been cancelled. You may also call Jane A. Nelson at (612) 627-5038 after November 28, 1990, for oral confirmation regarding the scheduled hearing.

Dated: 11 October 1990

Sister Mary Madonna Ashton
Commissioner of Health

Rules as Proposed

4620.1450 VARIANCE TO RULES RELATING TO CLEAN INDOOR AIR.

The commissioner shall grant variances to parts 4620.0100 to 4620.1500, except part 4620.0300, only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4620.1800 MAXIMUM PERMISSIBLE FORMALDEHYDE LEVEL IN HOUSING UNITS.

At the time of sale of a newly constructed housing unit, the ambient indoor air of any habitable room in the unit shall not contain more than 0.4 parts of formaldehyde per million parts of air as measured according to the procedures specified in parts 4620.1900 and 4620.2000. The seller is responsible for assuring that the unit complies with this level.

The installation of urea formaldehyde foam insulation in a housing unit which is not newly constructed shall not cause the indoor level of formaldehyde in any habitable room in the unit to exceed the higher of 0.4 parts per million or the preinstallation level as

measured according to the procedures specified in parts 4620.1900 to 4620.2100. The installer of urea formaldehyde foam insulation is responsible for assuring that the installation complies with this level.

The commissioner shall grant a variance to this part only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4620.3500 STANDARDS FOR ASBESTOS RELATED WORK.

[For text of subps 1 to 3, see M.R.]

Subp. 4. **Required procedures for asbestos related work.** Asbestos related work must meet the following minimum criteria. The criteria do not replace or supersede more stringent standards or contractual agreements.

[For text of item A, see M.R.]

B. Preparation of the work area must meet the following requirements:

(1) Removal, enclosure, or encapsulation of asbestos containing material is a major operation for purposes of compliance with Code of Federal Regulations, title 29, section 1926.58, and must be done, where feasible in industrial facilities, in a negative pressure enclosure with a contiguous decontamination enclosure system. However, for the portion of an asbestos related project that includes removal of less than ten feet of pipe lagging or less than six square feet of asbestos containing material per room, the asbestos abatement contractor may use, as an alternative, the glove bag or mini enclosure procedures in subpart 5. The commissioner may approve ~~exceptions~~ a variance to the procedures specified in this ~~subitem~~ item, on a case by case basis, according to the procedures and criteria in parts 4717.7000 to 4717.7050, 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 gases are present in the area.

[For text of subitems (2) to (9), see M.R.]

[For text of items C to H, see M.R.]

[For text of subp 5, see M.R.]

4625.0900 SPACE REQUIREMENTS.

Every room occupied for sleeping purposes by one person shall contain at least 70 square feet of usable floor space, and every room occupied for sleeping purposes by more than one person shall contain not less than 60 square feet of usable floor space for each occupant thereof. Under no circumstances shall there be provided less than 400 cubic feet of air space per occupant. Beds shall be spaced at least three feet apart when placed side by side. No sleeping quarters shall be provided in any basement having more than half its clear floor to ceiling height below the average grade of the adjoining ground. ~~When strict compliance herewith is impracticable, the commissioner may waive any of the provisions of this part subject to such conditions as may be deemed desirable in the individual case.~~

4625.2355 VARIANCE TO RULES RELATING TO LODGING ESTABLISHMENTS.

The commissioner shall grant a variance to parts 4625.0400 to 4625.0600; 4625.0900; 4625.1200 to 4625.1600; 4625.2000, except the last sentence; and 4625.2200 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4625.2655 VARIANCE TO RULES RELATING TO FOOD AND BEVERAGE ESTABLISHMENTS.

The commissioner shall grant a variance to parts 4625.2901 to 4625.7801, except parts 4625.3601; 4625.3801, subpart 1; 4625.3901, subpart 3; 4625.4101, subpart 1; 4625.4301; 4625.4401; 4625.4601; 4625.5000; 4625.5101, subpart 7; 4625.5601; 4625.5701; 4625.6101, subparts 3 and 7; 4625.6601; 4625.6701; 4625.7101, subpart 7; 4625.7601; and 4625.7701 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.1801 VARIANCE TO RULES RELATING TO MOBILE HOME PARKS AND RECREATIONAL CAMPING AREAS.

The commissioner shall grant a variance to part 4630.0400 and parts 4630.0900 to 4630.1700 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.4750 VARIANCE TO RULES RELATING TO CHILDREN'S CAMPS.

The commissioner shall grant a variance to parts 4630.2300 to 4630.4700 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

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4630.6550 VARIANCE TO RULES RELATING TO MIGRANT LABOR CAMPS.

The commissioner shall grant a variance to parts 4630.5000 to 4630.6500 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4635.0200 ROLLER TOWELS.

In order to prevent the spread of communicable diseases, the use of the roller towels in public places, public conveyances, and public buildings is hereby prohibited, except that continuous towels dispensed from a cabinet which is so constructed as to provide complete separation between the clean and soiled portions of the towel on separate rolls within the cabinet and to provide that the soiled portion is taken up on the soiled towel roll at the same rate the clean portion is withdrawn from the clean roll shall not be within this prohibition. The commissioner shall grant a variance to this part only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4635.2100 VARIANCE TO RULES RELATING TO ENCLOSED SPORTS ARENAS.

The commissioner shall grant variances to parts 4635.1100 to 4635.2000, except part 4635.1500, only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4715.5600 VARIANCE.

If an installation cannot be made in conformance with the Minnesota Plumbing Code (parts 4715.0100 to 4715.2860) or with the provisions contained in parts 4715.5000 to 4715.6000, the water conditioning contractor or installer shall consult with the appropriate plumbing inspector, and obtain a variance from the state rules before the installation may proceed. Such a variance can be granted only if the nonconforming alternative will not create a risk to health. The commissioner shall grant variances to parts 4715.5000 to 4715.6000 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4717.0500 WATER SUPPLY.

The water supply serving the swimming pool and all plumbing fixtures including drinking fountains, lavatories, and showers shall meet the requirements of the commissioner of health. ~~Where strict compliance with the requirement that the water supply serving the swimming pool be of potable quality is not possible or reasonable, the commissioner of health may grant a variance which does not endanger the health and safety of the users of the pool.~~

All portions of the water distribution system serving the swimming pool and auxiliary facilities shall be protected against backflow. Water introduced into the pool, either directly or to the recirculation system, shall be supplied through an air gap (Minnesota Plumbing Code, parts 4715.2000 to 4715.2170). When such connections are not possible, the supply shall be protected by a suitable backflow preventer (Minnesota Plumbing Code, parts 4715.2000 to 4715.2170) installed on the discharge side of the last control to the fixture, device, or appurtenance.

The pumps, filter, disinfectant and chemical feeders, and related appurtenances shall be kept in operation at all times during the swimming season unless approved by the commissioner of health.

Rules as Proposed (all new material)

4717.7000 VARIANCE REQUEST.

Subpart 1. **Request.** A party may ask the commissioner of health to grant a variance from the following rules:

A. clean indoor air, parts 4620.0100 to 4620.1500, except part 4620.0300;

B. formaldehyde in housing, part 4620.1800;

C. asbestos abatement, part 4620.3500, subpart 4, item B, and part 4620.3700, subpart 3, item B, first sentence;

D. lodging establishments, parts 4625.0400 to 4625.0600; 4625.0900; 4625.1200 to 4625.1600; 4625.2000, except the last sentence; and 4625.2200;

E. food and beverage establishments, parts 4625.2901 to 4625.7801, except parts 4625.3601; 4625.3801, subpart 1; 4625.3901, subpart 3; 4625.4101, subpart 1; 4625.4301; 4625.4401; 4625.4601; 4625.5000; 4625.5101, subpart 7; 4625.5601; 4625.5701; 4625.6101, subparts 3 and 7; 4625.6601; 4625.6701; 4625.7101, subpart 7; 4625.7601; and 4625.7701;

F. manufactured home parks and recreational camping areas, parts 4630.0400 and 4630.0900 to 4630.1700;

G. children's camps, parts 4630.2300 to 4630.4700;

H. migrant labor camps, parts 4630.5000 to 4630.6500;

I. roller towels, part 4635.0200;

J. enclosed sports arenas, parts 4635.1100 to 4635.2000, except part 4635.1500;

K. water conditioning contractors and installers, parts 4715.5000 to 4715.6000;

L. public swimming pools, parts 4717.0100 to 4717.3900;

M. water haulers, parts 4720.4000 to 4720.4600;

N. wells and borings, parts 4725.0100 to 4725.7600;

O. explorers and exploratory borings, parts 4727.0100 to 4727.1300; and

P. ionizing radiation, parts 4730.0100 to 4730.3610, except parts 4730.0400 and 4730.0600.

Subp. 2. **Procedures for requesting a variance.** The procedures in this subpart apply to a request for a variance of the rules specified in subpart 1. Additional procedures may be specified in the rules listed in subpart 1 which also must be complied with. The party requesting the variance must submit the variance request in writing to the commissioner of health along with any applicable fee. A request must contain:

A. the specific language in the rule or rules from which the variance is requested;

B. the reasons why the rule cannot be met;

C. the alternative measures that will be taken to assure a comparable degree of protection to health or the environment if a variance is granted;

D. the length of time for which the variance is requested;

E. a statement that the party applying for the variance will comply with the terms of the variance, if granted; and

F. other relevant information the commissioner determines necessary to properly evaluate the request for the variance.

Subp. 3. **Applicant for a variance.** The applicant for a variance must be the party to whom the rule specified in subpart 1 applies.

4717.7010 CRITERIA FOR DECISION; CONDITIONS.

Subpart 1. **Criteria for granting a variance.** The commissioner may grant a variance if:

A. the variance was requested in a manner prescribed by part 4717.7000;

B. the variance will have no potential adverse effect on public health, safety, or the environment;

C. the alternative measures to be taken, if any, are equivalent to or superior to those prescribed in the rule;

D. strict compliance with the rule will impose an undue burden on the applicant; and

E. the variance does not vary a statutory standard.

Subp. 2. **Conditions for variance.** In granting a variance the commissioner may attach conditions the commissioner determines are needed to protect public health, safety, or the environment.

