9-0900-9007-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Permanent Rules of the Minnesota Department of Health Relating to Pools, Minnesota Rules, part 4625.2100, parts 4717.0150 to 4717.3975, and part 4717.7000.

REPORT OF THE ADMINISTRATIVE LAW J UDGE

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on October 4, 1994, at 9:00 a.m. in Room 200, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Health (MDOH or Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the MDOH after initial publication are impermissible substantial changes.

Susan Casey, Assistant Attorney General, 525 Park Street, St. Paul, Minnesota 55155, appeared on behalf of the MDOH. The MDOH's hearing panel consisted of Milton Bellin, Supervisor of the Engineering Unit of the Environmental Health Division of MDOH; William Deneen, Public Health Engineer of the Drinking Water Protection Section of MDOH; and Jane Nelson, Rules Coordinator for the Department.

Thirty-eight persons attended the hearing. Thirty-six persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the last hearing, to October 24, 1994. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on October 31, 1994, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The MDOH submitted written comments responding to matters discussed at the hearings and making changes in the proposed rules.

The MDOH must wait at least five working days before the agency takes any final action on the rule(s); during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the MDOH of actions which will correct the defects and the MDOH may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the MDOH may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the MDOH does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the MDOH elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the MDOH may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the MDOH makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the MDOH files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On August 3, 1994, the MDOH filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes;
(b) an estimate of persons expected to attend the hearing, an estimate of the expected duration of the hearing, and a statement that the Department expects to provide additional discretionary notice;
(c) a copy of the MDOH's Order for Hearing;

(d) the Notice of Hearing proposed to be issued; and,
(e) the Statement of Need and Reasonableness (SONAR).

2. On August 17, 1994, the MDOH mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. MDOH gave discretionary notice to city and county health departments, school officials operating pools, the American Red Cross in Minneapolis and St. Paul, and representatives of the pool industry.

3. On August 22, 1994, a copy of the proposed rules and the Notice of Hearing were published at 19 *State Register* 384.

4. On September 2, 1994, the MDOH filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;
(b) a copy of the *State Register* containing the Notice of Hearing and the proposed rules;
(c) a copy of the Notice of Solicitation of Outside Opinion together with all materials received in response to that notice;
(d) the Agency's certification that its mailing list was accurate and complete and the Affidavit of Mailing the Notice to all persons on the MDOH's mailing list and to those persons receiving discretionary notice;
(e) the names of persons who will represent the Department at the hearing; and,
(f) the executed Order for Hearing.

5. On September 22, 1994, the MDOH filed the following documents with the Administrative Law Judge:

(a) a copy of the letters requesting a hearing;
(b) the Notice of Hearing sent to those parties who had submitted written requests for hearing, as well as to other interested parties, indicating that a hearing will be held. (MDOH Exhibits 14-16); and,
(c) the affidavit of mailing the Notice and the mailing list.

Statutory Authority.

6. In its SONAR, MDOH cites several statutes as the source of the Department's statutory authority. Minn. Stat. § 144.05(c) authorizes the Commissioner to:

establish and enforce health standards for the protection and the promotion of the public's health such as the quality of health services, reporting of disease, regulation of health facilities, environmental health hazards and personnel.

In addition, Minn. Stat. § 144.12, subd. 1 states:

The commissioner may adopt reasonable rules pursuant to Chapter 14 for the preservation of public health. ... The commissioner may control, by rule, by requiring the taking out of licenses or permits, or by other appropriate means, any of the following matters:

. . .

(13) The general sanitation of tourist camps, summer hotels, and resorts in respect to water supplies ... and the prevention and control of communicable diseases ....

Money was appropriated to the Department to engage in "plan review and pool monitoring and surveillance" by Laws of Minnesota 1987, Chapter 403, Article 1, Section 8, subd. 2.

The Commissioner is authorized to charge fees for inspection of certain public pools by Minn. Stat. § 157.03. The Commissioner is authorized to delegate services to local public health boards, including swimming pool sanitation and safety. Minn. Stat. § 145A.02.

Based on the foregoing citations, the Administrative Law Judge concludes that the MDOH has the statutory authority to promulgate rules governing public swimming pools.

Nature of the Proposed Rules.

7. In Minnesota, some 5,000 public pools are in operation. Between 150 and 200 new pools are being constructed every year with plan approval from the Department. Of the existing pools, 1,653 were inspected by local boards of health. SONAR, at 2. Of that number, 1,487 pools are inspected as part of the hotel, motel, manufactured home park, and camping area inspections conducted under Minn. Stat. § 157.03. Inspections are also driven by complaints concerning particular problems at pools.

The existing rules governing public pools were based on the American Public Health Association publication *Standards for Public Pools*. That document dates from 1964. The rules themselves were adopted in 1971. Since that time, filtration and treatment technology, pool construction, and standards for toilet and shower facility have changed.

Certain identified hazards have come to the attention of the Department. SONAR, at 4. MDOH maintains that the existing rules should be changed to eliminate those hazards. The

Department also has identified tensions between public pool use and private pool use in the existing rules that can be eliminated by new rule language.

The rules proposed by the Department define terms used, authorize Department inspections, require submission of plans for new pools, establish standards for owners and operators of public pools, and require recordkeeping. Operating standards for health and safety are established. Standards for pool closure are proposed and a variance procedure established.

Small Business Considerations in Rulemaking.

8. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. Pool contractors, resorts, hotels, motels, camps, manufactured home parks, apartments, private schools, and recreational facilities are identified by the Department as small businesses affected by the proposed rules. The five methods listed in the statute for reducing the impact of the proposed rules were considered by the Department. SONAR, at 5. MDOH has indicated that the risk of death by drowning and risk of harm to public health by disease dictate that no exemptions be made based on the size of the business operating the pool. The Department has met the requirements of Minn. Stat. § 14.115, subd. 2, by considering methods to reduce the impact of the rules on small businesses.

Fiscal Notice.

9. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of $100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. MDOH estimates the proposed rules on physical plant and operator certification will require expenditures of $87,500 by local governmental units over the next two years. SONAR, at 6-7. The Department has met the fiscal notice requirements of Minn. Stat. § 14.11, subd. 1.

Impact on Agricultural Land.

10. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Rule 4625.2100 - Plumbing and Swimming Pools.

11. Rule part 4625.2100 is the existing rule on plumbing and swimming pools. As initially proposed, the rule only changed the citations to the remainder of the rules. Suggested changes to remove references to swimming and bathing. These changes would conform the rule language to the language in Minn. Rule 4717.0150, subd. 8. The rule as modified is needed and reasonable. The new language is not a substantial change.

Proposed Rule 4717.0250 - Definitions.

12. Proposed rule 4717.0250 defines terms used in these rules. The proposed rule consists of eleven definitions. Scott Fryer, R.S., of Olmsted County Community Health Services, recommended that several words be added to the given list of definitions. These included: “combined chlorine”, “deck level overflow gutters”, “dedicated plunge pool”, “flume water slide”, “roll out overflow gutters”, “wave pool”, and “zero depth pool”. Manny Camilon, R.S., Health and Safety Inspector for the City of St. Louis Park, requested definitions for “combined chlorine”, “super chlorination”, “ton chlorine containers”, and “children”.

