

NATURAL RESOURCES DEPARTMENT[561]

Notice of Intended Action

**Proposing rule making related to waivers
and providing an opportunity for public comment**

The Natural Resources Department hereby proposes to amend Chapter 10, “Waivers or Variances from Administrative Rules,” Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is proposed under the authority provided in Iowa Code section 17A.3.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code section 17A.9A.

Purpose and Summary

Chapter 10 outlines a uniform process for the granting of waivers or variances from rules adopted by the Department. This proposed rule making seeks to align the chapter with the Iowa Administrative Procedure Act as amended by 2020 Iowa Acts, House File 2389. The legislation amended Iowa Code section 17A.9A to remove the term “variance.” The section now refers only to “waivers,” rather than to “waivers or variances.” House File 2389 was passed as a technical edit to simplify the law’s language. Neither the Iowa Code section nor the Department’s associated rules contain any substantive distinction between a waiver or a variance. Therefore, the Department is proposing to strike “variance” in all instances from Chapter 10. There are no other changes proposed.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa. A copy of the fiscal impact statement is available from the Department upon request.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found. A copy of the jobs impact statement is available from the Department upon request.

Waivers

This rule is subject to the waiver provisions of 561—Chapter 10. Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Department for a waiver of the discretionary provisions.

Public Comment

Any interested person may submit written or oral comments concerning this proposed rule making. Written or oral comments in response to this rule making must be received by the Department no later than 4:30 p.m. on February 2, 2021. Comments should be directed to:

Tamara McIntosh
Department of Natural Resources
Wallace State Office Building
502 East Ninth Street, Fourth Floor
Des Moines, Iowa 50319
Email: tamara.mcintosh@dnr.iowa.gov

Public Hearing

No public hearing is scheduled at this time. As provided in Iowa Code section 17A.4(1)“b,” an oral presentation regarding this rule making may be demanded by 25 interested persons, a governmental subdivision, the Administrative Rules Review Committee, an agency, or an association having 25 or more members.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its [regular monthly meeting](#) or at a special meeting. The Committee’s meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making actions are proposed:

ITEM 1. Amend **561—Chapter 10**, title, as follows:

WAIVERS OR VARIANCES FROM ADMINISTRATIVE RULES

ITEM 2. Amend rule 561—10.1(17A,455A) as follows:

561—10.1(17A,455A) Applicability. This chapter outlines a uniform process for the granting of waivers ~~or variances~~ from rules adopted by the department. As used in this chapter, the term “director” includes the director’s designee. As used in this chapter, “waiver ~~or variance~~” means an action by the department which suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person.

ITEM 3. Amend rule 561—10.2(17A,455A) as follows:

561—10.2(17A,455A) Authority. A waiver ~~or variance~~ from rules adopted by the department may be granted in accordance with this chapter if:

10.2(1) The department has exclusive rule-making authority to promulgate the rule from which waiver ~~or variance~~ is requested or has final decision-making authority over a contested case in which a waiver ~~or variance~~ is requested; and

10.2(2) The waiver ~~or variance~~ is consistent with any applicable statute, constitutional provision, or other provision of law. In addition, this subrule does not authorize the department to waive ~~or vary~~ any requirement created or duty imposed by statute.

ITEM 4. Amend rule 561—10.4(17A,455A) as follows:

561—10.4(17A,455A) Criteria for waiver ~~or variance~~. Upon petition of any person and at the sole discretion of the department, the department may issue a waiver ~~or variance~~ from the requirements of a rule if the director or the department in a contested case proceeding finds, based on clear and convincing evidence, all of the following:

10.4(1) The application of the rule would pose an undue hardship on the person for whom the waiver ~~or variance~~ is requested.

10.4(2) The waiver ~~or variance~~ from the requirements of a rule in the specific case would not prejudice the substantial legal rights of any person.

10.4(3) The provisions of a rule subject to a petition for a waiver ~~or variance~~ are not specifically mandated by statute or another provision of law.

10.4(4) Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver ~~or variance~~ is requested.

ITEM 5. Amend rule 561—10.5(17A,455A) as follows:

561—10.5(17A,455A) Burden of persuasion. The burden of persuasion rests with the person who petitions the department for the waiver ~~or variance~~ of a rule. Each petition for a waiver ~~or variance~~ shall be evaluated by the department based on the unique, individual circumstances set out in the petition. A waiver ~~or variance~~, if granted, shall be drafted by the department so as to provide the narrowest exception possible to the provisions of the rule. The department may place any condition on a waiver ~~or a variance~~ that the department finds desirable to protect the public health, safety, and welfare. A waiver ~~or variance~~ shall not be permanent unless the petitioner can show that a temporary waiver ~~or variance~~ would be impracticable, and, in any event, shall not exceed one year in accordance with the provisions of Iowa Code section 455B.143. If a temporary waiver ~~or variance~~ is granted, there is no automatic right to renewal. At the sole discretion of the department, a waiver ~~or variance~~ may be renewed if the department finds all of the factors set out in rule 561—10.4(17A,455A) remain valid.