Subp. 3. **Future effect.** A variance shall have only future effect.

4717.7020 NOTIFICATION OF DECISION.

The commissioner of health shall notify the party in writing of the commissioner's decision to grant or deny the variance. If a variance is granted, the notification must specify the period of time for which the variance will be effective and the alternative measures or conditions, if any, the applicant must meet. If a variance is denied, the commissioner of health shall specify the reasons for the denial.

4717.7030 EFFECT OF ALTERNATIVE MEASURES OR CONDITIONS.

Alternative measures or conditions attached to a variance have the force and effect of the applicable rule. If the party violates the alternative measures or conditions attached to the variance, the party is subject to the enforcement actions and penalties provided in the applicable law or rule. The party to whom a variance has been issued must notify the commissioner of health in writing within 30 days of any material change in the conditions upon which the variance was granted.

4717.7040 RENEWAL OF VARIANCE.

A request for the renewal of a variance must be submitted to the commissioner of health in writing 30 days before its expiration date. Renewal requests must contain the information specified in part 4717.7000, subpart 2. The commissioner shall renew a variance if the party continues to satisfy the criteria contained in part 4717.7010 and demonstrates compliance with the alternative measures or conditions imposed at the time the original variance was approved. This provision does not apply if there has been any material change in the conditions upon which the variance was granted.

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4717.7050 DENIAL, REVOCATION, OR REFUSAL TO RENEW; APPEALS.

Subpart 1. **Action.** The commissioner shall deny, revoke, or refuse to renew a variance if the commissioner determines that the criteria in part 4717.7010 are not met.

Subp. 2. **Appeal procedure.** A party may appeal the denial, revocation, or refusal to renew a variance by requesting, in writing, a contested case hearing under the Administrative Procedure Act, *Minnesota Statutes*, chapter 14, within 30 days of receipt of the notice to deny, revoke, or refuse to renew the variance.

4725.0410 VARIANCE.

Subpart 1. **General.** The commissioner shall grant a variance to any provision of this chapter according to the procedures and criteria specified in parts 4717.7000 to 4717.7050. The variance request must be accompanied by the fee specified in *Minnesota Statutes*, section 103I.101, subdivision 6.

Subp. 2. **Additional standards for construction, repair, or sealing variance requests.** In addition to subpart 1, a request to vary a construction, repair, or sealing provision related to wells or borings in parts 4725.1860 and 4725.2300 to 4725.7600 must also include:

A. the location of the well or boring in terms of township, range, and four-quarter sections;

B. the unique number, if assigned;

C. the name, address, and telephone number of the contractor doing work, the property owner, and the well owner;

D. a scaled map showing the location of the well or boring in relation to all property lines, structures, utilities, and contamination sources cited in part 4725.2000;

E. the proposed depth of the well or boring;

F. the casing type, its diameter, and its depth;

G. a description of the method of construction, grout materials, and method of emplacement;

H. a description of the anticipated geologic conditions; and

I. the depth to water, pumping rate, number of persons served by the well, and a description of the use of the well.

Subp. 3. **Additional standards for variance request from isolation distance.** In addition to the information in subparts 1 and 2, a variance request to parts 4725.1900 to 4725.2200 must include:

A. information on special construction methods or precautions proposed to prevent contamination of the well, boring, or groundwater;

B. a description of the age, design, size, and type of construction of any existing or potential contamination source as specified in part 4725.2000;

C. any testing, inspection, or certification data and the name and address of the person supplying the data;

D. information on soil type from a soil survey, percolation test, or soil boring report; and

E. a copy of any review of contamination sources done by a local or state unit of government under other applicable regulations.

4730.0850 VARIANCE TO RULES RELATING TO IONIZING RADIATION.

The commissioner shall grant a variance to parts 4730.0100 to 4730.3610, except parts 4730.0400 and 4730.0600 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

REPEALER. *Minnesota Rules*, parts 4625.2650; 4630.1800; 4725.0400; and 4727.0300 are repealed.

Higher Education Coordinating Board

Proposed Permanent Rules Relating to Financial Aid

Notice of Intent to Adopt a Rule Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Higher Education Coordinating Board intends to adopt the above-entitled rule without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in *Minnesota Statutes*, sections 14.22 to 14.28. The statutory authority to adopt the rule is in *Minnesota Statutes* 136A.04, Subd. 1(9), 136A.16, and 136A.234.

Department of Health

Proposed Permanent Rules Governing Variances to Environmental Health Rules

Rules as Proposed

4620.1450 VARIANCE TO RULES RELATING TO CLEAN INDOOR AIR.

The commissioner shall grant variances to parts 4620.0100 to 4620.1500, except part 4620.0300, only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4620.1800 MAXIMUM PERMISSIBLE FORMALDEHYDE LEVEL IN HOUSING UNITS.

At the time of sale of a newly constructed housing unit, the ambient indoor air of any habitable room in the unit shall not contain more than 0.4 parts of formaldehyde per million parts of air as measured according to the procedures specified in parts 4620.1900 and 4620.2000. The seller is responsible for assuring that the unit complies with this level.

The installation of urea formaldehyde foam insulation in a housing unit which is not newly constructed shall not cause the indoor level of formaldehyde in any habitable room in the unit to exceed the higher of 0.4 parts per million or the preinstallation level as measured according to the procedures specified in parts 4620.1900 to 4620.2100. The installer of urea formaldehyde foam insulation is responsible for assuring that the installation complies with this level.

The commissioner shall grant a variance to this part only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4620.3500 STANDARDS FOR ASBESTOS RELATED WORK.

[For text of subps 1 to 3, see M.R.]

Subp. 4. **Required procedures for asbestos related work.** Asbestos related work must meet the following minimum criteria.

Approved by Revisor

The criteria do not replace or supersede more stringent standards or contractual agreements.

[For text of item A, see M.R.]

B. Preparation of the work area must meet the following requirements:

(1) Removal, enclosure, or encapsulation of asbestos containing material is a major operation for purposes of compliance with Code of Federal Regulations, title 29, section 1926.58, and must be done, where feasible in industrial facilities, in a negative pressure enclosure with a contiguous decontamination enclosure system. However, for the portion of an asbestos related project that includes removal of less than ten feet of pipe lagging or less than six square feet of asbestos containing material per room, the asbestos abatement contractor may use, as an alternative, the glove bag or mini enclosure procedures in subpart 5. The commissioner may approve ~~exceptions~~ a variance to the procedures specified in this ~~subitem~~ item, on a case by case basis, according to the procedures and criteria in parts 4717.7000 to 4717.7050, 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 gases are present in the area.

[For text of subitems (2) to (9), see M.R.]

[For text of items C to H, see M.R.]

[For text of subp 5, see M.R.]

4625.0900 SPACE REQUIREMENTS.

Every room occupied for sleeping purposes by one person shall contain at least 70 square feet of usable floor space, and every room occupied for sleeping purposes by more than one person shall contain not less than 60 square feet of usable floor space for each occupant thereof. Under no circumstances shall there be provided less than 400 cubic feet of air space per occupant. Beds shall be spaced at least three feet apart when placed side by side. No sleeping quarters shall be

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provided in any basement having more than half its clear floor to ceiling height below the average grade of the adjoining ground. ~~When strict compliance herewith is impracticable, the commissioner may waive any of the provisions of this part subject to such conditions as may be deemed desirable in the individual case.~~

4625.2355 VARIANCE TO RULES RELATING TO LODGING ESTABLISHMENTS.

The commissioner shall grant a variance to parts 4625.0400 to 4625.0600; 4625.0900; 4625.1200 to 4625.1600; 4625.2000, except the last sentence; and 4625.2200 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4625.2655 VARIANCE TO RULES RELATING TO FOOD AND BEVERAGE ESTABLISHMENTS.

The commissioner shall grant a variance to parts 4625.2901 to 4625.7801, except parts 4625.3601; 4625.3801, subpart 1; 4625.3901, subpart 3; 4625.4101, subpart 1; 4625.4301; 4625.4401; 4625.4601; 4625.5000; 4625.5101, subpart 7; 4625.5601; 4625.5701; 4625.6101, subparts 3 and 7; 4625.6601; 4625.6701; 4625.7101, subpart 7; 4625.7601; and 4625.7701 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.1801 VARIANCE TO RULES RELATING TO MOBILE HOME PARKS AND RECREATIONAL CAMPING AREAS.

The commissioner shall grant a variance to part 4630.0400 and parts 4630.0900 to 4630.1700 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.4750 VARIANCE TO RULES RELATING TO CHILDREN'S CAMPS.

The commissioner shall grant a variance to parts 4630.2300 to 4630.4700 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4630.6550 VARIANCE TO RULES RELATING TO MIGRANT LABOR CAMPS.

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The commissioner shall grant a variance to parts 4630.5000 to 4630.6500 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4635.0200 ROLLER TOWELS.

In order to prevent the spread of communicable diseases, the use of the roller towels in public places, public conveyances, and public buildings is hereby prohibited, except that continuous towels dispensed from a cabinet which is so constructed as to provide complete separation between the clean and soiled portions of the towel on separate rolls within the cabinet and to provide that the soiled portion is taken up on the soiled towel roll at the same rate the clean portion is withdrawn from the clean roll shall not be within this prohibition. The commissioner shall grant a variance to this part only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4635.2100 VARIANCE TO RULES RELATING TO ENCLOSED SPORTS ARENAS.

The commissioner shall grant variances to parts 4635.1100 to 4635.2000, except part 4635.1500, only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4715.5600 VARIANCE.

