

This space for use by IRRC	
(1) Agency Department of Health	201803-7 12:13:14 REVIEW COMMISSION IRRC Number: 2288
(2) I.D. Number (Governor's Office Use) Reg. No. 10-155	
(3) Short Title Recreational Swimming Establishment Lifeguard Requirements	
(4) Pa. Code Cite 28 Pa. Code Ch. 18 § 18.1 § 18.42	(5) Agency Contacts & Telephone Numbers Primary Contact: Dennis Wilson Bureau of Community Health Systems Room 628 Health & Welfare P.O. Box 90 Harrisburg, PA 17108 (717) 787-4366 Secondary Contact: Michael Huff Bureau of Community Health Systems Room 628 Health and Welfare P.O. Box 90 Harrisburg, PA 17108 (717) 787-4366
(6) Type of Rulemaking (Check One) <input type="checkbox"/> Proposed Rulemaking <input checked="" type="checkbox"/> Final Order Adopting Regulation <input type="checkbox"/> Final Order, Final-form Rulemaking <input type="checkbox"/> Omitted	(7) Is a 120-Day Emergency Certification Attached? <input checked="" type="checkbox"/> No Yes: By the Attorney General Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

These final-form regulations require certain facilities defined as "recreational swimming establishments" to have the appropriate number of certified lifeguards on duty during facility operation. Lifeguard certifying authorities that are approved by the Department will be identified to assure uniform lifeguard certification procedures. If the Department determines that a "recreational swimming establishment" is not in compliance with the regulatory requirements, the facility will be closed until the Department has conducted a re-inspection and issued a written authorization to reopen.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

Statutory authority for these regulations is established by Act 75 of 1998, P. L. 531, amending the Public Bathing Law of 1935, 35 P.S. §§ 672-680d.

Prior to the passage of Act 75, the Pa. Supreme Court decision, *Spooner v. Secretary of Commonwealth*, 574 A. 2d 600 (Pa. 1990), held that the Department of Environmental Resources exceeded the scope of its statutory authority when it required lifeguards at public bathing facilities.

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Yes, the final-form regulations are mandated by 35 P.S. § 675.1(b).

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

Act 75 and these regulations address the need for safety at recreational swimming establishments by requiring certified lifeguards at certain public swimming facilities that, prior to this legislation, were not required to retain lifeguards. The Act and these regulations further provide for specific certification requirements for lifeguards. Statistics maintained by the (federal) Centers for Disease Control and Prevention indicate that 1,030 drowning deaths occurred in Pennsylvania from 1990 through 1998.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

The public health, safety, and general welfare risks associated with non-regulation are the increased number of drownings and other injuries. Drownings and other injuries may occur when lifeguards are not required at certain public bathing facilities, are not properly trained, are not present in adequate numbers, or are permitted to do multiple tasks while on duty at pool side.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The beneficiaries are all persons who use recreational swimming establishments. Patrons of these facilities will benefit through the assurance of adequately trained lifeguards and that an adequate number of lifeguards are on duty to protect the bathers when the facility is in operation. Enhanced public safety through facilities that are properly staffed with adequate certified lifeguards will benefit the general public, the industry and promote tourism within the Commonwealth.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

No entities are perceived to be adversely affected by these final-form regulations. However, the Department notes that some recreational swimming establishment owners may consider themselves to be adversely affected.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

These regulations will apply to all facilities defined as recreational swimming establishments. This includes swimming pools, water rides, wave pools and swimming beaches and other outdoor swimming facilities as defined by Act 75. The facilities that will be required to comply with the regulations include water parks and municipal, county and state-owned bathing places that charge a fee for the use of the facility. The exact number of recreational swimming establishments, as defined by Act 75, is unknown as this term has not been used as a category of Public Bathing Place facilities for statistical purposes.

(16) Describe the communications with, and input from, the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

A stakeholder group, composed of representatives from the Department of Health, the Department of Conservation and Natural Resources, the American Red Cross, the YMCA, the PA Travel Council and Amusement Parks Association, Jeff Ellis and Associates Inc., Independent Insurance Agents of PA, and aquatics experts, was consulted at a stakeholder meeting held at the Health and Welfare Building on October 1, 1998.