The MDOH responded that these words are self explanatory or not defined in other national standards, such as those published by the American Public Health Association and the U.S. Department of Health and Human Services. The rule is not unreasonable for not defining the terms requested by the commentators.

MDOH proposed to change the words "pools with zero depth area" for "zero depth pool" in part 4717.2560, subp. 5. All other references to zero depth areas in the proposed rule use the phrase "pool with zero depth area." Department Comment, at 1. The definition, as modified, is needed for clarity, is reasonable, and is not a substantial change.

Subp. 8. Public pool.

13. Roger H. Carlson and Mary Fandrey, representing the Hennepin County Environmental Health Management Group, requested that the definition of "public pool" include a pool at a "group home." The Department commented that "group home" is comparable to "licensed child care facility," but agreed to add "group homes" to the definition, for clarification. Department Comment, at 2. Group homes are different from “licensed child care facilities.” Group homes are commonly used by adult populations. Adding that term accurately denotes the intended scope of the definition. The rule, as modified, is needed and reasonable. The new language is not a substantial change.

Proposed Rule 4717.0310 - Plan Review Fees.

14. Proposed rule 4717.0310 is a revision of Minn. Rule 4717.0310. Fern Meyers, co-owner of Camp Maiden Rock in Faribault, Minnesota, stated that the $500 plan review fee is too high a fee for campground owners. Carmen Olivieri, representing MC & R Pools and Spas of Sioux Falls, South Dakota, requested a change in the provisions for inspection fees,and compared Minnesota pool fees to Iowa pool fees. The fees for pool review were in the prior rule and have not been changed in this rulemaking. See Minn. Rule § 4717.0310. The fee defrays the Department's costs in conducting the plan review. The fee is not unreasonable. The revisions in this rule part are needed and reasonable.

Proposed Rule 4717.0375 - Inspections: Water Sampling.

15. Proposed rule 4717.0375 is the modification to the existing rule, section 4717.0700. The rule authorizes the Commissioner to conduct inspections for compliance with these regulations and perform water sampling. Under Minn. Stat. § 144.99, subd. 2, the Commissioner, or an agent of the Commissioner, is authorized to enter upon any property and take any action necessary. Meyers asserted that these new rules would require more administration and inspectors, and that delays in getting plans approved interferes with pool owners business affairs.

MDOH responded that the majority of these rules have been in effect since 1971, and the majority of the new portions of the rule have been used as guidelines by the Health Department since the early 1980's to deal with new technologies and innovations. The Department stated that it will take no more administrators or inspectors to administer the proposed rule revisions, and plan review time will not change. Department Comment, at 2,3.

Taking water samples or testing is required to verify whether pool operators are in compliance with these rules. The newly proposed language merely updates language, is needed and reasonable, and is not a substantial change.

Proposed Rule 4717.0450 - Submission of Plans and Specifications.

16. Proposed rule 4717.0450 is a redraft of present rule 4717.0300. The new language includes more detail on what is needed in pool designs and plans. Carlson and Fandrey suggested requiring that local public health authorities be contacted prior to the opening of a public pool. The Department responded that if a pool owner does not contact the local authority when opening a pool, existing policy requires the Department to do so. The standard practice is for the owner to initially contact the Commissioner, who has responsibility for plan review and inspection. The local authority is contacted where the local authority is responsible for pool inspections. For clarification, MDOH added, "and any local jurisdiction which regulates pool use" to Subpart 3. Department Comment, at 3. The modification ensures the appropriate local

authority is notified. The additional burden on the pool owner is minimal. The rule as modified is needed and reasonable. The new language is not a substantial change to the rule.

Subpart 3. B.

17. William Sheely, owner of Beaver Trails Campground in Austin, Minnesota, objected to having only one year to construct a pool once plans were approved. He suggested three to five years as a reasonable period for pool construction. The Department responded that the rule requires initiation of pool construction within one year of approval of the plans, not completion of the project. Department Comment, at 3, 4. The one year requirement is consistent with the Department's practice in plumbing regulations. See Minn. Rule 4715.3130. The proposed rule is needed and reasonable, and is not a substantial change in the rule.

Proposed Rule 4717.0650 - Pool Operation and Maintenance; Operator Training.

18. Proposed rule 4717.0650 is comprised of three subparts setting forth the requirements for certification of pool operators. Subparts 1 and 2 received no critical comment.

Subpart 3. Designation of trained operator.

19. John Anderson, on behalf of the St. Cloud Parks and Recreation Department, requested that a definition of "direct supervision" be added to assist pool owners in meeting the requirements of subpart 3. MDOH responded that direct supervision or direct operation, and the responsibilities of the person assigned the direct supervision, are delineated within the rule by the contents in items A and B of subpart 3. The person designated to supervise the pool and who has hands-on control of the pool and pool equipment must be properly trained. The Department cited the health risks entailed in failing to properly control the chemical consistency in the pool during use to demonstrate the need for the rule. MDOH indicated that four of six waterborne disease outbreaks in Minnesota were from either swimming pool or hot tub use. The Department contended that proper operation of a pool by a trained operator is important to maintain sanitary conditions and public health and safety. Department Comment, at 3. 4. There is affirmative evidence to support the need and reasonableness of the rule as proposed.

Anderson requested that a limit be set on the number of pools a trained operator can supervise. The Department responded that setting a limit on the number of pools, or on geographical locale of pools to which an operator has control, would be arbitrary. One facility may have 10 pools which are easily maintained while another facility may have one pool needing the supervision of three or four operators. The Department preferred making operators responsible for controlling only pools that they can properly and safely operate while being responsible for the daily operation of the pool. Department Comment, at 4.

Dave Siegel, representing the Minnesota Hotel, Lodging, Resort and Restaurant Association, stated that weekly inspections by the trained operator would be preferred to the daily inspection proposed in the rule. This would allow for vacations, and independent contractors could be hired to supervise a number of pools. Carol Lovro, representing the Minnesota Motel and Campground Association, stated the need for certified operators is not inappropriate, but daily inspections are too stringent. Lovro also expressed concern over the cost of training classes.

Lynn Waldorf, representing the Minnesota Recreation and Park Association, supported requiring certified operators be readily available rather than present daily, as is proposed in the rules. Lynn Lean, Manager of the Backstretch RV Park & Campground in Shakopee, Minnesota, objected to requiring daily inspection of a pool by a trained operator as an undue hardship on campgrounds. Rodney S. Wallace, President and CEO of the Thunderbird Motel in Bloomington, Minnesota, supported daily testing of pools by a certified operator as reasonable. His hotel has four trained operators.

Siegel and Fryer expressed support for requiring trained operators. Navratil and Tom Schaffer, certified pool operator instructors, asserted that trained operators must be present on site to set guidelines for others to check the pool and supervise testing and monitoring, but need not be present 24 hours per day. Navratil also stated that the cost of the certified operator's course is more than made up for in more efficient operation of the pool.

