

## Notice of Emergency Rule

### AGENCY FOR HEALTH CARE ADMINISTRATION Health Facility and Agency Licensing

RULE NO.: RULE TITLE:

59AER17-2: Variances from Nursing Home Emergency Power Plan Rule

**SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:** The specific reasons are as set forth in the Notice of Emergency Rule, published in the Florida Administrative Register on Monday, September 18, 2017, Volume 43, No. 180, pp. 4003-4005. As a result of the vulnerabilities and risks to the elderly population residing in Florida nursing homes that was evidenced by the impacts of Hurricane Irma, the Agency has promulgated Rule 59AER17-1 Nursing Home Emergency Power Plan to set forth the requirements for each nursing home to develop a plan to ensure the safety and health of residents in the event of the loss of electrical power. In the aftermath of the devastation left by Hurricane Irma, including the loss of life at a licensed nursing home facility due to an incompetent emergency response coupled with the loss of power to cooling systems, and facing the threat of two more potential hurricanes on a similar track toward Florida, the Agency took immediate steps to require nursing home facilities to develop and implement plans to ensure that each facility would be able to maintain temperatures at an appropriate level for a minimum of 96 hours in the event of the loss of electrical power. The experience of Hurricane Irma revealed that additional protections for the elderly were needed beyond reliance on evacuation plans, transfer agreements for evacuation of patients to other facilities, or third-party suppliers of emergency power in times of emergency, and staffing issues arise when facilities are without air conditioning, potentially immediately endangering the health, safety and welfare of the residents. Accordingly, the Emergency Rule was promulgated to direct licensed nursing homes to implement Emergency Power Plans for a minimum of 96 hours to protect patients and residents during the immediate aftermath of a major power outage and infrastructure disruption, not just during a hurricane.

This Supplement does not repeal or modify the requirements of the Emergency Power Plan Rule. Instead, this supplement to Emergency Rule is adopted to provide guidance and direction on the submission of variance requests under current Florida law. Nursing homes must focus their efforts on ensuring their patients and residents will be protected during the immediate 96 hours following a community-wide disruption of operation of environmental controls.

**REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES:** To facilitate the expeditious implementation of the Emergency Rule requirements, this Supplement to Emergency Power Plan Rule regarding the variance process already available under existing law is adopted to provide guidance and direction to the nursing homes that for reasons outside their control are unable to fully implement an Emergency Power Plan within the sixty (60) days specified in the Emergency Rule. This Supplement does not repeal or modify the requirements of the Emergency Power Plan Rule. This Supplement will enable the Agency to accurately track the steps taken by nursing homes around the state to address the important goal of ensuring that all nursing homes have the ability to protect the safety of the residents in times of emergency. The Supplement provides at least the procedural protections given by other statutes, the Florida Constitution, or the United States Constitution; and takes

only that action necessary to clarify the requirements and to protect the public interest under the emergency procedure.

**SUMMARY:** This Supplement to Emergency Rule sets forth the criteria and information that should be provided by nursing homes seeking an emergency variance on the grounds that, for reasons outside their control, full implementation of the Emergency Power Plan is not feasible within the sixty (60) day timeframe required by the Emergency Rule.

This Supplement does not repeal or modify the requirements of the Emergency Power Plan Rule. The Agency will consider the reasonable efforts undertaken by a nursing home to provide the protections contemplated by the Emergency Rule. Administrative action or sanctions for non-compliance with the Emergency Rule will be evaluated based upon the information submitted by the nursing home in conjunction with any variance request under existing law (see § 120.542, Florida Statutes) along with such additional information as may be available to the Agency.

THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS: Kimberly Stewart, Agency for Health Care Administration, Division of Health Quality Assurance, Bureau of Health Facility Regulation, 2727 Mahan Drive, MS# 28A, Tallahassee, FL 32308 or at [BHFR@ahca.myflorida.com](mailto:BHFR@ahca.myflorida.com).

THE FULL TEXT OF THE EMERGENCY RULE IS:

Rule 59AER17-2, Variances from Nursing Home Emergency Power Plan Rule.

(1) Rule 59AER17-1, Nursing Home Emergency Power Plan, calls for implementation of a plan within sixty (60) days (the “Sixty-Day Period”) of its effective date. Variances from Rule 59AER17-1, Nursing Home Emergency Power Plan, may be granted by the Agency pursuant to section 120.542, Florida Statutes and Rule 28-104.004-104.005. To facilitate the timely consideration of requests for variances or waivers, in addition to the requirements of Section 120.542, Fla. Stat. and Chapter 28-104, F.A.C., a nursing home seeking a variance from any of the requirements of Rule 59AER 17-1 may provide a sworn affidavit from the Administrator of the nursing home that addresses the following:

(a) steps the nursing home has taken to implement the detailed plan required by Rule 59AER17-1 (the “Detailed Plan”) within the Sixty-Day Period;

(b) specific circumstances beyond the control of the nursing home that have prevented full implementation of the Detailed Plan within the Sixty-Day Period;

(c) arrangements the nursing home has made pending full implementation of the Detailed Plan to ensure that residents and patients of the nursing home will not be exposed to ambient temperatures above 80 degrees Fahrenheit in the event of power failure or loss of air conditioning due to loss of electrical power;

(d) a delineation of the steps remaining for full implementation of the Detailed Plan and the nursing home’s estimate of the time needed to fully implement the Detailed Plan called for by the Emergency Power Plan Rule; and,

(e) all steps taken by the nursing home to provide notice to each resident or patient and, if applicable, to the resident’s or patient’s legal guardian or health care surrogate that the nursing home has applied for a variance or waiver from Emergency Rule 59AER17-1 and the steps that the nursing home is taking to comply with the Emergency Rule.

(2) The nursing home’s request for a variance shall be posted on the Agency’s website.

(3) Once notice has been provided as required in this Rule and the information related to the nursing home's request has been posted on the Agency's website, the Agency will consider the request for variance and the accompanying proof. If the Agency determines from the petition and any accompanying proof offered by the nursing home:

(a) that the nursing home has made all feasible efforts to implement the Detailed Plan within the Sixty-Day Period;

(b) circumstances beyond the control of the nursing home have made full and timely implementation impossible; and

(c) that satisfactory arrangements have been made to ensure the residents and patients will not be exposed to ambient temperature above 80 degrees Fahrenheit in the event the nursing home is without electric power, the Agency will grant a variance of the Sixty-Day Time Period for implementation of the Detailed Plan under the 'principles of fairness' standard in §120.542 for a period no longer than 180 days as to the nursing home, subject to such conditions the Agency determines are appropriate under the circumstances.

(4) The Agency will not assess a fine during the period of the variance if the agency grants a variance under Florida law.

Rulemaking Authority 400.23, 408.819, 408.821(4) FS. Law Implemented 400.23, 408.819, 408.821(4) FS. History – New 10-12-2017.

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.