If an installation cannot be made in conformance with the Minnesota Plumbing Code (parts 4715.0100 to 4715.2860) or with the provisions contained in parts 4715.5000 to 4715.6000, the water conditioning contractor or installer shall consult with the appropriate plumbing inspector, and obtain a variance from the state rules before the installation may proceed. Such a variance can be granted only if the nonconforming alternative will not create a risk to health. The commissioner shall grant variances to parts 4715.5000 to 4715.6000 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

4717.0500 WATER SUPPLY.

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The water supply serving the swimming pool and all plumbing fixtures including drinking fountains, lavatories, and showers shall meet the requirements of the commissioner of health. ~~Where strict compliance with the requirement that the water supply serving the swimming pool be of potable quality is not possible or reasonable, the commissioner of health may grant a variance which does not endanger the health and safety of the users of the pool.~~

All portions of the water distribution system serving the swimming pool and auxiliary facilities shall be protected against backflow. Water introduced into the pool, either directly or to the recirculation system, shall be supplied through an air gap (Minnesota Plumbing Code, parts 4715.2000 to 4715.2170). When such connections are not possible, the supply shall be protected by a suitable backflow preventer (Minnesota Plumbing Code, parts 4715.2000 to 4715.2170) installed on the discharge side of the last control to the fixture, device, or appurtenance.

The pumps, filter, disinfectant and chemical feeders, and related appurtenances shall be kept in operation at all times during the swimming season unless approved by the commissioner of health.

Rules as Proposed (all new material)

4717.7000 VARIANCE REQUEST.

Subpart 1. **Request.** A party may ask the commissioner of health to grant a variance from the following rules:

A. clean indoor air, parts 4620.0100 to 4620.1500, except part 4620.0300;

B. formaldehyde in housing, part 4620.1800;

C. asbestos abatement, part 4620.3500, subpart 4, item B, and part 4620.3700, subpart 3, item B, first sentence;

D. lodging establishments, parts 4625.0400 to 4625.0600; 4625.0900; 4625.1200 to 4625.1600; 4625.2000, except the last sentence; and 4625.2200;

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E. food and beverage establishments, parts 4625.2901 to 4625.7801, except parts 4625.3601; 4625.3801, subpart 1; 4625.3901, subpart 3; 4625.4101, subpart 1; 4625.4301; 4625.4401; 4625.4601; 4625.5000; 4625.5101, subpart 7; 4625.5601; 4625.5701; 4625.6101, subparts 3 and 7; 4625.6601; 4625.6701; 4625.7101, subpart 7; 4625.7601; and 4625.7701;

F. manufactured home parks and recreational camping areas, parts 4630.0400 and 4630.0900 to 4630.1700;

G. children's camps, parts 4630.2300 to 4630.4700;

H. migrant labor camps, parts 4630.5000 to 4630.6500;

I. roller towels, part 4635.0200;

J. enclosed sports arenas, parts 4635.1100 to 4635.2000, except part 4635.1500;

K. water conditioning contractors and installers, parts 4715.5000 to 4715.6000;

L. public swimming pools, parts 4717.0100 to 4717.3900;

M. water haulers, parts 4720.4000 to 4720.4600;

N. wells and borings, parts 4725.0100 to 4725.7600;

O. explorers and exploratory borings, parts 4727.0100 to 4727.1300; and

P. ionizing radiation, parts 4730.0100 to 4730.3610, except parts 4730.0400 and 4730.0600.

Subp. 2. **Procedures for requesting a variance.** The procedures in this subpart apply to a request for a variance of the rules specified in subpart 1. Additional procedures may be specified in the rules listed in subpart 1 which also must be complied with. The party requesting the variance must submit the variance request in writing to the commissioner of health along with any applicable fee. A request must contain:

A. the specific language in the rule or rules from which the variance is requested;

B. the reasons why the rule cannot be met;

C. the alternative measures that will be taken to assure a comparable degree of protection to health or the environment if a variance is granted;

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D. the length of time for which the variance is requested;

E. a statement that the party applying for the variance will comply with the terms of the variance, if granted; and

F. other relevant information the commissioner determines necessary to properly evaluate the request for the variance.

Subp. 3. **Applicant for a variance.** The applicant for a variance must be the party to whom the rule specified in subpart 1 applies.

4717.7010 CRITERIA FOR DECISION; CONDITIONS.

Subpart 1. **Criteria for granting a variance.** The commissioner may grant a variance if:

A. the variance was requested in a manner prescribed by part 4717.7000;

B. the variance will have no potential adverse effect on public health, safety, or the environment;

C. the alternative measures to be taken, if any, are equivalent to or superior to those prescribed in the rule;

D. strict compliance with the rule will impose an undue burden on the applicant; and

E. the variance does not vary a statutory standard.

Subp. 2. **Conditions for variance.** In granting a variance the commissioner may attach conditions the commissioner determines are needed to protect public health, safety, or the environment.

Subp. 3. **Future effect.** A variance shall have only future effect.

4717.7020 NOTIFICATION OF DECISION.

The commissioner of health shall notify the party in writing of the commissioner's decision to grant or deny the variance. If a variance is granted, the notification must specify the period of time for which the variance will be effective and the alternative measures or conditions, if any,

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the applicant must meet. If a variance is denied, the commissioner of health shall specify the reasons for the denial.

4717.7030 EFFECT OF ALTERNATIVE MEASURES OR CONDITIONS.

Alternative measures or conditions attached to a variance have the force and effect of the applicable rule. If the party violates the alternative measures or conditions attached to the variance, the party is subject to the enforcement actions and penalties provided in the applicable law or rule. The party to whom a variance has been issued must notify the commissioner of health in writing within 30 days of any material change in the conditions upon which the variance was granted.

4717.7040 RENEWAL OF VARIANCE.

A request for the renewal of a variance must be submitted to the commissioner of health in writing 30 days before its expiration date. Renewal requests must contain the information specified in part 4717.7000, subpart 2. The commissioner shall renew a variance if the party continues to satisfy the criteria contained in part 4717.7010 and demonstrates compliance with the alternative measures or conditions imposed at the time the original variance was approved. This provision does not apply if there has been any material change in the conditions upon which the variance was granted.

4717.7050 DENIAL, REVOCATION, OR REFUSAL TO RENEW; APPEALS.

Subpart 1. **Action.** The commissioner shall deny, revoke, or refuse to renew a variance if the commissioner determines that the criteria in part 4717.7010 are not met.

Subp. 2. **Appeal procedure.** A party may appeal the denial, revocation, or refusal to renew a variance by requesting, in writing, a contested case hearing under the Administrative Procedure Act, Minnesota Statutes, chapter 14, within 30 days of receipt of the notice to deny, revoke, or refuse to renew the variance.

4725.0410 VARIANCE.

Subpart 1. **General.** The commissioner shall grant a

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variance to any provision of this chapter according to the procedures and criteria specified in parts 4717.7000 to 4717.7050. The variance request must be accompanied by the fee specified in Minnesota Statutes, section 103I.101, subdivision 6.

Subp. 2. **Additional standards for construction, repair, or sealing variance requests.** In addition to subpart 1, a request to vary a construction, repair, or sealing provision related to wells or borings in parts 4725.1860 and 4725.2300 to 4725.7600 must also include:

A. the location of the well or boring in terms of township, range, and four-quarter sections;

B. the unique number, if assigned;

C. the name, address, and telephone number of the contractor doing work, the property owner, and the well owner;

D. a scaled map showing the location of the well or boring in relation to all property lines, structures, utilities, and contamination sources cited in part 4725.2000;

E. the proposed depth of the well or boring;

F. the casing type, its diameter, and its depth;

G. a description of the method of construction, grout materials, and method of emplacement;

H. a description of the anticipated geologic conditions; and

I. the depth to water, pumping rate, number of persons served by the well, and a description of the use of the well.

Subp. 3. **Additional standards for variance request from isolation distance.** In addition to the information in subparts 1 and 2, a variance request to parts 4725.1900 to 4725.2200 must include:

A. information on special construction methods or precautions proposed to prevent contamination of the well, boring, or groundwater;

B. a description of the age, design, size, and type of construction of any existing or potential contamination source as specified in part 4725.2000;

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C. any testing, inspection, or certification data and the name and address of the person supplying the data;

D. information on soil type from a soil survey, percolation test, or soil boring report; and

E. a copy of any review of contamination sources done by a local or state unit of government under other applicable regulations.

4730.0850 VARIANCE TO RULES RELATING TO IONIZING RADIATION.

The commissioner shall grant a variance to parts 4730.0100 to 4730.3610, except parts 4730.0400 and 4730.0600 only according to the procedures and criteria specified in parts 4717.7000 to 4717.7050.

REPEALER. Minnesota Rules, parts 4625.2650; 4630.1800; 4725.0400; and 4727.0300 are repealed.

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Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Governing Variances to Environmental Health Rules

AGENCY: Department of Health

MINNESOTA RULES: Chapters 4620; 4625; 4630; 4635; 4715; 4717; 4725; 4727; and 4730

The attached rules are approved for publication in the State Register

Kathleen T. Harrington
Assistant Revisor

STATE OF MINNESOTA

MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Adoption of Rules of the Minnesota Department of Health Governing Variances to Environmental Health Rules

FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING A RULE WITHOUT A PUBLIC HEARING

(1) Notice of the Commissioner's intent to adopt the above-entitled matter was published in the State Register on October 29, 1990 and was sent by United States mail to all persons on the list maintained by the Department pursuant to Minnesota Statutes, sections 14.14, subdivision 1a and 14.22, on October 26, 1990.

(2) The Statement of Need and Reasonableness was prepared before the notice of intent to adopt a rule without a public hearing was mailed to all persons on the Department mailing list and published in the State Register and was available to the public. In accordance with Minnesota Statutes, sections 14.131 and 14.23, the Statement of Need and Reasonableness was submitted to the Legislative Commission to Review Administrative Rules on October 15, 1990.