MDOH responded that a pool must be checked daily to maintain proper water quality and protect pool users from unsafe conditions. It acknowledged that a person cannot be on the job 24 hours a day, seven days a week. MDOH modified this subpart to require that the trained operator who is responsible for the daily operation of the pool must verify the required testing be done and records maintained; that either the trained operator or a designated alternate must be able to respond at any time the pool is open for use. Department Comment, at 4. The change clarifies the subpart, is needed and reasonable, and is not a substantial change.

Subpart 5. Operator Training.

20. MDOH has proposed a certification standard for pool operators that requires training for operators until January 1, 1997. At that time, operators must be certified. What standards apply between the adoption of the rules and January 1, 1997, is not clear. Item B of subpart 5 states that the Commissioner "may" require trained operators to obtain a certificate of competency. There is no language in the rule to suggest what standard shall be applied by the Commissioner to determine whether an operator should be required to obtain a certificate. The Department indicates that the existing standard has been discretionary. SONAR, at 15. This is not an affirmative showing of need or reasonableness to justify adoption of a rule. To eliminate the undue discretion of the Commissioner, the Department must either adopt standards for requiring certificates from operators or eliminate the discretion to the Department. To adopt such standards at this point in the rulemaking or to require all operators to obtain a certificate

before January 1, 1997, would be a substantial change. To remove the defect in the proposed rule, the discretion must be given to operators. Thus, subpart 5(B) could read:

> Until January 1, 1997, any operator is eligible for certification through attendance at and successful completion of a pool operator's training course.

The new language eliminates the Commissioner's unfettered discretion which may or may not require certification of pool operators. The Department can seek to add standards which require operators to be certified before January 1, 1997, but that can only be accomplished through a new rulemaking proceeding. The proposed rule, as modified, is needed and reasonable. The new language corrects a defect in the proposed rule and does not constitute a substantial change.

21. Carlson asked what constitutes "safe chemical handling training." for the purpose of this subpart. MDOH stated that training of pool operators is needed to educate operators about the specific chemicals used in the operation of a pool, and the equipment used to apply it, and to make pool operators aware of container labeling and of operations manuals available from chemical manufacturers. Part 4717.0650, subpart 4 requires an operation manual for all operational information related to the pool. MDOH response to Comments, at 5. Requiring a pool operator to be familiar with the operating standards of the pool that person is responsible for is needed and reasonable. Regarding chemical safety, following the label instructions should be a sufficient safeguard for operators.

Subpart 5. Operator Training., Item E.

22. Meyers requested that operator classes be cost efficient and easily available in various parts of the state. Navratil testified that pool owners will more than make up for the cost of a course through savings in amounts of chemicals used, clearer water, fewer hazards, and more efficient operation of their pools. MDOH responded that operator training is a cost of doing business, similar to certifying boiler operators, or getting a commercial kitchen licensed. It stated that courses are already offered throughout the state and the Department predicts that the supply of courses will increase with the demand. Department Comment, at 5.

The St. Louis Park Health Department; Susan Hibberd; Joseph Hibberd, R.S.; Carlson; and Fandrey requested that local training of pool operators be allowed or that alternate training be allowed if approved by the Department. Some commentators asserted that local courses were either free or cost no more than $30. Lovro expressed concern at the cost to small operators to send personnel to two or more days of training. Siegel commented that the cost would be a significant burden on public pool owners. Sheely suggested that, although even one day would be costly, it was better than the cost for a two day course.

MDOH responded that the proposed rule does not prohibit local health departments from operating their own training in addition to the required national courses, or from offering the

national courses. MDOH noted that many local agencies charge an annual pool registration fee to subsidize the cost of the training classes. The Department also suggested that the large number of pool operators already certified indicates that requiring certification is not an undue burden on pool operators and owners.

Navratil stated that the national course cannot be taught in less than two days if all the required information is to be covered. Waldorf and Themig supported nationally recognized training, as such training standardizes the materials and subjects taught. Fandrey was concerned that national courses do not cover Minnesota rules. Navratil stated that the national courses do include state code information and that teachers encourage students to take advantage of local classes.

The Department responded that the national courses at a minimum cover basic safety and health standards, and in its Comments lists a number of subjects. Department Comment, at 5. The Department may consider listing the subjects which must be included in any course that would meet the rule standards for certification. Such a change would eliminate the commentators' concerns.

Hibberd argued that any requirement for a certified operator should not be adopted if the Department cannot enforce the regulation throughout the state. The Department responded that by law, all public pools in the state have to comply with these rules independent of whether or not there is an inspection of the pool. Department Comment, at 6. The original rule had an inspection requirement as well. See Minn. Rule. 4717.0700. The rule is needed and reasonable.

Proposed Rule 4717.0750 - Pool Record.

23. Proposed rule 4717.0750 is a modification of present rule 4717.3600. The rule outlines what is required in a daily report of pool activities. MC & R Pools and Spas suggested that the six year retention requirement for pool records was arbitrary. The commentator suggested original blueprints, dates of equipment installation, and repairs should be kept indefinitely, but that records of daily operation and routine maintenance activities are rarely useful beyond one year. MDOH reiterated its position in the SONAR, that the six year retention period is needed because generally the statute of limitations for bringing tort actions is six years, and that the rule provides protection for pool owners by having records available when claims are made. The rule is reasonable and needed as proposed.

Item A.

24. Navratil, Carlson, and Fandrey requested that the daily recording of the number of people using a pool, required by item A, be deleted from the requirements. Siegel requested that a variance procedure be implemented for recording user load. The commentators asserted that the information was not really accurate, there is no one to record it, and it is not of much use.

MDOH responded that the user load is a significant factor affecting the chemical balance in a pool. A small user load creates less demand on the disinfectant residual in a pool than does a large user load. When residuals are recorded, fluctuations and problems are more easily explained and resolved when all the variables which affect the pool water's chemistry are known. This requirement is in the existing rule, part 4717.3600, item A. The Department acknowledged that for some pools the information would be difficult to maintain. MDOH modified item A to add the phrase, "if known," to address situations where the number of users may not be known. Department Comment, at 6.

The Department has adequately protected against improper chemical treatments by requiring daily testing of pools. The suggestion that pool owners and operators record usage to determine if the chemical mix is proper is neither needed nor reasonable. Adding the language, “if known,” merely changes the recording process to an arbitrary option. Any attempt to gauge clorination of the pool by usage is more likely to result in improper use of chemicals. The practical necessities of recording pool usage, such as controlling access to the pool and accurately measuring the length of time persons are in the pool, are very cumbersome and in many cases, impossible. The proposed rule has not been shown to be needed or reasonable. It is defective and must be deleted.

Item B.

25. Item B requires recording the operating periods of pumps and filters and recording the rate of flow for recirculating water. Carlson suggested that recording the rate of flow meter readings is appropriate, but the operating periods of the pumps and filters is not necessary. The Department noted that although pool filter pumps operate continuously, backwashing of filters and equipment repairs are occasionally done. The Department maintains that such work would require stopping the operation of the equipment. MDOH seeks to have those periods recorded to better explain pool operation, maintenance, and deviations in the pool chemistry. The proposed rule is needed and reasonable as proposed.

Item D.