Following the publication of previous final-form regulations in the *Pennsylvania Bulletin*, comments were received from Senator Harold F. Mowery, Jr., Majority Chairman, Senate Public Health & Welfare Committee; Senator Vincent J. Hughes, Minority Chairman, Senate Public Health & Welfare Committee; and the Independent Regulatory Review Commission (IRRC).

A second stakeholder group, composed of representatives from the Department of Health, the Department of Conservation and Natural Resources, the American Red Cross, Jeff Ellis and Associates, Inc., waterpark operators and representatives of county and municipal-owned pools, was consulted at a stakeholder meeting held at the Health and Welfare Building on February 12, 2001.

In the summer of 2001, regional stakeholder meetings were conducted in each of the Department of Health's six District Offices in Wilkes-Barre, Reading, Williamsport, Harrisburg, Jackson Center and Pittsburgh, Pennsylvania. Representatives from the Department of Health, Department of Conservation and Natural Resources, American Red Cross, Jeff Ellis and Associates, Inc., water park operators and representatives of county and municipal-owned pools attended and were consulted on standards for the number of lifeguards at recreational swimming establishments.

Information, suggestions and comments provided during the extensive stakeholder process have been taken into consideration when drafting these final-form regulations.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Costs will be incurred to recruit and retain certified lifeguards. That expense will vary with the number of lifeguards necessary, the annual hours of operation, supplies pertinent to lifeguarding operations, bookkeeping, and related expenses. Assuming full-time employment of 40 hours per week for a 14-week season at \$6.00 per hour, the cost of an additional lifeguard will be \$3,360.00. Using the same figures for the work week and length of the season, the cost of an additional lifeguard would be \$3,920.00, based on wages of \$7.00 an hour. Indoor pools typically hire high school and college students on a part-time basis. For an indoor pool that is open all year, the cost of a lifeguard is approximately \$7,000.00, based on working 20 hours per week, 50 weeks per year and wages of \$7.00 an hour. However, most recreational swimming establishments which will be affected by these final-form regulations already employ lifeguards to be on duty during the hours of operation to ensure the health and safety of patrons. The number of additional lifeguards required under the final-form regulations will depend upon the size of the recreational swimming establishment and that establishment's current practices for lifeguard coverage.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

Based on the analysis in paragraph 17, a negligible cost or savings to local governments is anticipated.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

Based on the analysis in paragraph 17, and projected lifeguard staffing, the cost to state government is estimated below.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government and state government for the current year and five subsequent years.

	Current 2004-05	FY +1 2005-06	FY +2 2006-07	FY +3 2007-08	FY +4 2008-09	FY +5 2009-10
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	\$0	0	0	0	0	0
Local Government	\$0	0	0	0	0	0
State Government	\$0	0	0	0	0	0
Total Savings	\$0	0	0	0	0	0
COSTS:	\$	\$	\$	\$	\$	\$
Regulated Community	\$0	0	0	0	0	0
Local Government	\$0	0	0	0	0	0
State Government- DCNR-State Park Operations	\$67,000	\$200,000	\$200,000	\$200,000	\$200,000	\$200,000
Total Costs	\$67,000	\$200,000	\$200,000	\$200,000	\$200,000	\$200,000
REVENUE LOSSES:	\$	\$	\$	\$	\$	\$
Regulated Community	\$0	0	0	0	0	0
Local Government	\$0	0	0	0	0	0
State Government	\$0	0	0	0	0	0
Total Revenue Losses	\$0	0	0	0	0	0

(20a) Explain how the cost estimates listed above were derived.

Costs were derived per the analysis in paragraph 17 and financial information for DCNR was provided by DCNR.

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	2001-2002	2002-2003	2003-2004	
*DCNR-State Park Operations	\$61,133,000	\$60,559,000	\$51,207,000	

* Financial information provided by DCNR.

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Nonregulatory alternatives were not options. The regulations were required to address the mandates prescribed by Act 75 requiring the Department to determine certification procedures for lifeguard certifying authorities and the number of lifeguards required for recreational swimming establishments.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

In addition to the system presented in these final-form regulations, an alternative regulatory concept considered was requiring one lifeguard for every 2,000 square feet of water surface area at the facility. This earlier final-form regulatory standard was withdrawn by the Department as possibly being too inflexible, plus indications of a potential significant cost burden on the regulated community. The Department subsequently considered a regulatory basis of one lifeguard for every 3,400 square feet. This proposal was also perceived as resulting in a significant cost burden to the regulated community.