(4) All persons were given the opportunity to submit comment on the rule for 30 days after notice of proposed rulemaking. (5) The Department received one comment which is addressed in Finding 2 below, and one request for a public hearing which was subsequently withdrawn. Therefore, the Department did not receive requests for a public hearing from 25 or more persons which were not withdrawn.

(7) No requests for notice of submission to the Attorney General were received by the Department. Based on the comments and evidence in the record before the Department, I find the following:

FINDINGS

1. Based on the comment and evidence in the record before the Minnesota Department of Health, including the Statement of Need and Reasonableness which is incorporated herein, the above-captioned rules are needed and reasonable. (8)

2. James L. Werner of the Brand Companies, Inc. of Park Ridge, Illinois comments that state work practice requirements promulgated under Minnesota's Asbestos Abatement Act, Minnesota

Statutes section 326.70 to 326.78 are more stringent than OSHA laws regarding work practices and that state rules should be made less stringent to conform with OSHA work practice standards, specifically the federal Occupational Safety and Health Review Commission ruling on asbestos abatement work practices which Mr. Werner attached to his comment. With respect to Mr. Werner's comment I find that the proposed rules do not establish new or revised performance or work practice standards with respect to federal Occupational Safety and Health Act (OSHA) standards or state asbestos abatement rules. The purpose of the proposed variance rule is to establish variance procedures and criteria for adopted state rules of the Department pertaining to environmental health. The purpose of the proposed rules and accompanying justification in the Statement of Need and Reasonableness is not to consider revision of a specific state asbestos abatement or work practice standard as Mr. Werner suggests. Any revision to adopted state asbestos work practice standards such as to the indoor air standard of the Minnesota Asbestos Abatement Act would require legislative action or additional rulemaking notice and justification on that subject. Revision of specific federal or state asbestos abatement work practice standards is not a matter under consideration in these proceedings.

CONCLUSIONS

1. The above-captioned rules are needed and reasonable.

2. Any duplication in these rules of language contained in Minnesota Statutes is crucial to the ability of the persons affected by the rules to comprehend their meaning and effect.

3. The Department has complied with all applicable provisions of law and rule in the promulgation of these rules.

4. If any find or part of a finding, above, is properly characterized as a conclusion, it is adopted as a conclusion.

NOW THEREFORE, IT IS ORDERED, that the rules identified as Variances to Environmental Health Rules, are adopted this 7 day of December, 1990, pursuant to authority vested in me by Minnesota Statutes, section 14.05, subdivision 4.

(9)

/s/ Mary Madonna Ashton

SISTER MARY MADONNA ASHTON
COMMISSIONER OF HEALTH

brand b
the brand companies, inc.



quality results from quality people

November 9, 1990

Jane A. Nelson, Rules Coordinator
Division of Environmental Health
Minnesota Department of Health
925 Southeast Delaware Street
P.O. Box 59040
Minneapolis, Minnesota 55459-0040

Subject: 4620.3500 Standards for Asbestos Related Work
Subp. 4, B. Preparation of Work Area
Proposed Rules, State Register, 29 October, 1990
Comments

Dear Ms. Nelson:

We are pleased to see the proposal of the body of Minnesota Asbestos Standards to encompass broader latitude in the application of work area preparation procedures.

We wish to comment, though, that the proposed approach is not in keeping with recent Federal OSH Review Commission rulings. In the matter of the so-called "Nimco Glovebag Case" (OSHRC Docket Nos. 89-136 and 89-1703, consolidated). OSHRC went substantially beyond the instant question in addressing Nimco's defense assertions.

As a part of their arguments, the defendant asserted that the negative pressure enclosure description (e(6)) is a subparagraph of paragraph e) as a whole. As such, the general requirement in subparagraph e)(1) is a condition precedent to e)(6). e)(1) requires that a regulated area be established whenever the airborne asbestos fiber concentrations "exceed or are reasonably expected to exceed" the Permissible Exposure Limit (PEL). The court agreed with the argument that if a the PEL is not exceeded, or reasonably expected to be exceeded, then there is no requirement for a regulated area in general, and therefore there is likewise no requirement for a specific type of regulated area (a negative pressure enclosure) in particular.

With the OSHRC ruling, it is clear that the literal and legal interpretation of the current OSHA rules, as written, clearly tie the requirement for any type of "regulated area", including negative pressure containments or others, to the level of airborne contamination and its relationship to the PEL. A copy of that May, 1990 ruling is enclosed for your use and information.

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4620.3500 Standards for Asbestos Related Work (Minnesota)
Subp. 4, B. Preparation of Work Area
Proposed Rules, State Register, 29 October, 1990
Comments

With this in mind, you may want to likewise consider such a relationship between fiber concentrations, and containment and engineering control limits. The benefit of this approach is that it would provide project designers with more design options as well as providing response contractors with incentives to employ alternative engineering controls or more rigorous work practices in difficult, specialized, or problematic situations that may not be well served by classic negative pressure containment strategies. This is particularly evident in many cases of outdoor work, condemned facility dismantling, geographically large distribution of relatively low levels of contaminants, and many situations involving non-friable materials such as flooring, mastic, transite products, caulkings, and high cohesive-strength coatings.

Copies of the OSHRC decision and a Brand internal memo are included for your reference and to give you further explanation of our perspective regarding these decisions.

We trust that this provides additional information and perspective for your consideration. Please feel free to contact us at your convenience should you have questions or wish to discuss any of these issues at further length.

Respectfully submitted,

James L. Werner
Vice President of Technical Planning and Developments

cc: C. Hoidahl, Brand, Chicago
R. Holland, Brand, Minnesota
J. Hynes, WMI, Oak Brook

July 23, 1990

to: Larry Mates
Brand of Michigan

from: Jim Werner

subject: Regulated Areas

Larry, enclosed is a full copy of the OSH Review Commission Decision. Note that they wrestled with the regulated area/negative pressure containment issue (pp 6-10) <u>separately</u> from the small-scale, short-duration issue (pp 12-16).

The rulings and their language are very clear:

1. A regulated area is required when you exceed or expect to exceed the PEL. Absent that, there is no requirement for a regulated area of any kind, glovebag or otherwise. Prudence dictates restricting access or establishing neg. press. containments when there is high risk of contamination spread, unpredictable conditions, or indoors or where there are other occupants or bystanders, in addition to the PEL restraint. But that's it. As I already hinted, open air removal may even be a possible alternative, especially where there are other safety hazard potentials that could be exxagerated by establishing a containment (a heat source that could cause burn hazards in a confined area, heat-gain induced heat stress, or toxic gases that could be concentrated, among others). You should ask: what work methods or engineering controls are available that would reduce fiber release and airborne fiber concentrations to predictable, manageable levels. This ruling, in my opinion, is an endorsement of that approach, whether the work involves three feet or thirty thousand and three feet.

2. What is small-scale, short-duration work? This case involved several hundred feet of pipe, with a significant portion of it in the immediate area. The commission repudiated OSHA's contention that asbestos abatement can't be the purpose of removal. Nimco's argument against this is both pointed and eloquent (bottom of page 14). This part of the ruling, though, has seemed to make the s-s/s-d definition even more muddy. If I had to take a crack at it, I would say the commision's ruling means that it is small-scale if it is a) part of a maintenance program, and b) is a single item. That could be a large run of pipe, if it was a single branch, or part of a singularly controlled system, where the whole pipe is affected the same as any individual piece of it, and probably where it isn't feasible to remove only a portion of it. I better stop; I'm even confusing myself.

Good luck, and I hope this helps more than confounds.

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

NOTICE OF DECISION

PHONE
COM (404) 347-4197
FTS 257-4086

FAX:
COM (404) 347-0113
FTS 257-0113

SECRETARY v. NIMCO, INC.

OSHRC Docket Nos. 89-136 and 89-1703 (Consolidated)

1. Enclosed is a copy of my decision. It will be submitted to the Commission's Executive Secretary on May 22, 1990. The decision will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary, unless within that time a Member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.

2. Any party that is adversely affected or aggrieved by the decision may file a petition for discretionary review by the Review Commission. A petition may be filed with this Judge within twenty (20) days from the date of this notice. Thereafter, any petition must be filed with the Review Commission's Executive Secretary within twenty (20) days from the date of the Executive Secretary's notice of docketing. See Paragraph No. 1. The Executive Secretary's address is as follows:

Executive Secretary
Occupational Safety and Health Review Commission
1825 K Street, N. W., Room 401
Washington, D. C. 20006

3. The full text of the rule governing the filing of a petition for discretionary review is 29 C.F.R. § 2200.91 (51 Fed. Reg. 32026, Sept. 8, 1986). It is appended hereto for easy reference. The rule also prescribes requirements concerning the following: (a) any cross-petition for discretionary review; (b) the contents of a petition; (c) the effect of a failure to file a petition; (d) statements in opposition to a petition; and (e) the number of copies required of any document that may be filed. There are closely related rules which are published in 29 C.F.R. § 2200.90 and .92 (51 Fed. Reg. 32026, 32027, Sept. 6, 1986). Rule 90 concerns the contents of a decision of this kind; the aforementioned docketing by the Executive Secretary; and the correction of errors and relief from default. Rule 92 describes review by the Commission--the jurisdiction of the Commission and the standards that are applied concerning issues that are raised by the parties or that otherwise may exist. The text of these rules is also appended hereto.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

Date: May 2, 1990

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
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SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket Nos.
	)	
NIMCO, INC.,	)	89-136 and 89-1703
	)	
Respondent.	)	(Consolidated)

APPEARANCES:

Cyrus A. Alexander, Esquire, Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, on behalf of complainant.

Wyon F. Wiegratz, Esquire, Remley Sensenbrenner Law Offices, Cummings, Snyder, Hanes and Wiegratz, S. C., Neenah, Wisconsin, on behalf of respondent.

DECISION AND ORDER

SALYERS, JUDGE:

Docket No. 89-136

NIMCO, Inc. ("NIMCO"), is an asbestos abatement contractor. It was established in 1981 by its president, David McLeod, and it employs approximately 40 workers (Tr. 597).