26. Disinfectant residuals must be recorded under item D. The City of St. Louis Park suggested that both free and residual amounts of disinfectant be recorded. The Department agreed to this modification to conform the information required to that which is mandated in the code. MDOH also noted that the additional information is important to maintain proper water quality and to ensure compliance with the specific residuals. Department Comment, at 6. The item is needed and reasonable, as modified, and is not a substantial change.

27. Carlson requested that the pool temperature be recorded. MDOH agreed and added that requirement, but only on heated pools. The limitation was added because only heated pools are required to have thermometers. The new requirement is needed and reasonable and does not constitute a substantial change.

28. Schaffer requested that required recorded data include any item which has limits mandated by the code such as alkalinity and cyanuric acid. The Department agreed with this requirement because the limits mandated are important for maintaining water quality and pool patron safety. The Department modified the rule by adding a new item which reads as follows:

> G. any other pool chemistry measurements taken, such as alkalinity and cyanuric acid concentrations, although these are not required to be recorded daily.

This change is reasonable and needed, and does not constitute a substantial change.

Proposed Rule 4717.0775 - Reporting.

29. Proposed rule 4717.0775 requires reporting of all serious or fatal incidents to MDOH. Carlson and Fandrey requested that the rule clarify who has to report incidents resulting in death or serious injury. MDOH agreed that clarification is warranted, and added, "by the owner or owner's agent" to this part. This is a needed clarification and is not a substantial change.

Sheely asserted that one working day is an unduly restrictive requirement when reporting incidents. In its posthearing comment, the Department stated it needs the information to “allow for inspection and follow-up in a timely manner, in order to reduce the possibility for further injury, and to determine whether the pool condition creates an on-going potential for injury.” Department Comment, at 7. A situation where several drownings had taken place at a single pool was cited in support of the requirement. Id. The reporting requirement is not unreasonably burdensome in light of the seriousness of the incidents involved and the potential for public harm. The proposed rule as modified is needed and reasonable.

Proposed Rule 4717.0950 - Lifeguard Requirement.

30. Proposed rule 4717.0950 states the qualifications needed to be a lifeguard at a public pool. The existing rule requires a "qualified attendant" to be on duty at all times. Minn. Rule 4717.3700. The proposed rule requires certified lifeguards if a lifeguard is attending the pool. The rule does not require lifeguards for pools, but does require signage stating “no lifeguard on duty” if that is the case. No comments were received on this rule part and the rule is needed and reasonable as proposed.

Proposed Rule 4717.1050 - No Lifeguard Warning.

31. Proposed rule 4717.1050 sets out the language and size of letters required on warning signs when no lifeguard is present. Camilon requested specification as to when a lifeguard must be present. Lifeguards are required at wave pools under proposed rule 4717.3950. They are also required at zero depth pools under proposed rule 4717.1850. No other lifeguard requirements are specified. Other than those specific requirements, "No lifeguard" sign must be posted when no lifeguards are required. The requirement is meant to inform pool users, or in the case of children, their parents, that no lifeguard is present. The sign must expressly state that "Children must not use the pool without an adult in attendance." The users of the pool then must make an informed decision about using the facility. The rule is needed and reasonable as proposed.

32. The St. Louis Park Health Department requested that "child" be defined in the rule. MDOH considered this request and reviewed state statutes on the subject. The Department found no consistent age defining "child." MDOH considered that selecting an age limit in these rules would be arbitrary. In its posthearing comment the Department pointed out that the swimming abililty of children differs widely and that the only requirement is that an adult be present. Department Comment, at 8. As to the arbitrariness question, so long as the Department has some reason to choose one age over another, setting an age limit in the definition of child would not be arbitrary. That having been said, there is no requirement that the Department adopt any such definition in this rulemaking. The proposed rule is not defective for omitting the definition of "child."

Proposed Rule 4717.1250 - Emergency Telephone Location.

33. Proposed rule 4717.1250 is a modification of existing rule 4717.0350, and clarifies telephone requirements and emergency number posting requirements. Olmsted County Environmental Health Service objected to the emergency telephone requirement as confusing regarding when a telephone is required. The commentator expressed a preference for requiring an emergency telephone in all public pools. MDOH stated that only pools with lifeguards require telephones and that posting emergency numbers when a telephone is present allows quick contact with emergency personnel. The Department expressed a preference for allowing pool owners and operators flexibility in meeting this requirement. Thus MDOH did not include a distance limitation on how near the telephone must be to the pool. Requiring a telephone at all public pools would place a substantial burden on pool owners. The Department's choice of not requiring a telephone at every public pool is reasonable. Proposed rule 4717.1250 is needed and reasonable.

Proposed Rule 4717.1350 Pool Facility Capacity.

34. Proposed rule 4717.1350 is a modification of existing rule parts 4717.0350 and 4717.2200 that set out allowable user loads for pools. Item D of subpart 2 is a new provision,

designed to address the capacity of spa pools. The limitation of one user per three lineal feet of seating space has been used since 1984 in conjunction of spa plan reviews. The ratio was taken from the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers' *Recommended Standards for Swimming Pool Design*. 1982 Edition, part 14.2. SONAR, at 21. Fryer requested that the language used to define user load requirements for spa pools be clarified as to from where the measurement is taken. MDOH agreed with this request and modified the rule to include "measured along the front edge of the seats." Department Comment, at 8. The item, as modified, is needed and reasonable. The new language is not a substantial change.

Proposed Rule 4717.1450 - Lifeguard Stations and Lifesaving Equipment.

35. The proposed rule is a revision of existing rule 4717.3300, and outlines required lifesaving equipment.

Subpart 1. Lifeguard stations.

36. The requirements in subpart 1 are the same as in existing rule 4717.3300, subpart 1. No significant changes were made. The St. Louis Park Health Department stated that lifeguard platforms should not be required if a pool facility does not provide a lifeguard, as the presence of the platform would invite misuse and the requirement would be a major expense for the pool owner. MDOH replied at the hearing that lifeguard stands need not be permanent, but requiring platforms follows national consensus standards. MDOH believed that this requirement must be included in the construction phase of any pool project.

Fryer requested that a minimum height for lifeguard stations be implemented. MDOH noted that there are many types of pools that may require different types of lifeguard stands. The Department believes it is limited in its ability to regulate a height requirement. There would be a significant group of persons affected by such a change in the rule that did not have adequate notice of the subject matter of the rule. This would render the height requirement language a substantial change. The subpart is needed and reasonable, as proposed.

Subpart 3. Lifesaving equipment unit., Item A.

37. Item A of subpart 3 sets out the requirement for a ring buoy and attached rope as stated in the existing rule 4717.3300, subpart 2. The size of the buoy is no longer identified in the proposed rule. The St. Louis Park Health Department requested that the rule be specific as to what materials are considered equivalent to manila rope. MDOH stated that the type of rope required is not specified, as there are many equivalents, and a list would be impractical. The rule is not unreasonable for failing to list equivalents to manila rope. Subpart 3 is needed and reasonable, as proposed.

Subpart 5. First aid kit; spine board.