Another alternative regulatory concept considered was to utilize the number of bathers to determine the number of lifeguards required at a recreational swimming establishment. This concept was dismissed based on the difficulty of maintaining adequate lifeguard numbers since bather load can fluctuate dramatically depending on weather, holidays, events and numerous other variables. No final cost projections were made, as it was determined, in preliminary analysis, that this alternative was not efficient.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

No. There are no federal standards for lifeguard coverage at recreational swimming establishments. The final-form regulations are consistent with industry protocols.

Nationally recognized lifeguard training organizations, such as the American Red Cross and Jeff Ellis and Associates, recommend that all lifeguards be able to survey their assigned area every 10 seconds and be able to respond to a distressed swimmer within 20 seconds. This standard, called the "10/20 rule," is the basis upon which the majority of lifeguards are trained. A comprehensive study conducted by the New York State Department of Public Health and a private aquatics safety consulting firm, Pia Consulting, supports the position that the standard of one lifeguard for every 6,700 square feet of water surface area meets the minimum requirements of the 10/20 rule under ideal conditions. As ideal conditions are never found in the field, the study recommends a higher number of lifeguards in practice. Based on this study and input from Pennsylvania stakeholders, the standard of one lifeguard per 4,000 square feet represents the best standard with all economic factors taken into consideration.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Lifeguard certification procedures are similar to those in place in other states. The standards for lifeguard coverage are comparable to those in other states. This final-form regulation will not put Pennsylvania at a competitive disadvantage.

(26) Will the regulation affect existing or final-form regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

These final-form regulations would affect 28 Pa. Code 18.1 and 18.42 by adding the definitions of Certified Lifeguard and Recreational Swimming Establishment (18.1) and modifying section 18.42 (Lifeguards) to repeal subsection (a) (Number) and subsection (b) (Qualifications) Section 18.42, subsection (a) (Recognized lifeguard certifying authorities); subsection (b) (Requirements for a lifeguard certifying authority); subsection (c) (Required number of lifeguards); and subsection (d) (Violation of certified lifeguard requirement) have been added pursuant to Act 75.

(27) Will any public hearings or information meetings be scheduled? Please provide the dates, times, and locations, if available.

No other public meetings are scheduled. The Department has conducted an extensive stakeholder process in developing these final-form regulations. Please also see details provided in Section 16.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

Current Department inspection forms of recreational swimming establishments will not have to be altered.

The final-form regulations require each lifeguard certifying authority applying to be listed as a recognized lifeguard certifying authority to complete and submit an "Application for Recognition as a Lifeguard Certifying Authority" as part of the application process. A copy of the Application is attached and marked "Attachment #1."

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The regulations do not include any special provisions.

(30) What is the anticipated effective date of the regulation, the date by which compliance with the regulation will be required, and the date by which any required permits, licenses or other approvals must be obtained?

The anticipated effective date of the final-form regulations is January 1, 2005.

(31) Provide the schedule for continual review of the regulation.

Effectiveness of the final-form regulations will be monitored on a continual basis, primarily through annual sanitary surveys conducted by the Department. The Department performs an operational inspection of each public bathing facility before it is opened and continues to inspect the facility on an annual basis once the facility is opened. If the facility is a recreational swimming establishment, the Department will review the number of certified lifeguards who will be on duty and ensure that the lifeguard(s) is/are appropriately certified by a lifeguard certifying authority approved by the Department.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

2288

SEP 27 2004

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General.</p> <p>BY _____ DEPUTY ATTORNEY GENERAL</p> <p>_____ DATE OF APPROVAL</p> <p>☑ Check if applicable. Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p>(AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>10-155</u></p> <p>DATE OF ADOPTION: _____</p> <p>BY: <u>Calvin B. Johnson</u> Calvin B. Johnson, M.D., M.P.H.</p> <p>TITLE <u>Secretary of Health</u></p>	<p>Copy below is hereby approved as to form and legality. Executive or independent Agencies.</p> <p>BY: <u>Tang</u></p> <p><u>9/22/04</u> DATE OF APPROVAL</p> <p><u>Asst.</u> (<u>Deputy</u> General Counsel) (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p>☑ Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
---	--	--