In October of 1988, NIMCO was hired by Management By Design, a real estate management company, to remove some

asbestos from the Zuelke Building, a 12-story office building located at 103 West College Avenue in Appleton, Wisconsin (Tr. 35-36). Approximately 280 linear feet of asbestos was to be removed from pipes, of which approximately 150 feet was located on the ninth floor and approximately 130 feet was located on the twelfth floor of the building (Tr. 125, 623).

On October 13, 1988, OSHA Industrial Hygienist James Taetsch visited the Zuelke Building on a referral complaint. He was accompanied by a Wisconsin Department of Natural Resources inspector. They first went to the ninth floor, where there was no activity. They then proceeded to the twelfth floor where they observed two employees, John Pownell and Douglas Wruck, engaged in asbestos removal using the glove bag technique. Taetsch held an opening conference with the crew foreman, Clayton Zehren, after which Taetsch conducted personal monitoring for asbestos on Pownell and Wruck (Tr. 123-124).

A glove bag is a plastic bag, approximately four feet by four feet, with two internal sleeves and an interior pouch (Tr. 28). The pouch holds a retractable utility knife. To use the glove bag, the top of the bag is wrapped around the asbestos pipe insulation. The top flaps are stapled and the ends are sealed with duct tape. The insulation is then wetted with water mixed with a surfactant, in order to keep the asbestos dust down. The asbestos insulation is cut with the utility knife and lowered to the bottom of the bag. After

that section of insulation is removed, the employee unseals the ends of the bag and slides it down to the next section of pipe, which is two and a half to three feet. The ends of the bag are resealed and the process is repeated. After the bag is filled, the employee removes the bag from the pipe, tapes the bag shut, and puts the bag inside another plastic bag for disposal (Tr. 22-28, 403).

The area in which the asbestos pipe insulation was being removed was approximately 55 feet long on the north side of the building and about 20 feet deep (Tr. 50). Vacuum devices were available to remove air from the glove bags, but Wruck testified that he did not use one (Tr. 33, 128, 402). Respirators were also available on the work site, but neither of the employees were wearing them (Tr. 13, 133, 403). The employees were not wearing coveralls, nor were any available at the site (Tr. 403). The employees were not working in a negative-pressure enclosure (Tr. 132). There was no decontamination area established at the site (Tr. 134). An asbestos warning sign was posted on the door (Tr. 133).

Wruck testified that he had worked for NIMCO approximately three and a half weeks at the time of the inspection and that the work at the Zuelke Building was his first project (Tr. 14-15). He had received two days of training in asbestos removal after he was hired (Tr. 18). Wruck stated that crew chief Zehren told him that he did not need to wear his respirator while using the glove bags (Tr. 17). Wruck said

that the glove bags almost always ripped and tore open, and that he would seal the tears with tape and staple the bags shut (Tr. 13, 16).

Taetsch stated that he did not notice any rips or tears in the glove bags while inspecting the site (Tr. 127). Pownell, who had worked for NIMCO for three years at the time of the hearing, testified that he had no rips or tears in his glove bags, and that in three years, he had never lost any asbestos insulation out of a glove bag (Tr. 409-410).

Pownell stated that NIMCO had a policy requiring the wearing of respirators during all removals (Tr. 404). Exhibit R-14 is a document, dated June 1, 1988, and entitled "RESPIRATOR POLICY." It states in pertinent part:

> The following is the policy of NIMCO with respect to the requirements for the wearing of respirators.
>
> * * *
>
> 2. . . . For our purposes, we will consider any asbestos removal job to require respirators.

Pownell testified that he and Wruck were not wearing respirators on the day of the inspection in violation of NIMCO's policy, and that was the first time that the policy had been so violated. Thomas Lightbody, the general manager of NIMCO, reprimanded the employees for the violation (Tr. 404-405). Lightbody demoted Zehren from crew chief and reduced his pay (Tr. 580). Respondent was not charged with a violation for failure to require the wearing of respirators.

The results of the employees' monitoring samples conducted by the Secretary detected no asbestos for Pownell's sample and .03 fibers per cubic centimeter (f/cc) for Wruck's sample (Ex. C-7; Tr. 132). Section 1926.58(c) establishes the permissible exposure limit (PEL) for asbestos to be .2 f/cc of air as an eight-hour time-weighted average (TWA). The action level for asbestos is .1 f/cc. Thus, both employees' personal samples were below the PEL and the action level for asbestos (Tr. 132).

Following Taetsch's inspection, the Secretary of Labor issued a citation for an other-than-serious violation of the Occupational Safety and Health Act of 1970 ("Act") on December 7, 1988. The citation alleged a violation of 29 C.F.R. § 1926.58(e)(6)(i), which provides:

> Wherever feasible, the employer shall establish negative-pressure enclosures before commencing removal, demolition, and renovation operations.

In her complaint, the Secretary amended the citation by alleging a second other-than-serious violation, that of 29 C.F.R. § 1926.58(j)(2)(i), which provides:

> Except for small scale, short duration operations, as described in paragraph (e)(6) of this section, the employer shall establish a decontamination area that is adjacent and connected to the regulated area for the decontamination of employees contaminated with asbestos, tremolite, anthophyllite, or actinolite. The decontamination area shall consist of an equipment room, shower area, and clean room in series. The employer shall ensure that employees enter and exit the regulated area through the decontamination area.

At the hearing, the Secretary moved to amend the citation and complaint by reclassifying the two alleged violations as

serious and proposing a penalty of $240.00 for each item. The Secretary's motion was held in abeyance until the writing of this decision. The Secretary's motion is granted but has become moot in view of the decision reached in this case.

NIMCO does not deny that it had neither a negative-pressure enclosure nor a decontamination area established at the Zuelke Building site. NIMCO argues, however, that the asbestos standard requires a negative-pressure enclosure and a decontamination area only in regulated areas.

29 C.F.R. § 1926.58(e)(6)(i)

Requirement for negative-pressure enclosure

Section 1926.58(e)(1) provides:

> The employer shall establish a regulated area in work areas where airborne concentrations of asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals exceed or can reasonably be expected to exceed the permissible exposure limit prescribed in paragraph (c) of this section.

The definitions section of the standard, § 1926.58(b), states:

> "Regulated area" means an area established by the employer to demarcate areas where airborne concentrations of asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals exceed or can reasonably be expected to exceed the permissible exposure limit. The regulated area may take the form of (1) a temporary enclosure, as required by paragraph (e)(6) of this section, or (2) an area demarcated in any manner that minimizes the number of employees exposed to asbestos, tremolite, anthophyllite, or actinolite.

NIMCO argues that paragraph (e) must be read as a whole, starting with the requirement under (e)(1) that a regulated

area must be established under certain circumstances, and continuing through (e)(6), which requires that a negative-pressure enclosure must be established "where feasible" before commencing removal, demolition, and renovation operations. NIMCO contends that the ordinary meaning of paragraph (e) is that the requirement for a negative-pressure enclosure is contingent upon the existence of a regulated area.

The Secretary argues that the requirements of § 1926.58(e)(1)-(5) are separate and distinct from the requirements of § 1926.58(e)(6)(i), which relates specifically to asbestos removal, demolition, and renovation operations. The captions of the paragraph indicate that NIMCO's reading is more reasonable. "[T]he provisions of a standard should be interpreted in the context of the entire standard. See State Highway Commission of Missouri v. Volpe, 479 F.2d 1099, 1111-1112 (8th Cir. 1973) (a section of statute should not be read in isolation but rather in the context of the whole act.)" Bunge Corporation, 86 OSAHRC 52/A3, 12 BNA OSHC 1785, 1986 CCH OSHD ¶ 27,565, pp. 35,804-35,805 (Nos. 77-1622, 78-838, 78-2213, 1986).

The captions of each of the subparagraphs of paragraph (e) read as follows:

(e) Regulated areas--
- (1) General.
- (2) Demarcation.
- (3) Access.
- (4) Respirators.
- (5) Prohibited activities.
- (6) Requirements for asbestos removal, demolition, and renovation operations.

If, as the Secretary argues, (e)(6) is separate and distinct from (e)(1)-(5), it would be reasonable to assume that a caption indicating a separate topic would appear immediately before (6). As the paragraph stands, however, a reasonable person reading the standard would assume that paragraph (e) addresses regulated areas, and subparagraphs (e)(1)-(6) address specific aspects of the general subject.

The Secretary argues that reference to the standard's preamble (51 Fed. Reg. 22705 et seq., June 20, 1986) and OSHA Instruction CPL 2-2.40, Sept. 1, 1987 (Ex. C-3), makes clear the Secretary's intent that § 1926.58(e)(6) be read as independent from the rest of paragraph (e). Reference to the Secretary's construction of the standard in not appropriate, however, when the standard itself is unambiguous.

> It is axiomatic that OSHA standards must be interpreted in accordance with the natural and plain meaning of their words; they cannot be construed to mean what the agency may have intended but did not adequately express. . . . Adoption of a strained interpretation of the . . . standard, an interpretation that bears no reasonable relationship to the standard's plain words, would not serve the purposes of the Act because the standard would not be effective in guiding the conduct of employers.

Bunge Corp., 1986 CCH OSHD 27,565 at p. 35,806.

The Secretary offers another argument against NIMCO's interpretation: "To require a showing that the area where asbestos removal operations are performed is an area where exposures did or could have exceeded the PEL would nullify the preventive purpose of the cited standards to require the

establishment of negative-pressure enclosures before commencing removal, demolition, and renovation operations and the establishment of decontamination areas." (Secretary's Brief, p. 20; emphasis in original).

This requirement is no more illogical than the requirement that regulated areas be established where airborne concentrations of asbestos exceed or can reasonably be expected to exceed the PEL. In either case, the employer must either actually sample for airborne concentrations of asbestos (which can take two weeks or longer to get back from the laboratory, by which time the project will most likely be completed), or the employer can make an educated prediction based upon previous experience as to whether the level of airborne asbestos can reasonably be expected to exceed the PEL.