38. The proposed rule incorporates regulations for first aid kits from part 4717.3300, subpart 2, and adds the requirement of a spine board at every pool where a lifeguard is present. Anderson, Carlson, and Fandrey requested that the spine board requirement be removed at pools where only one lifeguard was present, as using a spine board with only one trained person might do more harm than good. Barb Pierce of the American Red Cross testified that guidelines exist which allow for the use of a spine board with only one trained lifeguard and assistance from others. In its Statement of Need, MDOH explained that many injuries are made more serious when a person is improperly moved, and that a spine board will immobilize a person on a firm surface, lessening the opportunity for additional injury. SONAR, at 22. Where a spine board is needed, its lack will cause more harm than the potential for harm from misuse. The subpart is needed and reasonable, as proposed.

Boat at Pools.

39. Carlson and Fandrey requested that a boat be required at pools measuring more than 100 feet from the pool side to the pool center. There are no public pools in the state which are of this size. With the requirements already in the proposed rule, there are adequate safety features to protect the public in those pools in existence. In the event that a pool of this size is proposed, the Department can certainly examine the proposed safety features and decide if a boat is an appropriate requirement. No change to the rule is required at this time for this size of pool.

Proposed Rule 4717.1550 - Pool Access Restriction; Fencing.

40. In the SONAR, MDOH explained that restricting access to pools of water is a safety factor, and hoped that restrictions will deter accidents. The present rule states, in part:

> access to the pool shall be controlled by fencing or other effective means acceptable to the commissioner of health,

and states that the restriction must prevent the entrance of children by not having any hand- or foot-holds on fencing, by requiring that the fencing be at least four feet high, and by requiring a self-closing, latching gate.

The proposed rule changes clarify the meaning of the phrase, "other effective means acceptable to the commissioner." The rules do not require fencing, but rather require restriction of access by any effective means. Fencing is one option, and is discussed extensively in the rules, as it is the most widely used means to restrict access. Rules for outdoor and indoor pools, as well as different types of pools, are separately specified.

Siegel wanted clarification on whether fencing requirements are retroactive or whether they only apply to new construction projects. MDOH responded that the proposed rule changes only clarify the existing rule, which was vague. The new rules apply to all pools.

Subpart 1. General., Item B.

41. This proposed rule section discusses the expected restriction methods used for indoor pools, including doors, latches, locating the pool in a separate room, or fencing. Carlson and Fandrey generally supported these changes. Brodie, Siegel, Lovro, and Schaffer all requested a better definition of "public space." Lovro asked how far from the pool fencing must be, and how to protect guests in rooms off the pools after the pools close, without expensive redesign. Brodie stated that the requirement for a barrier was ambiguous, that the pool owners see the requirement as needing fencing directly around a pool, and MDOH sees it as closing a door of a room in which the pool is located.

Hibberd suggested that the rule change was needed to protect intoxicated adults from themselves. Schaffer and Navratil asked how these changes would affect indoor pools with inside rooms, and whether latching guest rooms doors would be sufficient. They cautioned that dining often occurs around an open pool, that caterers are required through other regulations to use glassware. A fence between the eating areas and the pool was suggested. Wallace stated that the new pool rule would require all indoor pools to be surrounded by fencing.

In its posthearing comment, MDOH stated that the rules do not require fencing directly surrounding the pool. MDOH explained that the pool may be located in a separate room which has controlled access. It proposes to clarify the intent of the barrier requirements for indoor pools by eliminating the words, "public places," adding the language “to effectively prevent the entrance of children,” and by removing item 1, moving items 2 and 3 up to items 1 and 2 (and requiring self-latching gates or doors) , and adding a new third item which states:

> (3) Exception: Pool side guest rooms, corridors adjacent to poolside guest rooms, and pool side activity areas may be within the pool enclosure.

Department Comment, at 10.

The explanation for the rule as originally proposed in MDOH's Statement of Need stated:

> Within some buildings or enclosures that [sic] may be configurations where the pool is in close proximity to other uses such as guest rooms, major traffic hallways, or patio areas in atriums. The proposed provisions for restricting access in indoor areas is designed to restrict small children and toddlers in particular. The building or enclosure itself provides a degree of access restriction from the general public compared to a public pool located outside. However, there still must be provision for security to reduce accidents.

SONAR, at 23.

The elimination of the requirement for barriers around guest rooms and corridors, as a modification to better clarify the intent of the commissioner, is not a substantial change to the proposed rule changes. Elimination of barrier requirements for poolside guest rooms, activity areas, and corridors is reasonable to accommodate existing facilities designed for adult use. While some risk to children will remain in such a setting, the facility can take steps to minimize those risks. The rule, as modified, is needed and reasonable. The modification does not constitute a substantial change.

Subpart 2. Fencing.

42. Subpart 2 sets different height requirements for fences on indoor and outdoor pools. Olivieri stated that it is needlessly complex to require different size fencing for indoor and outdoor pools. MDOH responded that the height requirement for pools at four feet is adequate for indoor pools, but outdoor pools are subject to other conditions. For example, the Department suggested that snow can accumulate around a fence during winter, reducing the effective height of the fence, and making the fence easier to get over. In the off-season, outdoor pools are partially emptied, leaving a slimy pool bottom. This makes it nearly impossible to keep one's footing and can result in preventing persons from getting out of the pool. Department Comment, at 10. Mr. Sheely expressed concern that the five foot fence requirements would prevent him from jumping over the fence. MDOH stated that this is the Department's point exactly. The five foot fence height requirement is designed to be an access deterrent. The height requirements are needed and reasonable.

Subpart 4 - Wading Pools

43. This is a new addition to the rule, to distinguish wading pools from other pools. Camilon requested 48 inch high fencing around all wading pools. The Department responded that there are many existing wading pools with 42 inch high fences, and there has been no demonstrative problem associated with them to require that the fences be higher. For new wading pools a four foot fence is required, which adds an additional safety margin for the public on new pools. The Department has balanced the desire for safety in new pools with the cost that

would be imposed on owners of existing pools. The subpart is needed and reasonable as proposed.

Proposed Rule 4717.1750 - Pool Water Condition.

44. Proposed rule 4717.1750 is based on existing part 4717.3400. The rules set maximum water temperatures, identify what test kits must be used, and what chemicals are to be used.

Subpart 2. Test kits., Item A.

45. Item A requires a DPD test kit. This kit measures free chlorine, using a regulated disinfectant parameter. Other types of test kits do not test in the range required by subpart 3, Item A. Carlson stated that as measuring disinfectant residual to 0.1 part per million (ppm) requires electronic instruments, the testing should only be accurate to 0.5 ppm, the test kits should have a range from 0.0 to 10.0 ppm, and paper strip disinfectant strips which read up to 200 ppm should be required. MDOH responded that the requirement has not changed from the existing rule, part 4717.3400, is consistent with several national standards, and test kits measuring to 0.2 ppm are available. MDOH stated it did not identify ranges for required test kits because operators must purchase the kit that allows them to properly measure the disinfectant residuals in their pool. Standard chlorine test kits will also measure bromine to 10 ppm because bromine reads double using a chlorine test kit.

MDOH stated that test strips are requested to eliminate the problem of high disinfectant levels bleaching out test samples and confusing pool operators. Because operators will be trained, test strips are not necessary, as any bleaching of test samples will be recognized. There were no changes to the proposed rule, which is needed and reasonable.