FINAL FORM

DEPARTMENT OF HEALTH

Title 28. HEALTH AND SAFETY
PART II. LOCAL HEALTH

[28 Pa. Code Ch. 18]

Public Swimming and Bathing Places

The Department of Health (Department) hereby adopts amendments to 28 Pa. Code Chapter 18 (relating to public swimming and bathing places). The amendments include requirements relating to certification of lifeguards and criteria to be followed by recreational swimming establishments regarding lifeguards. The amendments are set forth in Annex A.

I. PURPOSE OF THE AMENDMENTS

The Act of June 18, 1998 (P.L. 531, No. 75) (Act 75), *amending* the Public Bathing Law (35 P.S. §§672-680d), directed the Department to select and identify authorities to certify lifeguards and to promulgate regulations to determine the number of lifeguards required at a recreational swimming establishment when the recreational swimming establishment is open to the public. The Department prepared these final-form regulations in consultation with established certifying authorities and the operators of recreational swimming establishments.

The regulations require that all lifeguards in Pennsylvania obtain certification from a certifying authority recognized by the Department and establish the minimum-criteria that a lifeguard certifying authority must include in their training program in order for their program to be recognized by the Department. Further, the regulations name the American Red Cross, the YMCA, and Jeff Ellis and Associates, Inc. (Ellis and Associates) as recognized lifeguard certifying authorities. Finally, the regulations establish criteria which recreational swimming establishments must follow in order to have an adequate number of lifeguards present to ensure the safety of patrons.

The Department published proposed rulemaking in the Pennsylvania Bulletin on September 21, 2002, and provided a 30-day public comment period. (See 32 Pa. B. 4581 (September 21, 2002)). The Department received nine public comments to the proposed rulemaking and twelve additional comments from the Independent Regulatory Review Commission (IRRC). The Department's responses to these comments appear in the summary of this final rulemaking.

II. SUMMARY

One commentator raised a concern that the requirement in section 18.42(c), which requires a minimum of two lifeguards be "present and available to aid bathers whenever the recreational swimming establishment is being used by bathers," is too restrictive for small, low volume pools. The commentator suggested that, when two lifeguards are not available, "a competent and qualified employee at least 18 years of age and specifically trained to assist lifeguards in an emergency, must be present and assist the lifeguard on-duty should an aquatic emergency arise."

The provision cited by the commentator applies to only very small recreational swimming establishments (5,000 square feet or less) in which only one certified lifeguard would be required at waterside during general swim activities. The Department believes that it is essential to ensure the safety of the bathers that there is a certified lifeguard available to act as a backup in the event that an emergency or other event occurs that removes the sole

certified lifeguard from protecting the bathers. Furthermore, Act 75 only grants the Department the authority to require certified lifeguards at recreational swimming establishment. Regulations requiring an assistant lifeguard or other type of personnel at the recreational swimming establishment would be beyond the scope of the statutory authority granted to the Department.

Another commentator suggested that basing the lifeguard regulations on the size of the facility is not consistent with industry standard, as required by Act 75. According to the commentator, regulations requiring a lifeguard coverage plan, taking into account surveillance and response time, would be consistent with industry standards. IRRC also asked the Department to explain why it had not proposed regulations based on the “10/20 rule” for surveillance by lifeguards and how the lifeguard coverage requirement of one lifeguard per 4,000 square feet of water surface area was consistent with the intent of Act 75.

In 1999, the Department proposed regulations requiring that all recreational swimming establishments would draft a lifeguard coverage plan based on the “10/20 rule.” The “10/20 rule” means that each lifeguard can scan his or her assigned area in less than 10 seconds and can respond to any emergency within his or her assigned areas within 20 seconds. At that time, both the Senate Public Health and Welfare Committee and IRRC questioned the use of a lifeguard coverage plan. The Public Health and Welfare Committee stated, “Operators of recreational swimming establishments are entitled to know with reasonable certainty the requirements they need to satisfy to comply with Department

regulation, and they are entitled to know those requirements in advance of opening to the public.” No other state has adopted the “10/20 rule” for determining lifeguard coverage in its regulations because the term is too subjective for regulatory language. All states that require lifeguards at swimming pools use more objective criteria such as the size of the facility, the number of bathers, or a combination of both.