David McLeod is the president of NIMCO. He testified that his company has a data base of over 1000 personal and area air samples, going back to 1981. Based upon this data base, NIMCO is able to determine to a reasonable degree of accuracy whether the PEL will be exceeded for any given project (Tr. 625-627).

John Schauer is president of Schauer and Associates, Inc., a rival asbestos abatement company (Tr. 55-57). He appeared as one of the Secretary's witnesses. Schauer concurred with McLeod that "training and experience" enabled asbestos abatement contractors to accurately estimate the level of

exposure to airborne asbestos which a particular project would generate (Tr. 93):

> Mr. McLeod has been in the business for quite awhile, I'm sure he has extensive knowledge of -- and OSHA, in fact, has accepted data base information on, or in lieu of, air monitoring.
>
> You can establish certain levels of expected exposure for particular procedures with particular abatement activities. That's basically how the judgment is made.

The Secretary argues that relying on predictions for the level of exposure to airborne asbestos is too great a gamble to risk. She makes a point that, given the hazards associated with asbestos, actual air monitoring is preferable to predictions based on past samples for similar projects. The standard, however, in providing for regulated areas when levels "exceed or can reasonably be expected to exceed" the PEL, explicitly allows for such predictions.

NIMCO had a reasonable expectation that the Zuelke Building project would not generate levels of airborne asbestos in excess of the PEL. The Secretary's air monitoring results establish that NIMCO's expectation was justified. Therefore, it was not necessary for NIMCO to establish a regulated area. There being no regulated area, it was not necessary to establish a negative-pressure enclosure.

Small-scale, short-duration operations

Even if § 1926.58(e)(6) imposed a requirement for a negative-pressure enclosure regardless of the establishment of a regulated area, NIMCO argues that it would be exempted from

compliance with that standard by virtue of § 1926.58(e)(6)(iv), which provides:

> Exception: For small-scale, short-duration operations, such as pipe repair, valve replacement, installing electrical conduits, installing or removing drywall, roofing, and other general building maintenance or renovation, the employer is not required to comply with the requirements of paragraph (e)(6) of this section. (Refer to Appendix G.)

Appendix G provides in pertinent part:

> Definition of Small-Scale, Short Duration Activities
>
> For the purposes of this appendix, small-scale, short duration renovation and maintenance activities are tasks such as, but not limited to:
>
> - Removal of asbestos-containing insulation on pipes;
> - Removal of small quantities of asbestos-containing insulation on beams or above ceilings;
> - Replacement of an asbestos-containing gasket on a valve;
> - Installation or removal of a small section of drywall;
> - Installation of electrical conduits through or proximate to asbestos-containing materials.
>
> Evidence in the record (see the Summary and Explanation section of the preamble for paragraph (g), Methods of Compliance, for specific citations) suggests that the use of certain engineering and work practice controls is capable of reducing employee exposures to asbestos to levels below the final standard's action level (0.1 f/cc). Several controls and work practices, used either singly or in combination, can be employed effectively to reduce asbestos exposures during small maintenance and renovation operations. These include:
>
> - Wet methods
> - Removal methods
> - Use of glove bags
> - Removal of entire asbestos insulated pipes or structures
> - Use of mini-enclosures
> - Enclosure of asbestos materials; and
> - Maintenance programs.

This appendix describes these controls and work practices in detail.

Appendix G indicates that NIMCO would be exempt under its definition. The first activity mentioned is "Removal of asbestos-containing insulation on pipes," which is the specific task NIMCO was performing at the Zuelke Building.

The Secretary argues that CPL 2-2.40, an internal instruction issued by OSHA to provide clarification of § 1926.58, takes NIMCO out of the § 1926.58(e)(6)(iv) exemption. That instruction provides in pertinent part (Ex. C-3, p. 7):

> c. 29 C.F.R. 1926.58 (e)(6)(iv) grants exceptions from the requirements of establishing negative-pressure enclosures and designating a competent person, if the operating is small-scale and of short-duration. For the purposes of this standard a "small-scale, short-duration" operation is defined as:
>
> (1) Maintenance or renovation tasks, where the removal of asbestos-containing materials is not the primary goal of the job (e.g., repairing a valve which entails the removal of asbestos, installing electrical conduit which must be fastened to asbestos-cement siding, etc.).
>
> (2) Activities where employees' exposures to asbestos can be kept below the action level via worker isolation techniques, such as glove bags or other methods described in Appendix G.
>
> (3) An operation which has been includes in the employer's asbestos maintenance program (as required in Appendix G) of all employers who are claiming an exemption from the requirements of 29 C.F.R. § 1926.58(e)(6).

(4) Nonrepetitive operations (viz.: not a series of small-scale jobs, which if performed at one time would have resulted in a large-scale removal).

But the clarification has some ambiguity problems of its own. Bruce Stockmeier, manager of Industrial Hygiene Services and a witness for the Secretary, stated (Tr. 308): "To be honest, I think that the CPL doesn't clearly indicate what the standard indicates at first reading. However, if you take the time to read the CPL a couple of times, I believe that it is consistent with the standard."

Stockmeier later described his approach to reconciling the language of the CPL with the language of the standard (Tr. 316-317).

> From my perspective, what I did was, based first on the standard and then looking at the CPL and seeing if there is a way to read this so that it fit in with the standard.
>
> I think if one adopts that, that perspective, saying, "here is the standard. Now, what does this say about the standard," you don't get as confused as you might if you went to the CPL and said, "Okay, this is the standard," or "This is the guiding language. How does the standard fit in with the CPL?"
>
> With that sort of reasoning, I think, or that approach, I would say, maybe that could lead to some misunderstanding.

Schauer testified that he believed that all four conditions mentioned in the CPL must exist simultaneously in order to meet the definition of a small-scale, short-duration operation. When asked by the court if there was some confusion in the industry on the interpretation of the instruction, Schauer replied (Tr. 80-81):

> It's not only in the industry, it's even within different regions. I had asked for an opinion from Region II on small-scale, short-duration, and their interpretation was, up to and including 110 linear feel for short scale, small scale . . . . Region X says one bag with one set of arms and three feet. So, even within the Department of Labor the different regions have different interpretations and enforcement of the standard.

Stockmeier testified that, from the preamble of the standard, he derived that the intent of the employer, and not the actual activity being performed, determined whether or not an operation was small-scale, short-duration (Tr. 319). If the intent of the employer is to perform some maintenance function, with the removal of asbestos as an attendant activity, the operation could be small-scale, short-duration. If the intent of the employer is to remove asbestos for the sake of removing asbestos, there cannot be a small-scale, short-duration exemption.

As NIMCO points out, asbestos abatement contractors always remove asbestos for the sole purpose of removing asbestos. Generally, they are not informed of the employer's intent in requesting the removal. This interpretation would lead to the undesirable situation where trained, licensed, asbestos abatement contractors would always be required to establish negative-pressure enclosures, while the employer's maintenance men, untrained and inexperienced in working with asbestos, could use the glove bag method.

The record discloses that the small-scale, short-duration exemption and its "clarifications" are vague, ambiguous, and

confusing. This is not a new relevation. In 1988, the United States Court of Appeals, D.C. Circuit, reviewed the revised asbestos standard issued by the Secretary in July 1986. In Building and Construction Trades Department, AFL-CIO v. Brock, 838 F.2d 1258 (D.C. Cir. 1988), the court upheld the standard in most respects, but remanded the small-scale, short-duration exemption to OSHA for clarification, stating:

> The regulations do not define "small-scale, short-duration operations" explicitly, but rather attempt to do so by example, noting that the term is meant to include operations "such as pipe repair, valve replacement, installing electrical conduits, installing or removing drywall, roofing, and other general building maintenance or renovation." Id. BCTD asserts that OSHA has not drawn the parameters of the exemption with enough specificity. Indeed, the exception as now worded seems to erase the rule. OSHA responds that explanatory language in the preamble adequately narrows the exception. There OSHA stated that the exemption was meant to apply only to "those work operations where it is impractical to construct a negative-pressure enclosure because of the configuration of the work environment." 51 Fed. Reg. at 22,711/2. In so far as the exemption applies to the negative-pressure enclosure requirement, this language seems marginally clear enough and makes apparent sense, but on remand the Secretary should consider including this clarification in the regulations themselves. (In so far as the exemption applies to the competent person requirement, we can discern no logic whatever in OSHA's choice of language, with or without the preamble's gloss.
>
> Id. at 1279-1280.

In an OSHA memorandum recently issued by the Health Standard Programs, the Secretary states: "Rather than making the suggested alternations to the regulatory text, which may not lead to reduced risk, OSHA believes that rulemaking should be instituted on the matter." Occupational Safety & Health

Reporter, p. 1851, March 14, 1990. To date, the cited standard has not been revised.

NIMCO claims it is exempt from the requirements of § 1926.58(e)(6) because it falls within the exemption created by § 1926.58(e)(6)(iv) for small-scale, short-duration operations. The record supports a finding that respondent's removal of asbestos containing material from pipes using the glove bag method qualifies for this exemption under the facts of this case.

29 C.F.R. § 1926.58(j)(2)(i)

The Secretary contends that NIMCO was in violation of § 1926.58(j)(2)(i) because it failed to establish a decontamination area at the Zuelke Building site. She must fail for two reasons.

First, the standard states that the employer shall establish a decontamination area "[e]xcept for small-scale, short-duration operations." As decided, supra, NIMCO was involved in a small-scale, short-duration operation.

Second, the standard provides that the employer "shall establish a decontamination area that is adjacent and connected to the regulated area." As also discussed, supra, no regulated area was required at the Zuelke Building site. The standard presupposes a regulated area as a condition to the decontamination area. If no regulated area is required, no decontamination area is required. NIMCO was not in violation of § 1926.58(j)(2)(i).