Subpart 3. Disinfectant residual., Item A.

46. The proposed item is from the existing rule, part 4717.3400, and has not been changed. Mr. Carlson requested that the minimum free chlorine residual be raised from 0.5 ppm to 1.0 ppm. MDOH stated that the 0.5 ppm requirement is consistent with several national standards as stated in the SONAR. The standard set in item A is needed and reasonable.

Subpart 3. Disinfectant residual., Item D.

47. Item D is proposed to protect pool users from harmful chemicals. Users are not allowed in the pool if chemical use exceeds 5 ppm for chlorine. A maximum for bromine was not listed. MDOH agreed to revise the standard to include a maximum for bromine as well, to 10 ppm. This is a needed and reasonable change meant to clarify the rule, and is not substantial.

Subpart 3. Disinfectant residual., Item F.

48. Item F is proposed to instruct the pool operator on when to superchlorinate a pool. The St. Louis Park Health Department requested a numeric definition of "superchlorination." The goal of superchlorination is to reduce the combined chlorine level to below the allowed maximum. There are a number of methods available to do this, including reducing the turbidity of the pool. MDOH responded that giving a cookbook recipe for superchlorination may create overkill or inefficient use of the disinfectant. MDOH did not change the proposed rule, which is needed and reasonable in its present form.

Carlson requested a change in the maximum allowed level of combined chlorine from 0.5 ppm to 1.0 ppm, and requested that the pool be treated within 24 hours. The existing rule allows a combined chlorine level of 0.0 ppm. The proposed rule allows for minor levels of combined chlorine which, stated MDOH, are always present in pool chemistry as a pool breaks down contaminants. Combined chlorine is 40 to 60 times less effective than free available chlorine. SONAR, at 30. MDOH stated that the level mandated is consistent with national standards and is easily calculated with standard test kits.

Carlson and Fandrey requested treatments other than chlorine disallowed for treating a pool. They claimed that nonchlorine products do not work on bacteria. Navratil stated that nonchlorine products will work on combined chlorine up to 1.5 ppm. Mark Themig, representing the Shoreview Community Center and the Minnesota Recreation and Park Association, stated that nonchlorine treatments such as ozone are an integral part of pool chemical treatment. MDOH noted that the purpose of nonchlorine shocks is to free chlorine which may then kill contaminants in the water, not to kill the contaminant themselves The proposed rule is needed and reasonable.

Subpart 4. Disinfection of spa pools.

49. Subpart 4 is proposed to set the minimum allowed disinfectant residual in a spa pool at 2.0 parts per million. Carlson and Fryer requested that the minimum allowed bromine level in a spa pool be mandated at 2.0 ppm. MDOH stated that to maintain a comparable disinfectant level between chlorine and bromine, the bromine level must be twice the chlorine level. The chlorine level is set at 2.0 ppm, and therefore the bromine level must be set at 4.0 ppm. MDOH

agreed with Carlson and changed the bromine residual level to the appropriate amount. The modification is needed and reasonable, and is not a substantial change.

Subpart 6. Alkalinity.

50. The proposed subpart is the same as existing rule 4717.3400, subpart 2. No changes were proposed. The representatives of the St. Louis Park Health Department proposed a high limit of 150 ppm for alkalinity. MDOH responded that there is no public health effect from a change in alkalinity, that it is a buffer for pH, that alkalinity levels greater than 150 ppm stabilize the pH. Subpart 6 is needed and reasonable as proposed.

Subpart 9. Bacteriological samples., Item B.

51. Proposed subpart 9 is the requirement to test for the presence of bacteria in public pool water, and is a modification of existing rule 4717.3400, subpart 3. The representative of the St. Louis Park Health Department requested that the "current edition" of Standard Methods be specified. The edition referred to is the current edition of the American Public Health Association's *Standard Methods for the Examination of Water and Wastewater*. MDOH stated that it cannot consider incorporation of the requested standard, as the standard could change, and so the rule would change without having followed the State's proper rulemaking procedures. All that would be required to to meet the rulemaking requirement would be to indicate that the standard is being "incorporated by reference, where the test is available, and whether it is subject to frequent change. See Minn. Stat. § 14.07, subd. 4. The Department may adopt the rule as proposed or incorporate the current standard using the statutory process for incorporation by reference. Either approach is needed and reasonable.

Proposed Rule 4717.1850 - Depth of Pool Water.

52. Proposed rule 4717.1850 establishes pool depth for swimming, wading, and zero depth pools, and is a modification of existing rule 4717.1000. Schaffer stated that there is a need to address water depths from 24 inches to 36 inches. According to MDOH, the maximum safe water depth for a wading pool is 24 inches, and the minimum safe water depth for a swimming pool is 36 inches. These depths are mandated for the respective pool types. MDOH stated that it intentionally did not address this range of water depth because it is not allowed except in zero depth pools. Zero-depth pools will have depths from 36 inches to 24 inches, and a lifeguard is required to be present, along with a rope and stanchion, along the side of the pool up to the three-foot depth. This requirement is to eliminate the likelihood of patrons from jumping into the pool in less than three feet of water. The rule part is needed and reasonable.

Proposed Rule 4717.2450 - Marking and Lines.

53. Proposed rule 4717.2450 is a modification of existing rule 4717.1200. Depth markings must be in feet and inches, and boundary areas between shallow and deep water are to be marked. Siegel requested verification on whether markings are retroactive or only apply to new construction. Navratil stated that the retrofitting of markers is very important and can be done for approximately $5.00. MDOH responded that the markings requirement applies to all public pools, and that the requirement is a safety provision which directly affects the safety of the public. The rule is needed and reasonable.

Subpart 1. Depth markings.

54. No system for markings is described in the proposed rule. Lovro and Al Brodie, a consultant to the Minnesota Motel and Campground Association, requested depth markers in meters as well as feet and inches, to inform foreign visitors. The Department indicated that its intention was to require pool depth markers to specify whatever units are used, as many pools only have a number such as "3" or "4-1/2" for specifying depth. MDOH allows the use of English units (feet, inches) or the metric system (meters). The public is generally aware that one meter is the near equivalent of three feet. The subpart is needed and reasonable without specifying any particular system.

The St. Louis Park Health Department, and Dick Holloway, on behalf of the Bloomington Health Department, wanted to see depth markers required on the inside walls of all pools. Schaffer stated that the depth markings inside the pool are tough to regulate and impossible to install on zero depth pools and pools with roll-out decks. The Department indicated at the hearing that it is difficult to mark the depth above the water line and visually hard to read below the water line. MDOH suggested that requiring depth markers in the pool may dictate the type of pool which may be installed. The purpose of markers is to inform the user of the water depth before they enter the pool. Once users are in the pool, the pool is designed to prevent patrons from entering deeper water too quickly. An additional protection against this danger is the requirement that the pool bottom be sloped no greater than 1 in 10 up to a depth of five feet. The rule is needed and reasonable, as proposed.

Subpart 2. Depth transition markings.

55. Holloway and others favored increasing the required transition line from 6 inches to 10 inches in width. Fryer expressed support for the line as mandated. MDOH responded that the 6 inch line width has been recommended by the Department for several years, found the line to be adequate to mark the transition, and is easily visible.