The Department considered numerous proposals for lifeguard coverage standards and consulted with various stakeholders and industry experts, including Dr. Tom Griffiths of Penn State University, the American Red Cross, Ellis and Associates, the Pennsylvania Recreation and Park Society, Pia Consulting, and various individual operators of swimming pools and water parks. Additionally, the Department reviewed regulations of other states, and studies conducted by the New York State Department of Health and Pia Consulting. After consulting with these individuals and entities and reviewing studies and regulations of other states, the Department concluded that the requirement of one lifeguard for every 4,000 square feet meets the goal of the “10/20 rule,” while also providing the operators of recreational swimming establishments an objective standard by which they can determine if they are in accordance with Act 75.

IRRC further asked if the Department had considered allowing the swimming establishments to use either the “10/20 rule” or square footage of water surface area to determine the required number of lifeguards under a Department-approved plan.

The Department's first proposed lifeguard regulations would have required recreational swimming establishments to draft and submit to the Department lifeguard coverage plans. This proposal was also questioned because commentators were concerned that a lifeguard coverage plan would not provide a sufficient degree of certainty that recreational swimming establishments are safe. IRRC noted that, "The regulations should specify the required number of lifeguards for a particular facility based on the size of facility, participants on site, support staff, and scheduled activities." The regulations proposed on September 21, 2002 were drafted in response to these concerns.

Further, it is estimated that there are 2000 swimming pools in Pennsylvania that meet the definition of "recreational swimming establishment," with more being added each year. The Department does not have the personnel or the resources to review that large a volume of coverage plans in order to ensure that each one provides adequate protection for the bathers.

IRRC asked if the Department had considered including provisions in the regulation which would allow a swimming establishment to petition the Department for a waiver of the standard lifeguard requirements if the facility can demonstrate that an alternative lifeguard coverage plan achieves the adequate level of safety. The Department has not altered the regulations in response to this comment. The Department does not have the resources or the personnel to review a large volume of lifeguard coverage plans or waiver requests to ensure that the plans provided an adequate level of safety for the bathers.

Another concern raised by a commentator was that once an entity, such as Ellis and Associates, was designated a lifeguard certifying authority, the Department would not need to consider approval of the authority.

Section 18.24(a) of the final-form regulations states, “The Department recognizes the American Red Cross, the YMCA, and Jeff Ellis and Associates, Inc. as lifeguard certifying authorities.” These three authorities are therefore recognized as lifeguard certifying authorities in the Pennsylvania Code and further approval by the Department would be unnecessary. These three certifying authorities were selected because they account for over ninety percent of lifeguard certifications in the United States and set the standard by which other certifying authorities are judged. Their inclusion in regulatory language is consistent with standards adopted by other states. The regulations allow the Department to determine whether any other lifeguard certifying authority meets the standards set forth in section 18.42(f), as provided for in Act 75.

Another concern raised by that commentator was that the phrase “sufficient to accomplish the task” in section 18.42(c)(1)(I) was potentially ambiguous. The phrase “sufficient to accomplish the task” was included in the language after stakeholder comments requested clarification on the meaning of “adequate.” The phrase “sufficient to accomplish the task” is based on, and consistent with, lifeguard regulations adopted by other states, including New York, when defining the word “adequate.” The Department has not revised the regulation in response to the comment.

One commentator stated that the proposed regulations would require unnecessary additional lifeguard hours. The Department disagrees with this assessment and has not changed the regulations. The regulations were drafted to provide adequate lifeguard coverage to ensure the safety of the bathers at recreational swimming establishments, based on input from stakeholder groups including operators and certifying authorities. As with any new regulatory standard, there are some facilities that do not currently meet the standard, while others already exceed it. In comparison to the regulations adopted by other states, the regulations proposed by the Department are not excessive. In fact, most neighboring states, including New York, New Jersey, Delaware, Maryland, and Ohio have adopted standards for the number of lifeguards that exceed the standards in the Department's regulations. The Department believes that most recreational swimming establishments in the Commonwealth will be able to meet these standards with little or no budgetary difficulty.