On March 21, 1989, OSHA Industrial Hygienist Timothy Braun, conducted an inspection at the James River Plant, located at 160 Washington Street in Monaska, Wisconsin (Tr. 693). Robert Harp, a project engineer with the James River Plant, testified that NIMCO had been engaged to remove asbestos from a storage area of the plant (Tr. 347, 351). NIMCO commenced work on March 20, 1989. The asbestos removal lasted approximately one week (Tr. 348).

On March 20, 1989, NIMCO employees, including Pownell, removed asbestos insulation from a pipe about 60 to 80 feet in length, using the glove bag technique. The pipe remained in place after the asbestos insulation was removed. (Tr. 350, 414).

The pipe was located 18 feet above the ground. Pownell and another employee were working off of a tubular scaffold. They set up a partial enclosure around the top of the scaffold, which extended above the pipe from which they were removing asbestos (Ex. C-11; Tr. 413, 351-352). A vacuum was attached to the enclosure and was running continuously during the operation (Tr. 353). Although the top was left open, Pownell testified that he believed the enclosure was a negative-pressure enclosure because he had conducted a smoke tube test. The smoke tube is squeezed a couple of times, and a thick smoke is released. Pownell stated that the smoke went into the flex tube of the negative-pressure machine that was hooked to the

enclosure (Tr. 417-418). Braun stated that the enclosure was not a negative-pressure enclosure because the top was open (Tr. 701).

The employees were each wearing two protective suits and a respirator (Tr. 413). Air monitoring was being conducted by NIMCO at the site, but not all samples were being collected in the employees' breathing zone and the samples were not being taken at the proper flow rate, which was .5 to 2.5 liters per minute (Tr. 710-711). NIMCO's samples were at a rate of 4 liters per minute (Ex. C-20, Tr. 712).

Braun conducted personal air samples for the employees. No asbestos was detected (Tr. 700).

As a result of the inspection, NIMCO was issued two citations on May 4, 1989. Citation 1 alleged repeat violations of 29 C.F.R. § 1926.58(e)(6)(i) for failure to establish a negative-pressure enclosure, and of 29 C.F.R. § 1926.58(j)(2)(i) for failure to establish a decontamination area. The Secretary amended this citation in the complaint to allege a serious violation. Citation 2 alleges other-than-serious violations of 29 C.F.R. § 1926.58(f)(1)(ii) for failure to collect proper breathing zone air samples of employees, and of 29 C.F.R. § 1926.58(f)(5)(i) for failure to use the proper flow rate in the air samples.

At the hearing, the Secretary moved to amend the complaint to change the date of the alleged violations in Items 1 and 2

of Citation 1 to March 20, 1989. The motion was held in abeyance. It is hereby granted.

CITATION 1

Item 1: 29 C.F.R. § 1926.58(e)(6)(1)

NIMCO raises the same defense against this allegation as it raised in the previous docket: No regulated area was required to be established, therefore, no negative-pressure enclosure was required; and, NIMCO was engaged in a small-scale, short-duration operation. In addition, NIMCO argues that it had constructed an adequate negative-pressure enclosure.

Although this court disagrees that the structure established by NIMCO was a negative-pressure enclosure within the meaning of the Act, NIMCO does prevail on its other two arguments. The PEL for airborne asbestos was not exceeded during the operation. No regulated area was required, and neither was the concomitant negative-pressure enclosure. Furthermore, in removing asbestos insulation from 60 to 80 feet of pipe, NIMCO was engaged in a small-scale, short-duration operation. NIMCO was not in violation of § 1926.58(e)(6)(i).

Item 2: 29 C.F.R. § 1926.58(j)(2)(i)

The Secretary charges that NIMCO was required to establish a decontamination area at the James River Plant site. Because NIMCO was not required to establish a regulated area, and because NIMCO was engaged in a small-scale, short-duration

operation, no decontamination area was required. NIMCO was not in violation of § 1926.58(j)(2)(i).

CITATION 2

Section 1926.58(f)(1)(ii) provides:

> Determinations of employee exposure shall be made from breathing zone air samples that are representative of the 8-hour TWA of each employee.

The citation alleged:

> 29 C.F.R. 1926.58(f)(1)(ii): Determinations of employee exposure were not made from breathing zone samples that were representative of the 8-hour TWA of each employee:
>
> > (a) Employee exposure to asbestos while glove bagging on 3/20/89 through 3/23/89 was determined during only 1-2 hours of the removal project on those days, and not all sampling was done in the employees breathing zone.

Section 1926.58(f)(5)(i) provides:

> All samples taken to satisfy the monitoring requirements of paragraph (f) of this section shall be personal samples following the procedures specified in Appendix A.

The citation alleged:

> 29 C.F.R. 1926.58(f)(5)(i): All samples taken to satisfy the monitoring requirements of paragraph (f) were not personal samples collected following the procedures specified in Appendix A.
>
> > (a) On 3/20/89, air samples were taken using flow rates in excess of those specified in Appendix A.

NIMCO does not dispute these charges. Braun observed the filter cassettes used to collect the samples were hung on the scaffold railing, out of the employees breathing zone. Pownell told Braun that he believed that such a sample would be the equivalent of a personal sample (Tr. 735). Anthony Hoppe,

NIMCO's operations controller, testified that the company's policy is to set its monitors at an air flow rate of 2 or 2.5, and that the air monitor was in excess of that rate on the date of the inspection (Tr. 766).

NIMCO argues that the violation of these standards was the result of unpreventable employee misconduct. Pownell, however, was working with one other employee that day, and he was in charge (Tr. 766). As supervisory personnel, Pownell's actions and knowledge are imputed to the employer. Pownell's actions cannot be isolated employee misconduct.

NIMCO also argues that § 1926.58(f) allows for initial monitoring and periodic monitoring to be dispensed with or terminated under certain conditions. Those conditions are not present in the instant case.

Section 1926.58(f)(2)(iii) provides that the employer may rely on earlier monitoring results of projects which are similar to the current project to satisfy the initial monitoring requirements of § 1926.58(f)(2)(i). That standard is not at issue here. Section 1926.58(f)(3) exempts employers from conducting periodic monitoring in regulated areas when employees are equipped with supplied air respirators operated in the positive-pressure mode. This standard is not applicable to the present case because employees were not working in a regulated area.

NIMCO was in other-than-serious violation of § 1926.58(f)(1)(ii) and (5)(i).

FINDINGS OF FACT

Docket No. 89-136

1. NIMCO is an asbestos abatement contractor. It employees approximately 40 workers.

2. NIMCO was working at the Zuelke Building in Appleton, Wisconsin, on October 13, 1988. It had been hired to remove approximately 280 linear feet of asbestos insulation from pipes on the 9th and 12th floors.

3. NIMCO employees John Pownell and Douglas Wruck were removing asbestos insulation using the glove bag technique. No negative-pressure enclosure and no decontamination area were established.

4. Monitoring tests conducted by the OSHA industrial hygienist indicated that the level of airborne asbestos concentration for Wruck was 0.03 f/cc. No asbestos was detected for Pownell.

Docket No. 89-1703

1. NIMCO was working at the James River Plant in Monaska, Wisconsin, in March, 1989. It was hired to remove asbestos insulation from pipes in a storage area of the plant. On March 20, 1989, NIMCO removed asbestos insulation from approximately 60 feet of pipe.

2. The NIMCO employees worked off of a tubular scaffold, upon which they had constructed a partial enclosure that extended above the pipe, and was open at the top.

3. Pownell was in charge of the operation. He was conducting air monitoring tests by placing the cassette filters on the scaffold railing. The rate of air flow was set at 4 liters per minute.

CONCLUSIONS OF LAW

1. NIMCO, at all times material to this proceeding, was engaged in a business affecting commerce within the meaning of § 3(5) of the Act.

2. NIMCO, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and the subject matter.

Docket No. 89-136

1. NIMCO was not in violation of § 1926.58(e)(6)(i). No negative-pressure enclosure was required, and NIMCO was engaged in a small-scale, short-duration operation.

2. NIMCO was not in violation of § 1926.58(j)(2)(i). No decontamination area was required, and NIMCO was engaged in a small-scale, short-duration operation.

Docket No. 89-1703

1. NIMCO was not in violation of § 1926.58(e)(6)(i). No negative-pressure enclosure was required, and NIMCO was engaged in a small-scale, short-duration operation.

2. NIMCO was not in violation of § 1926.58(j)(2)(i). No decontamination area was required and NIMCO was engaged in a small-scale, short-duration operation.

3. NIMCO was in other-than-serious violation of § 1926.58(f)(1)(ii) for failing to conduct personal air samples of each employee.

4. NIMCO was in other-than-serious violation of § 1926.58(f)(5)(i) for failing to set air monitors at an appropriate rate of air flow.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED:

Docket No. 89-136

1. That item 1 of the citation is vacated and no penalty is assessed, and

2. That item 2 of the citation is vacated and no penalty is assessed.

Docket No. 89-1703

1. That item 1 of Citation 1 is vacated and no penalty is assessed; and

2. That item 2 of Citation 1 is vacated and no penalty is assessed; and

3. That item 1 of Citation 2 is affirmed as other-than-serious and no penalty is assessed; and

4. That item 2 of Citation 2 is affirmed and no penalty is assessed.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

MAR 16 1990

Deputy Assistant Secretary for Facilities (08)

Cost Impact of OSHA Interpretation That Limits Use of Glove Bags (Follow up to O/P Memo dtd 3/5/90)

Designated Agency Safety & Health Official (008I)

1. We reviewed the cost estimates for two VA asbestos removal projects. The cost of removing asbestos by constructing full containment was compared to the cost of removing asbestos from components such as pipes, valves, and fittings from which asbestos could have previously been removed utilizing glove bags.

2. The table below summarizes our findings:

Project	Glove Bag Cost (1)	Full Containment Cost (2)
1	$ 91,000	$474,000
2	156,000	647,000

Note (1) "Glove Bag Cost" is the cost of removing asbestos by glove bagging.