56. Carlson, Holloway, and Peterson urged a float line be required at the transition point in the pool. Schaffer and Navratil wanted a float line be made available to pool owners. Sheely testified that the float line in his pool is hard to keep in the pool, and children use it as a diving

platform. In the Department's experience, float lines are frequently taken out of the pool or disconnected. Float lines also hamper lap swimming and cause nonswimmers to gravitate toward the deeper end of the pool. MDOH stated that it would not mandate a float line. The rule is needed and reasonable as proposed.

Subpart 3. No diving markings., Item B.

57. Carlson requested that the universal "no diving" symbol be 12 inches in diameter accompanied by 4 inch lettering. MDOH responded that if 4 inch lettering were mandated in Item B, the lettering would meet the requirements set in Item A, eliminating the need for the universal "no diving" symbol. MDOH stated that the size required is the size available from manufacturers and have been installed in several pools in the state without problem. Requiring the larger size symbol would require special orders from the manufacturer which would be costly. The rule is needed and reasonable as proposed.

Subpart 4. Stair markings.

58. Fryer and the St. Louis Park Health Department requested that a minimum width for the accent stripe on stairs be mandated. The proposed rule presently has no size limit. MDOH revised the proposed rule by adding that the marking stripe must be between one half inch and two inches in width. This modification is needed and reasonable, and clarifies the requirement. Adding a width requirement for stair markings is not a substantial change.

Proposed Rule 4717.2560 - Recirculation Rate.

59. The proposed rule outlines the mandated rate of recirculation for all public pools. Rates for swimming and wading pools are from existing rule 4717.1800, subpart 1. Rates for spa pools, dedicated plunge pools, and zero depth pools are added.

Subpart 1. General recirculation rate.

60. Camilon and Fandrey suggested that the six-hour recirculation rate was possible for new pools, but as lime builds up in pipes, the rate is necessarily slower; that if this rate is mandated, operators will have to buy bigger generators. MDOH noted that pipe scaling and other factors contribute to slowing the recirculation rate, and that slight variations on either side of the recirculation rate do not create a water quality problem. The rule is needed and reasonable as proposed.

Subpart 2. Wading pools and special purpose pools.

61. Wading pools and special purpose pools must recirculate every two hours under subpart 2. Camilon, Carlson, and Fandrey urged that pools used for lap swimming should not

have to be recirculated in two hours. MDOH responded that lap swimming is an activity done in a pool, not an activity that dictates special construction creating a special purpose pool. Subpart 2 is needed and reasonable as proposed.

Subpart 3. Spa pools.

62. Camilon suggested that large spa pools cannot recirculate within thirty minutes or less as required by subpart 3. Carlson and Fandrey questioned whether this would cause a vortex. MDOH noted that spa pools are designed to eliminate the possibility of a vortex, and that for a larger pool recirculated every 30 minutes the rule requires bottom drains to have a flow through rate no greater than 1-1/2 feet per second. The proposed rule is needed and reasonable.

Subpart 4. Dedicated plunge pools.

63. Carlson asked why the recirculation rate for dedicated plunge pools is faster than those for special purpose pools, and how recirculation systems for retrofitted pools is to be accomplished. MDOH responded that a plunge pool may be a special purpose pool, but the rule states a different recirculation rate for plunge pools. The SONAR states the need and reasonableness for a one hour turnover rate in dedicated plunge pools. SONAR, at 38. The rule does not require a one hour turnover in pools that have a plunge area, only dedicated plunge pools. The rule part is needed and reasonable.

Subpart 5. Pools with zero depth area.

64. Camilon, Carlson, and Fandrey requested information on how the recirculation rate of a zero depth area of a pool is determined or checked. MDOH noted that in the design of a pool with a zero depth area, the required turnover rate is calculated and the required recirculation equipment is installed, including inlets, outlets, and recirculation equipment, and that the rate is checked by looking at the recirculation system flow meter.

Proposed Rule 4717.2580 - Inlets and Outlets.

65. Proposed rule 4717.2580 identifies where inlets, grates, and outlets must be. Carlson, Fandrey, and Camilon requested the term "drain" be used rather than "outlet." MDOH responded that the language proposed has not been a problem and is equivalent in meaning to the word proposed. The word "outlet" is used by a number of national groups. SONAR, at 40. The rule is needed and reasonable as proposed.

Subpart 2. Inlets.

66. Carlson and Fandrey asked how testing is done for dead spots. MDOH noted that dead spots in a pool are created when water is stagnant. The situation promotes algae growth and the accumulation of debris, both of which can be visually detected. The subpart is needed and reasonable.

Proposed Rule 4717.2590 - Overflow Gutters.

67. Proposed rule 4717.2590 modifies existing rule parts 4717.1600 and 4717.1700. Overflow gutters are defined, and water surge requirements are set. Carlson and Fandrey suggested prohibiting gutter guards, on the basis that those guards are not easily cleanable, and can cause a health hazard. MDOH responded that gutter guards are an integral part of a gutter and are designed to prohibit pool patrons from becoming trapped in a gutter. Cleaning gutters is an operational issue that does not outweigh the need to protect persons using the pool. The rule is needed and reasonable.

Proposed Rule 4717.2595 - Skimmers.

68. Proposed rule 4717.2595 amends existing rule 4717.1700, and establishes requirements for cleaning skimmers in all pools. The St. Louis County Health Department stated that skimmer weirs should be made a requirement. The Department noted that the rule already requires them. See proposed rule 4717.2590, subpart 2, and 4717.2595, subpart 1 item F.

Proposed Rule 4717.2650 - Use of Hypochlorite Solution.
Proposed Rule 4717.2750 - Use of Erosion Feeders.

69. Proposed rule 4717.2650 is from existing rule 4717.2700. Proposed rule 4717.2750 specifies the requirements for erosion feeders. Portions of the existing rule, parts 4717.2500, and 4717.3400, subpart 1, were combined in this proposed rule for readability. Olivieri requested that the rule mandate the installation of a safety cutoff system to interrupt the automatic feeding of disinfectant or other chemicals when the recirculation of water is interrupted. MDOH responded that the only effect of disinfectant feeders continuing to feed when the recirculation water is not flowing is to increase the concentration of disinfectant in the piping. MDOH stated that this is an operational problem, not a public health problem, and the recommendation is not necessary. The requested change is not necessary.

Mr. Carlson requested an item "D" be added to this part, stating that skimmer baskets not be used to hold chemical pucks. The Department noted that the rule requires that erosion feeders be NSF International approved. Skimmer baskets are not NSF International approved and do not

meet the requirement of having an adjustable output rate. MDOH did not recommend a change, and none is needed. The proposed rule parts are needed and reasonable.

Proposed Rule 4717.3150 - Diatomaceous Earth Filters.

70. Proposed rule 4717.3150 uses existing language in rule 4717.2400. Olivieri objected to the prohibition of feeding diatomaceous earth through the skimmer system and states it is not a problematic procedure. The Department responded that the proposed rule uses existing language requiring a device accurate (to ten percent) and dependable, capable of continuous feed in a calibrated range and does not allow feeding through a skimmer. Manual feeding through a skimmer does not meet any of these requirements. MDOH did not accept the recommendation. The proposed rule is needed and reasonable.