ITEM 6. Amend rule 561—10.6(17A,455A) as follows:

561—10.6(17A,455A) Special waiver ~~or variance~~ rules not precluded. This chapter shall not preclude the department from granting waivers in other contexts or on the basis of other standards if a statute or other department rule authorizes the director to do so, and the director deems it appropriate to do so.

ITEM 7. Amend rule 561—10.7(17A,455A) as follows:

561—10.7(17A,455A) Administrative deadlines. When the rule from which a waiver ~~or variance~~ is sought establishes administrative deadlines, the department shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all persons governed by the particular rule.

ITEM 8. Amend rule 561—10.8(17A,455A), introductory paragraph, as follows:

561—10.8(17A,455A) Filing of petition. A petition for a waiver ~~or variance~~ shall be submitted in writing to the department as follows:

ITEM 9. Amend rule 561—10.9(17A,455A) as follows:

561—10.9(17A,455A) Contents of petition. A petition for waiver ~~or variance~~ shall include the following information when applicable and known to the petitioner:

10.9(1) The name, address, and telephone number of the entity or person for whom a waiver ~~or variance~~ is requested, and the case number of any related contested case.

10.9(2) A description and citation of the specific rule from which a waiver ~~or variance~~ is requested.

10.9(3) The specific waiver ~~or variance~~ requested, including the precise scope and operative period that the waiver ~~or variance~~ will extend.

10.9(4) The relevant facts that the petitioner believes would justify a waiver ~~or variance~~. This statement shall include a signed statement from the petitioner attesting to the accuracy of the facts provided in the petition and a statement of reasons that the petitioner believes will justify a waiver ~~or variance~~.

10.9(5) and 10.9(6) No change.

10.9(7) The name, address, and telephone number of any public agency or political subdivision of the state or federal government which also regulates the activity in question, or which might be affected by the granting of a waiver ~~or variance~~.

10.9(8) No change.

10.9(9) The name, address, and telephone number of any person with knowledge of relevant facts relating to the proposed waiver ~~or variance~~.

10.9(10) Signed releases of information authorizing persons with knowledge regarding the request to furnish the department with information relevant to the waiver ~~or variance~~.

ITEM 10. Amend rule 561—10.10(17A,455A) as follows:

561—10.10(17A,455A) Additional information. Prior to issuing a decision granting or denying a waiver ~~or variance~~, the department may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the director may, on the director's own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the director.

ITEM 11. Amend rule 561—10.12(17A,455A) as follows:

561—10.12(17A,455A) Hearing procedures. The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply to any petition for a waiver ~~or variance~~ of a rule filed within a contested case and shall otherwise apply to department proceedings for a waiver ~~or variance~~ only when the department so provides by rule or order or is required to do so by statute.

ITEM 12. Amend rule 561—10.13(17A,455A) as follows:

561—10.13(17A,455A) Ruling. A decision granting or denying a waiver ~~or variance~~ shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the decision pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and operative period of the waiver if one is issued.

ITEM 13. Amend rule 561—10.14(17A,455A) as follows:

561—10.14(17A,455A) Conditions. The department may condition the granting of the waiver ~~or variance~~ on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means.

ITEM 14. Amend rule 561—10.15(17A,455A) as follows:

561—10.15(17A,455A) Time for ruling. The department shall grant or deny a petition for a waiver ~~or variance~~ as soon as practicable but, in any event, shall do so within 120 days of receipt of the petition, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the department shall grant or deny the petition no later than the time at which the final decision in that contested case is issued.

ITEM 15. Amend rule 561—10.18(17A,455A) as follows:

561—10.18(17A,455A) Public availability. Subject to the provisions of Iowa Code section 17A.3(1) "e," the department shall maintain a record of all decisions granting and denying waivers ~~and variances~~ under this chapter. All final rulings in response to requests for waivers ~~or variances~~ shall be indexed and available to members of the public.

ITEM 16. Amend rule 561—10.19(17A,455A) as follows:

561—10.19(17A,455A) Voiding or cancellation. A waiver ~~or variance~~ is void if the material facts upon which the request is based are not true or if material facts have been withheld. The department may at any time cancel a waiver ~~or variance~~ if the department finds that the facts as stated in the request are not true, material facts have been withheld, the alternative means of compliance provided in the waiver ~~or variance~~ have failed to achieve the objectives of the statute, or the requester has failed to comply with the conditions of the waiver ~~or variance~~.

ITEM 17. Amend rule 561—10.20(17A,455A) as follows:

561—10.20(17A,455A) Violations. Violation of conditions of the waiver ~~or variance~~ approval is the equivalent of violation of the particular rule for which the waiver ~~or variance~~ is granted and is subject to the same remedies or penalties.

ITEM 18. Amend rule 561—10.21(17A,455A) as follows:

561—10.21(17A,455A) Defense. After the department issues a decision granting a waiver or ~~variance~~, the decision is a defense within its terms and the specific facts indicated therein for the person to whom the decision pertains in any proceeding in which the rule in question is sought to be invoked.