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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

April 15, 1999

Honorable Gary Gurian, Acting Secretary  
Department of Health  
802 Health and Welfare Building  
Harrisburg, PA 17108

Re: IRRC Regulation #10-155 (#2002)  
Department of Health  
Public Swimming and Bathing Places

Dear Acting Secretary Gurian:

Enclosed are our Comments on the subject regulation. They are also available on our website at <http://www.irrc.state.pa.us>.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact Chuck Tyrrell at 772-3455.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce  
Executive Director

REN:kgg  
Enclosure  
cc: William Williams  
Dr. Helen Burns  
Office of General Counsel  
Office of Attorney General  
Pete Tartline

# **COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION**

**ON**

## **DEPARTMENT OF HEALTH REGULATION NO. 10-155**

### **PUBLIC SWIMMING AND BATHING PLACES**

**APRIL 15, 1999**

We have reviewed this proposed regulation from the Department of Health (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to statutory authority, legislative intent, protection of the public health, reasonableness and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

#### **1. Section 18.1 Definitions – Statutory Authority and Legislative Intent**

The Department incorporated the statutory definition of recreational swimming establishment, but has added a sentence not contained in the statute. This additional sentence provides that “When a facility otherwise excluded by this definition provides access to the general public and charges a fee for admission, it shall be considered a recreational swimming establishment.” This language is contrary to the language and intent of Act 75 of 1998 (Act).

The Department added the language to encompass facilities, such as hotels and motels, which may allow the general public to use the facility for a fee. This is contrary to the intent of the General Assembly because it will include facilities, such as hotels and motels, which the Act specifically excluded.

The Department should delete the last sentence in the definition of recreational swimming establishment to be consistent with the Act.

#### **2. Section 18.42(a) Certified Lifeguards - Clarity**

Subsection (a) provides the criteria that the Department will use to determine who will qualify as a lifeguard certifying authority. Each facility must determine that its lifeguards have completed a certification program which matches these criteria. Facilities may have difficulty making this comparison or may not interpret the criteria in the same manner as the Department. Therefore, annually the Department should publish a list of those organizations that qualify as a lifeguard certifying authority.

Subsection (a)(8) provides that a lifeguard certifying authority must use instructors that have completed an *approved* lifeguard instructors' certification program. The regulation does not indicate what an approved lifeguard instructors' certification program is or who approves these programs; it should. Alternatively, the Department could publish an annual notice in the *Pennsylvania Bulletin* listing the approved lifeguard instructors' certification programs.

### **3. Section 18.42(b) Required Number of Lifeguards – Legislative Intent, Protection of the Public Health, Reasonableness and Clarity**

#### *What is adequate lifeguard coverage?*

Section 4.1(b) of the Act provides that “The department shall promulgate regulations to determine the number of lifeguards required at a recreational swimming establishment using objective criteria that takes into consideration industry standards.” The regulation does not completely meet the intent of this provision. Instead, Subsection (b) provides only vague criteria of what is considered adequate lifeguard coverage.

Commentators also questioned the lack of definitive standards for adequate lifeguard coverage. The Pennsylvania Recreation and Park Society believes the regulation should specify the required number of lifeguards for a particular pool contingent on the size of the facility, participants on site, support staff, and scheduled activities. We concur. Although it may not be feasible to include specific numbers in the regulation, the Department can include more definitive criteria to determine adequate lifeguard coverage.

#### *Department review of lifeguard coverage plan*

The regulation also does not meet the legislative intent of the Act because the Department will not be reviewing the lifeguard coverage plan. Section 8 of the Act amended the Public Bathing Law to allow inspection of facilities to determine if a facility has an adequate number of certified lifeguards. Section 8 specifically provides that such examinations and investigations can be used to determine “whether the provisions of this act and the rules and regulations of the department are being complied with or are being violated.”

Senators Mowery and Hughes, Majority and Minority Chairs of the Senate Public Health and Welfare Committee, expressed concern that the Department will not be approving the lifeguard coverage plan. They commented that the Act required more involvement by the Department.

To address these concerns, the regulation could include a process for approving the lifeguard coverage plan. For currently permitted facilities, this may be accomplished as part of the annual inspection. For new facilities, this can be completed as part of the permitting process. The regulation should specify the following:

- A resolution process for the Department and facility to address any deficiencies in the lifeguard coverage plan.
- A process for a facility to amend its plan due to a change in operation.
- The Department’s criteria for closing a facility.
- A resubmission process following Department disapproval.

#### **4. Timeframe for Compliance – Reasonableness**

The regulation does not indicate when recreational swimming establishments must begin employing certified lifeguards and have a completed lifeguard coverage plan. The final regulation should specify a reasonable time period after final publication for facilities to meet the new requirements.

#### **5. Advance Notice of Final Rulemaking**

If the Department amends the rulemaking to include more specific standards on adequate lifeguard coverage and a process for approval of a plan, it should consider issuing an advance notice of final rulemaking. An advance notice will give those establishments subject to the rulemaking an opportunity to review and comment on the new standards.