A municipality commented that, due to liability and insurance issues, municipalities whose swimming pools would be subject to the regulations are, in general, more safety-minded than other swimming pool operators that would be exempted from the regulations. Further, the municipality argued that the transient nature of some of the exempted swimming pools increases the likelihood of injury at these facilities, justifying making these facilities subject to the regulations.

The Department has not changed the regulation. The Department proposed exemptions from its regulations in accordance with the requirements of Act 75. The

definition of a “recreational swimming establishment” in Act 75 details which facilities are exempted from these regulations. Any regulation that requires certified lifeguards at the exempted facilities would be beyond the statutory authority granted to the Department by the General Assembly.

Another commentator recommended that the number of lifeguards be determined by the number of bathers in the water, not the size of the facility. The Department did consider regulations based on bather load rather than the size of the facility. After conducting several stakeholder meetings, it was determined that the majority of stakeholder participants opposed basing the number of lifeguards on bather load. These stakeholders considered a standard based on bather load to be unfeasible, especially for the operators of large recreational swimming establishments and the water park industry. Those facilities would be required to have personnel constantly monitoring people getting in and out of the water and adjusting lifeguard coverage accordingly. Therefore, the Department has not changed the regulation.

Related to this commentator’s concern, IRRC questioned the reliance on square footage for the number of certified lifeguards when there are only a small number of bathers in the facility.

The regulations will allow operators to close off unused portions of their recreational swimming establishments with a rope and float line, thereby reducing the square footage of water available to bathers. Furthermore, after consulting with numerous stakeholders, the

Department concluded that basing the number of guards on the number of bathers in the pool would be a heavy burden on many stakeholders, especially the operators of larger pools and the water parks. Recreational swimming establishments would be constantly counting the number of people in facility and adjusting their lifeguard coverage accordingly.

Another commentator suggested that the Department clarify the provision that only one certified lifeguard is required during restricted access swimming periods, such as early morning lap swimming. The commentator suggested that the Department change the proposed regulation to state that a minimum of two lifeguards is required “when the establishment is open to the general public for recreational swimming.” IRRC also recommended that the Department clarify this provision. The Department has accepted this recommendation and incorporated it into the final-form regulations.

A commentator suggested that the regulations allow for the use of “shallow water guards” at wading pools and other recreational swimming establishments. The American Red Cross certifies shallow water guards in first aid and CPR, but they do not receive deep-water rescue training, which is not needed in wading pools. However, Act 75 only grants the Department the authority to require certified lifeguards at recreational swimming establishments. No mention of shallow water guards is made in the statute. Regulations covering the use of shallow water guards would be beyond the statutory authority granted to the Department by the General Assembly. The Department did not revise the regulations in response to this comment.

IRRC also made several additional comments. IRRC first raised a concern about the definition of the term “bather.” IRRC suggested that the final-form regulation clarify whether “bather” includes a person in the pool area who does not intend to swim, such as a parent who accompanies a child to the pool.

The complete definition of “bather” in the proposed regulations is, “Any person using a recreational swimming establishment in the water or adjoining deck area for the purpose of swimming, water sports, or other recreational activity.” This definition was taken from the National Spa and Pool Institute. The scope of the definition is limited to only those people “in the water or adjoining deck area.” The deck area of a swimming pool is defined by the Public Bathing Place Manual, Part I, Section 5.9 as an area around the pool perimeter four feet in width, extending to between six and eight feet behind a diving board. The only people who would be on the deck area would either be getting into or out of the water or waiting in line at water features such as slides or diving boards. These individuals may require assistance from a certified lifeguard in the event of accident or injury or may provide a distraction to the lifeguard. A parent who accompanies a child to the pool, but does not intend to swim and is outside of the deck area, is not considered a bather.