(2) "Full Containment Cost" is the cost of providing full containment and abatement of the asbestos.

3. My point of contact on this issue is Josh Staudt, Chief, Hazardous Materials Management Division (008E). He may be reached on 233-3729.

Lester N. Rumbolo III

BRAND TECHNICAL SERVICES

TO: ALL PURCHASING PERSONNEL

SUBJECT: PURCHASING MEETING

PREPARED BY: KATHLEEN O'SHEA

Paul Dietzler opened the meeting wit Copy To Al Esson ll those who were present. We had a representati ement companies. An updated list of all t el and their phone numbers and addresses will acc the meeting.

Jim Werner had opening remarks regardi da for this day and a half meeting with an emphasi f trading equipment from one location to another r transferring.

Dave Raftery passed around pamphlets on is disposable and reasonably priced. Price with the brochure. The only drawback for this pr week delivery time. We could eliminate this by orderin greater quantity if other locations are interested in this unit. Dave has used these units and has had a remarkable positive response from the field personnel.

Larry Long talked about Poly Hangers which he passed around along with an information sheet that included prices. He passed around two types of hangers which are currently being used in our industry.

Tom Still & Dave Bohr talked about a new type of respirator that they passed around for everyone to inspect. It seems to be very efficient for our purposes and looks to be much better with an attractive price. The name of the respirator is ISI and is distributed by Environmental Abatement Products located in St. Louis MO. Although there are still many jobs that prefer to use the MSA and Racal it wouldn't hurt to look into this respirator further from an economical point of view. It seems to have all the features that we require and more. Also passed out were samples and literature on a disposable bath towel that has a reasonable price, the price sheet was also included.

Lorraine Henderson brought up the problem of HMIS labels. She is having to label to many products on an individual basis such as each can in a case of spray adhesive. There could be a solution to this problem if we talk to our vendors and ask them to pre-lable them for us. If they aren't going to assist us in this procedure we may suggest going to a vendor that will help us. There are many out there waiting to get our business. Lorraine puts together a package for her people in the field for every shipment so they have all the products they need to label there items accordingly. She would also like to have a list compiled of all the products that need to be labeled with the HMIS.

Jim Werner would like each of us to send Paul a list of products that should be on a APPROVED VENDORS LIST. This should be of great help to all of us in the future.

Steve Nichin talked about the Service Maintenance Program for our equipment. We should clean up all the machinery and repair what needs to be repaired before sending it out on a job and make sure it is in excellent working order. This will eliminate the problems in the field of having to take time out to repair before starting the job and not having to order new equipment on the spot. He also has a maintenance program that he charges $1.50 per man hour to help pay for the labor and equipment and new parts. Also, $1.10 per man hour to help pay for all the capitalization of equipment. It is in this way he doesn't have to charge rent on his equipment to the job. It seems to work well for his location and everyone should try to follow with a program to help cut cost on new equipment in the future.

Dean Featherstone talked about Mastic Removal and also passed out a brochure from Sentinel referring to their chemical removal of floor adhesive. It showed a procedure to use for removal of adhesive and also included an MSDS sheet for the product along with other procedures on how to use more efficiently.

Bill Aikins passed around information on Pneumatic Scrappers and Bead Blast Machines. He also passed around pictures showing the results of this machine.

Joe Steinmetz, Harold Cribbs & Jim Werner talked about equipment management and the possible sharing of equipment among all of our locations. The only problem (which seems to be a big one) is that some locations do not want to be caught without some equipment they may need ASAP because of a job suddenly. Also a big problem with this is the abuse the machinery takes out on the job.

Jim Werner would like us to make up a list and send it to Paul on all of our equipment in and out of the field. Please send this list to Paul as soon as possible.
We should have GOALS for the future on the repair of our existing equipment and be able to cut down the cost of the new equipment. Keeping a list of all the repairs and the cost for each piece of equipment and the location will be a help for researching the equipment. We would be able to track down that piece and see if it is worth repairing again or would it be more reasonable to replace.

Paul Dietzler passed out the Price Survey that we had Rafael create from the sheets that you submitted earlier this month. He did a rough draft on this so that we can see what we are paying for different items. If you have any changes please input them and send Paul a copy of them. Add or delete products and/or prices as needed then we can update the survey.

Also, updated price sheets from HAKO on their attachment parts is included. The vacuums are not being increased in price. Please put these sheets in your HAKO book.

Hiller Payne says that the TAD SYSTEM that he is working with is working out well to his advantage. He suggest that you read the manual at least twice before you try to work with it. Also he suggest that you always remember to SAVE your work. The system also requires a wide carriage printer.

Al Eaton wants to remind us to take a real close look at any and all CAPITAL EXPENDITURES that we try to submit and make sure that they are really necessary. Ask yourself first if you can repair what you have before replacing. We must also continue to keep the communication lines open within the company and continue to be informative to each other. We have made tremendous strides this year in estimating and project control procedures by keeping contact with our people and management. We have made excellent headway and should continue to get better.

John Gallagher has supplied each of our locations with a set of WASTE MANAGEMENT VENDOR GUIDES FOR NATIONAL ACCOUNTS. We will send these to you by UPS this week, they are to big to
carry on the plane. Use these books to get better prices on things such as Copiers, Fax Machines etc. You will get a better price for many items, also included with today's package is information on FLEET programs for light trucks.
John also asks that we report any problems with the travel agency and likewise with and good reports.

Jeff Mansfield circulated pamphlets on Vactagon units along with the prices. They use standard bags and we can buy them direct at a discount price of $750.00 each. You will be able to purchase these through Paul or Kathy at Technical Services.

Paul Dietzler talked about the differences on filters for the Negative Air Unit. Some of our vendors are passing off filters that are not adequate. Samples are here for your viewing please check them out before leaving today. If you have any questions on these filters please feel free to call Paul or Kathy regarding them. Remember that you can always call us at Tech Services and we will try to help the best we can and if we don't know the answer we will find it out for you. Paul closed the meeting at 4:00 p.m. We hope you all had a safe trip home.

ASSOCIATION OF
MINNESOTA COUNTIES
125 Charles Avenue
St. Paul, Minnesota 55103
612/224-3344
612/224-6540 Fax



January 30, 1990

Jane A. Nelson
Minnesota Department of Health
Division of Environmental Health
717 Delaware Street Southeast
P. O. Box 59040
Minneapolis MN 55459-0040

Reference No. A90-101

Dear Ms. Nelson:

I noted in the January 22, 1990 State Register (14 S.R. 1879) that your agency is seeking outside information or opinions regarding rules relating to variance procedures for environmental health rules (new rule), health supervision services in lodging establishments, lead abatement, infectious waste generators, health risk limits for groundwater, and asbestos.

The purpose of this letter is to call your attention to M.S. 14.11, which requires agencies to estimate the cost impact of proposed rules on local public bodies if a rule will require the expenditure of public money by local public bodies.

I believe that these proposed rules may result in local implementation costs in excess of $100,000. Our association will ask our member counties to share information with you relating to estimated cost impacts.

In the course of the rule adoption process, I hope your agency gives significant attention to the local cost impact issues. At the time that your agency publishes the appropriate notice of intent to adopt a rule on this subject, we would expect to see a local cost impact estimate as part of that notice, as required by M.S. 14.11.

Thank you for your attention to this matter.

Sincerely,

James A. Mulder
Executive Director

cc: Senator Linda Berglin
Senator Doug Johnson
Senator Gene Waldorf
Commissioner, Sister
Mary Madonna Aston
Representative Paul Ogren
Representative Peter Rodosovich
Representative Allan Welle
Commissioner,
Peter Hutchinson

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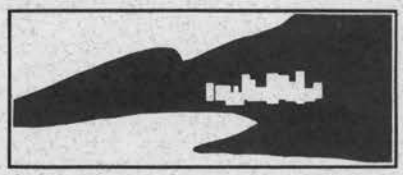
INSTITUTE



for ENVIRONMENTAL ASSESSMENT

October 31, 1990

Jane Nelson, Rules Coordinator
Division of Environmental Health
Minnesota Department of Health
925 Southeast Delaware St.
P.O. Box 59040
Minneapolis, MN 55459-0040

Dear Ms. Nelson:

On behalf of the Institute for Environmental Assessment, I would like to formally notify you of our request for public hearing for proposed Rules 4620.1450 Variance to Rules Relating to Clean Indoor Air. Specifically, we are most interested in those provisions relating to 4620.3500 Standards for Asbestos Related Work and Rules 4717.7000 thru 4717.7050.

If you have any questions or comments, please do not hesitate to contact me; however, I hope to be advised in writing when a date and time has been established for the hearing.

Sincerely,

Bill Sloan
Senior Vice President

BS:kj

cc: Greg Myer, Anoka Regional Office
Tom Halberg, Mankato Regional Office
Bob Swanfeld, Duluth Regional Office

Following meeting of Nov. 7th, 1990 with Jane Nelson, David Cendrow, Bill Fetzer the need for a hearing was found to be unnecessary.

William E. Sloan

Corporate Headquarters
433 Jackson Street, Anoka, Minnesota 55303 (612) 323-9770 1(800) 233-9513 FAX (612) 323-9771 A Minnesota Corporation

STATE OF MINNESOTA

MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Adoption of the Rules of the Minnesota Department of Health Governing Variances to Environmental Health Rules

DECLARATION OF COUNSEL

I, Paul Zerby, Special Assistant Attorney General, do hereby declare that I have examined the above-captioned rule, and the supporting rulemaking record, and that, based on my examination, the Administrative Procedure Act and Minnesota Rules, chapter 2010 have been followed. Any exceptions are listed below. For Attorney General billing purposes, the four-digit docket client code is 52546X 1200.

Paul Zerby

Paul Zerby
Special Assistant
Attorney General

Dated: December 11, 1990