

685—2.2 (17A) Waivers.

2.2(1) For the purposes of this rule, the term “waiver” means action by the state archaeologist that 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 the person.

2.2(2) The state archaeologist may grant a waiver from a rule only if OSA has jurisdiction over the rule and the requested waiver is consistent with applicable statutes and Constitutional provisions or other provisions of law. OSA may not waive requirements created or imposed by statute, by the state or federal Constitution, or by another provision of law.

2.2(3) In response to a petition completed pursuant to rule 685—2.1(17A), OSA may in its sole discretion issue an order waiving in whole or in part the requirements of a rule if OSA, based on clear and convincing evidence, finds all of the following:

a. The application of the rule would impose an undue hardship on the person for whom the waiver is requested;

b. The waiver from the requirements of the rule in the specific case would not prejudice the substantial legal rights of any person;

c. The provisions of the rule subject to the petition for a waiver are not specifically mandated by statute or another provision of law; and

d. 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 is requested.

2.2(4) OSA may require the petitioner to serve notice in a form prescribed by OSA on all persons to whom notice is required by any provision of law, as well as all persons who may be impacted by the grant or denial of the waiver sought. OSA may additionally require the petitioner to provide a written statement to OSA attesting that notice has been provided.

2.2(5) The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply to any petition for a waiver filed within a contested case and shall not otherwise apply to agency proceedings for a waiver. At a hearing on a petition for a waiver, the petitioner may offer exhibits and provide witnesses or testimony. The hearing may be in person, telephonic, or in any other format chosen by OSA. The state archaeologist, or the designee of the state archaeologist, shall preside over the hearing.

2.2(6) An order granting or denying a waiver shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and duration of the waiver if one is issued. OSA may place any condition on a waiver that OSA finds necessary and supportable by the law.

2.2(7) The final decision on whether the circumstances justify the granting of a waiver shall be made at the sole discretion of OSA, upon consideration of all relevant factors. OSA shall evaluate each fact based on the unique, individual circumstances set out in the petition for waiver. The burden of persuasion rests with the petitioner to demonstrate by clear and convincing evidence that OSA should exercise its discretion to grant a waiver from an OSA rule.

2.2(8) All orders granting or denying a waiver petition shall be indexed, filed, and available for public inspection as provided in Iowa Code section 17A.3. Petitions for a waiver and orders granting or denying waiver petitions are public records under Iowa Code chapter 22. Some petitions or orders may contain information that OSA is authorized or required to keep confidential. Accordingly, OSA may redact confidential information from petitions or orders prior to public inspection.

2.2(9) Semiannually, OSA shall prepare a summary report identifying the rules for which a waiver has been granted or denied, the number of times a waiver was granted or denied for each rule, a citation to the statutory provisions implemented by the rules, and a general summary of the reasons justifying OSA’s actions on waiver requests. If practicable, the report shall detail the extent to which the granting of a waiver has affected the general applicability of the rule itself. Copies of this report shall be available for public inspection and shall be provided semiannually to the administrative rules coordinator and the administrative rules review committee.

2.2(10) A waiver issued by OSA pursuant to this chapter may be withdrawn, canceled, or modified if, after appropriate notice and hearing, OSA issues an order finding any of the following:

- a.* The person who was the subject of the waiver order withheld or misrepresented material facts relevant to the propriety or desirability of the waiver; or
- b.* The substantially equivalent means for ensuring that the public health, safety and welfare will be adequately protected after issuance of the waiver order have been demonstrated to be insufficient; or
- c.* The subject of the waiver order has failed to comply with all conditions contained in the order.

2.2(11) Judicial review of the OSA decision to grant or deny a waiver petition may be taken in accordance with Iowa Code chapter 17A.

This rule is intended to implement Iowa Code chapter 17A.

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