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Mr. Gary L. Gurian, Acting Secretary
Department of Health
802 Health & Welfare Building
Harrisburg, PA 17108

Re: Department of Health Proposed Regulation #10-155
Public Swimming and Bathing Places

Dear Acting Secretary Gurian:

As Chairs of the Senate Public Health & Welfare Committee, we offer the following comments to the above-captioned proposed regulation. The purpose of the regulation is to implement the provisions of the act of June 18, 1998 (P.L. 531, No. 75) (hereinafter "Act 75"). In two significant respects, the proposal misses the mark.

In §18.1, Definitions, the department adds a definition for "Recreational swimming establishment". The first three sentences of the regulation are identical to the wording of Act 75. The regulation adds a fourth sentence, not found in the statute, which reads:

> During any time a facility otherwise excluded by the definition provides access to the general public and charges a fee for admission, it shall be considered a recreational swimming establishment.

The third sentence of both the statute and the regulation reads:

> The term excludes those facilities owned by condominiums, other property owner associations, rental arrangements which include three or more families or social units, hotels or motels, campgrounds, private clubs and private organizations which do not provide access to the general public, swimming facilities used exclusively for hydrotherapy and residential swimming facilities used solely by the owner of a residence, his family and personal guests. (Act 75, §1, adding §2 (6) to the Public Bathing Law, act of June 23, 1931 (P.L. 899, No. 299)) (Emphasis added).

The department has no authority to include a facility under the scope of the regulation if the General Assembly has specifically excluded it in Act 75. In the fourth sentence of its proposed definition, the department adds two conditions which would convert an otherwise excluded facility into an included facility. The first is that an admission fee is charged. The first sentence of the definition in Act 75 includes this as part of the definition of a recreational swimming establishment. The second condition is the one set out in the fourth sentence of the proposed regulatory definition, that a facility provides access to the general public. There is no authority for this second condition. The General Assembly made denying access to the public a condition of exclusion only for private clubs and private organizations. All listed facilities that precede them are excluded unconditionally. The last sentence of the definition of recreational swimming establishment, in §18.1 should be deleted from the final-form regulation.

The second problem is found in §18.42(b), Required number of lifeguards. This section purports to implement §3 of Act 75, which added §4.1, Certified lifeguards, to the Public Bathing Law. That law, at §4.1(b), now reads:

> The department shall promulgate regulations to determine the number of life guards required at a recreational swimming establishment using objective criteria that takes into consideration industry standards. The department shall consult with approved certifying authorities and recreational swimming establishments to develop regulations relating to lifeguards.

The General Assembly was very clear in its instructions to the department about the nature of the regulations to be promulgated. The regulations must, first and foremost, determine the number of lifeguards. In §18.42(b)(1), Required number of lifeguards, the department has responded to the legislative mandate by telling operators of recreational swimming establishment to:

> Develop, write and adhere to a lifeguard coverage plan for the recreational swimming establishment incorporating the standards of a Department-recognized lifeguard certifying authority which specifies how the recreational swimming establishment shall provide an adequate number of certified lifeguards at relevant times. This plan shall be posted in an area commonly utilized by lifeguard staff and shall be available to the Department and any member of the public upon request.

This completely fails to meet the legislative mandate. The regulations do not determine the number of lifeguards. That is left to the operators of recreational swimming establishments to figure out on their own. The whole point of Act 75 was to establish a level of safety in the recreational swimming establishments throughout the Commonwealth. The General Assembly demanded certainty and uniformity in the posting of qualified lifeguards. While it was recognized that different circumstances would require different numbers of lifeguards, e.g. a swimming party of 45 six-year olds would likely require more lifeguards than a swimming party of 20 forty-year olds, the department was not authorized to consider each circumstance to be unique, which it has done by its regulatory framework. Further, the department does not even require any prior approval of the plan. The department sets itself up as merely an interested bystander, only requiring that the lifeguard plan be available if the department ever asks. Act 75 required more.

The regulation at §18.42(b)(1) also present a public safety concern. There needs to be some degree of certainty that recreational swimming establishments are safe. The department, by abdicating its authority, leaves the public no more certain that swimming facilities are safe than it was before Act 75 was passed. Also, the operators of recreational swimming establishments have a reasonable expectation that they will know the requirements that they have to meet before they open to the public. Under the proposed regulation, a lifeguard plan could be implemented and the operator might not be told that it is inadequate until after an accident investigation was completed. That is not what Act 75 envisioned. Act 75 wanted to avoid accidents, these regulations will not accomplish that goal.

Sincerely yours,

Harold F. Mowery, Chairman
Senate Public Health & Welfare Committee

Sincerely yours,

Vincent J. Hughes, Minority Chairman
Senate Public Health & Welfare Committee

HFM/hsj
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