Proposed Rule 4717.3250 - Steps, Ladders,Handholds, and Handrails.

71. Proposed rule 4717.3250 modifies existing rule part 4717.1900, and outlines requirements for ingress and egress items. MDOH modified item A of subpart 2 of the proposed rule by cross-referencing the width requirement for striping on ladders and steps under part 4717.2450. The rule as modified is needed and reasonable. The new language is not a substantial change.

Proposed Rule 4717.3450 - Lighting, Ventilation, and Electrical Requirements.

72. Proposed rule 4717.3450 includes all requirements for the installation and maintenance of lighting, ventilation and electrical systems. It is a revision of existing rule 4717.2900. Carlson suggested additional wording in subpart 1 requiring area lighting in pump rooms to provide 70 footcandles on all monitoring devices, data plates, and work surfaces. Fryer wrote in support of the lighting requirements as proposed. MDOH noted that there are no other regulations requiring a lighting requirement of 70 footcandles in a pump room, and to mandate a level would be random and without basis. The 10 footcandle requirement has been used and is adequate to safely maneuver in the pump room. If additional lighting is necessary at a given facility, the operator has the discretion to add light. The rule is needed and reasonable as proposed.

Proposed Rule 4717.3550 - Dressing Rooms.

73. Proposed rule 4717.3550 is a revision of existing rule 4717.3100 establishing requirements for dressing rooms. Carlson and Fandrey requested that lockers be allowed to sit 6 inches off the floor. MDOH noted that the regulation is in the existing rule and is not proposed

for change in these proceedings. The regulation is intended to allow mopping and cleaning below the lockers. The rule, as proposed, is needed and reasonable.

Proposed Rule 4717.3650 - Toilets, Lavatories, and Showers.

74. Proposed rule 4717.3650 in part amends existing part 4717.3100. When restrooms and shower stalls are required, the ratio of users to facilities, floor finishes, and lighting, are regulated by the rule.

Subpart 1. General.

75. Regarding the distance between these facilities and the pool, Fryer requested that the term "conveniently available" be defined as it is in the California pool code. Item "A" specifies the Department's position on availability. MDOH replied that placing a distance requirement on restroom facilities as is done by the California rule would be arbitrary, and a linear distance requirement does not mean that a facility is easily accessible to pool users if it is within the distance mandated. The recommendation is not needed.

Meyers does not want to make changes to existing buildings. MDOH agreed that there are some facilities which will require physical alterations to comply with the rule, however, the department has modified some rule parts to keep changes to a minimum. In the case of pool areas with a sauna or work out area, a shower must be present and may have to be added. This requirement is needed and reasonable, and provides for the safety of all users from contaminants. No modifications were made to the proposed rule.

Subpart 7. Wading pool exception.

76. Fryer would like the section deleted that excludes the shower requirement for wading pools. The department responded that free standing wading pools are generally installed in neighborhood settings where showers are available in pool user's homes. Wading pools in facilities with other types of pools will have showers present because of the other pools present. Maintaining the required disinfectant residuals will help eliminate any additional demand put on the disinfectant by patrons who do not shower. No changes were made.

Subpart 8. Lighting.

77. Carlson and Fandrey want the 10 footcandle requirement for toilet, shower, and locker facilities to be raised to 30 footcandles as based on their local commercial kitchen standard. The proposed lighting level is an interpretation of the existing pool rule and creates a light level which allows safe movement. Any owner or operator who wants to provide more light may do so. The rule, as proposed, is needed and reasonable.

Proposed Rule 4717.3750 - Standards for Pools With Diving.

78. Proposed rule 4717.3750 amends the provisions in existing parts 4717.2100 and 4717.3900 to change the diving area requirements for pools with diving. Fryer noted a redundancy in items "C" and "D". MDOH noted that the language proposed in item "C" is existing language that was inadvertently omitted. The department agreed that there are redundancies and modified the part by deleting the redundancy and adding language that was originally planned. The proposed rule now reads:

> **4717.3750 STANDARDS FOR POOLS WITH DIVING**.
> The dimensions of the pool and appurtenances in a diving area must meet the standards in this part.
>
> (Items A and B no change.)
>
> C. Diving is not permitted, except in areas which conform to the minimum dimensions specified in this part.
>
> D. The dimensions of the diving area in all pools must conform to the minimum dimensions specified in this part.

The rule as modified is needed and reasonable. The new language does not constitute a substantial change.

Proposed Rule 4717.3850 - Spa Pools.

79. Proposed rule 4717.3850 is a new part, and specifies standards for spa pools. The existing rules do not include requirements applicable to spa pools.

Subpart 10. Signs.

80. Fryer noted that not all the required signage was referenced in this subpart, specifically the user load. MDOH agreed and added part 4717.1350 to the list of rules which include signage requirements. The modification reads:

> Subp. 10. **Signs.** In addition to the signs required in parts 4717.1050, 4717.1250, 4717,1350, and 4717.1650 signs with the warnings in items A to C must be posted and plainly visible in the spa pool area.

The subpart is needed and reasonable, as modified. The new language does not constitute a substantial change.

Proposed Rule 4717.3970 - Pool Closure.

81. Proposed rule 4717.3970 is proposed for amendment to include pool closure when construction of or alterations to a pool have been made without prior approval by the commissioner. All other closure conditions are in existing part 4717.3800. Carlson requested that the operator of the pool, rather than the owner, be required to place the closure sign at the pool when required. The owner is ultimately responsible for closure of the pool, but the owner is not always immediately available. MDOH proposed to modify the part to include that either the owner or the owner's agent must place a sign at the entrance to the pool indicating the pool is closed. The modification is needed and reasonable, and is not a substantial change.

82. The St. Louis Park Health Department suggested adding language making a lack of fully operational recirculation equipment and the presence of a pollutant or hazardous object or substance in the pool enclosure a reason for pool closure. MDOH responded that Item E is included in this part for that reason. The rule, as proposed, is needed and reasonable.

83. Waldorf stated that she would like to see the Department address recreational beaches. The request was noted by MDOH, but is outside the scope of these rule proposals, and is not within the Department's statutory authority as stated in the SONAR. MDOH indicated that it consistently recommends the standards for beaches set by the Great Lakes-Upper Mississippi River Board of State Sanitary Engineers.

84. Siegel wanted to see the pool rules established as statewide code and local health agencies preempted from adopting something stricter via local ordinance. MDOH noted the request, but it is outside the scope of the rule making process. Any such approach should be taken up with the Legislature.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Health (MDOH) gave proper notice of this rulemaking hearing.

2. The MDOH has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The MDOH has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. The MDOH has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings 20 and 24.

5. The additions and amendments to the proposed rules which were suggested by the MDOH after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested language to correct the defects cited in Conclusion 4, as noted at Findings 20 and 24.

7. Due to Conclusions 4 and 6, this Report has been referred to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the MDOH from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where otherwise noted above.

Dated this 30th day of November, 1994.

/S/ Phyllis a. Reha
PHYLLIS A. REHA
Administrative Law Judge

Reported: Tape Recorded; No Transcript.