Second, IRRC requested that the Department renumber the paragraphs in section 18.42. IRRC stated,

Section 18.42(a)(1) paragraph lists the three organizations that the Department recognizes as lifeguard certification authorities. Paragraph (a)(1) outlines the requirements that other organizations, that want to become lifeguard certifying authorities, must follow to obtain qualification. For clarity, Paragraph (a)(1) should be renumbered to become Paragraph (b), with Subparagraph (2) through Subparagraph (4)

being renumbered and place under the new Paragraph (b). Current Paragraphs (b), (c) and (d) should also be renumbered accordingly.”

The Department has accepted this recommendation and has incorporated it into the final form regulations.

IRRC next requested clarification on the meaning of “present and available,” in proposed section 18.42(c)(1)(iii). IRRC asked if that phrase required that two lifeguards be present at waterside at all times or if the location of lifeguards depends on the square footage of the recreational swimming establishment. For recreational swimming establishments where more than one lifeguard is required at waterside, for example, when there is more than 5,000 square feet in water surface area, then two or more lifeguards must be at waterside at all times. For smaller recreational swimming establishments, only one lifeguard must be at waterside, while the other must be only be somewhere in the facility where that lifeguard can be called upon to stand in for the primary lifeguard in the event of an emergency.

IRRC also raised a question about the provision in proposed section 18.42(c)(1)(iii), which states that the Department may require additional certified lifeguards under certain circumstances, such as when the shape or size of the pool prevents the lifeguard from monitoring the assigned area. IRRC asked if the Department would make this determination as part of the initial permitting process.

For new recreational swimming establishments, this determination will be made during the initial permit application process during the operational inspection and prior to

the issuance of an operating permit. During the operational inspection, the inspector will review issues such as surveillance, visibility of bathers, and response time with the operator to determine if additional lifeguards may be required to ensure safety of the bathers. However, since existing facilities have been constructed that may be required to have additional lifeguards at waterside, it is likely that the Department may have to notify some existing recreational swimming establishments that more lifeguards are required. If this is necessary, the operator will receive a written notice informing it of the need for additional lifeguard coverage during the annual inspection of the facility.

Further, IRRC commented regarding the provision in proposed section 18.42(c)(3), which requires one certified lifeguard at special events such as swim meets, swim team practices, learn-to-swim programs, lifeguard training, and other special events where access to the recreational swimming establishment was limited. IRRC requested that the Department clarify whether the certified lifeguard is required to be an employee of the recreational swimming establishment or if the group holding the special event can provide the certified lifeguard.

The Department does not believe that the question of who employs the lifeguard to be relevant to the issue of bather safety, which is the concern the rulemaking is intended to address. So long as the lifeguard is qualified and certified according the requirements of section 18.42, the issue of who provides the lifeguard should be negotiated between the owner of the recreational swimming establishment and organizers of the event on a case-by-case basis.

III. AFFECTED PERSONS

The regulations will affect all Pennsylvania swimming and bathing facilities that meet the definition of recreational swimming establishment. These establishments include, but are not limited to, swimming pools, water rides, wave pools and swimming beaches that are not otherwise excluded by the statutory definition of a recreational swimming establishment. The regulations will enhance the safety of the public when they use recreational swimming establishments.

IV. COST AND PAPERWORK ESTIMATES

The regulations will have little fiscal impact on the Commonwealth, local government, the private sector and the general public. Based on current hiring practices, the Department of Conservation and Natural Resources has estimated it may incur \$200,000 in expenses for additional lifeguard salaries.

Most recreational swimming establishments, as defined by Act 75, currently employ lifeguards to protect the safety of their patrons. Many recreational swimming establishments have lifeguard coverage ratios that exceed the regulatory standard; other recreational swimming establishments use a lifeguard coverage ratio that is below the regulatory standard. The exact cost incurred as a result of the regulations will depend on the current practices of the individual recreational swimming establishment and the number of

additional lifeguards, if any, that will be required to meet the standard. The costs incurred will primarily be in the form of lifeguard salaries. The regulations will not significantly increase paperwork.

V. EFFECTIVE DATE/SUNSET DATE

The regulations will be effective on January 1, 2005. No sunset date has been established. The Department will monitor the effectiveness of the regulations on a continual basis, primarily through the annual sanitary inspections conducted by the Department.

VI. STATUTORY AUTHORITY

The Department's authority to promulgate regulations related to public swimming and bathing places is established pursuant to the Public Bathing Law (35 P.S. §§ 672-680d), as amended by Act 75 of 1998 (P.L. 531, No. 75), the Local Health Administration Law (16 P.S. § 12001 - 12028) and § 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20).

VII. REGULATORY REVIEW

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on September 21, 2002, the Department submitted a copy of the notice of proposed rulemaking, published at 32 Pa. B. 4850, to IRRC and the Chairpersons of the House Health and Human Services Committee and the Senate Public Health and Welfare Committee for review and comment.

The Department received nine public comments during the public comment period. In preparing the final-form regulations, the Department has considered all comments received from the public and IRRC.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5(j.2)), on _____, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____ and approved the final form rulemaking. The Office of Attorney General approved the regulations on _____.

VIII. CONTACT PERSON

Questions regarding these final-form regulations may be submitted to: Dennis C. Wilson, Environmental Health Administrator, Department of Health, Bureau of Community Health Systems, Room 628 Health and Welfare Building, P.O. Box 90, Harrisburg, PA, 17108-0090, (717) 787-4366. Persons with disabilities may submit questions in alternative formats such as audio tape, Braille or by using V/TT (717) 783-6514 for speech and/or hearing impaired persons or the Pennsylvania AT&T Relay Service at (800) 654-5984 [TT]. Persons who require an alternative format of this document may contact Mr. Wilson at the above address or telephone numbers so that necessary arrangements may be made.

IX. FINDINGS

The Department, with the approval of the Board, finds that:

- (a) Public notice of the intention to adopt the regulation adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (b) A public comment period was provided as required by law and all comments were considered.
- (c) The adoption of the regulation in the manner provided by this order is necessary and appropriate for the administration of the authorizing statutes.

X. ORDER

The Department, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department, 28 Pa. Code, Chapter 18 (relating to public swimming and bathing places) are amended by amending §§ 18.1 and 18.42 as set forth in Annex A.
- (b) The Secretary shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as required by law.
- (c) The Secretary shall submit this order, Annex A and a Regulatory Analysis Form to IRRC, the House Committee on Health and Human Services and the Senate

Committee on Public Health and Welfare for their review and action as required by law.

- (d) The Secretary of Health shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (e) This order shall take effect on January 1, 2005.

ANNEX A

Title 28. HEALTH AND SAFETY

PART II. LOCAL HEALTH

CHAPTER 18. PUBLIC SWIMMING

AND BATHING FACILITIES

GENERAL PROVISIONS

§ 18.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Bather – A person using a recreational swimming establishment in the water or adjoining deck area for the purpose of swimming, water sports, or other recreational activity.

Bather load – The total number of bathers in a recreational swimming establishment.

Certified lifeguard – An individual who has a current certificate in lifeguarding, issued by a lifeguard certifying authority, as recognized by the Department of Health in a notice published yearly in the *Pennsylvania Bulletin*.

Department – The Department of Health of the Commonwealth.

Maximum bather load – The maximum number of bathers that the recreational swimming establishment is designed to accommodate, as defined in the plans and specifications submitted

as part of the permit application using the guidelines set forth in the Department's publication, *Public Bathing Place Manual*.

Recreational swimming establishment – A facility that is designed, constructed, or designated for use by individuals for the primary purpose of swimming, if a fee is charged for admission.

- (i) The term includes swimming pools, water rides, wave pools and swimming beaches and other outdoor swimming facilities.
- (ii) The term excludes those facilities owned by condominiums, other property owner associations, rental arrangements that 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, the owner's family and personal guests.

Rope and Float Line– A continuous line, at least ¼ inch in diameter, that is supported by buoys and attached to opposite sides of a swimming pool.

GENERAL PROVISIONS

§ 18.42. [Lifeguards] Certified lifeguards.

(a) **[Number.** One or more competent lifeguards in adequate number shall be on duty at the waterside at all times the public bathing place is open to use by bathers, and may not be assigned other tasks which will divert attention from the safety of the bather.

(b) **Qualifications.** Lifeguards shall be capable swimmers, skilled in lifesaving methods and in methods of artificial resuscitation as evidenced by the possession of a currently valid certificate or other proof of proficiency from a recognized agency offering instructions in these fields.]

Recognized lifeguard certifying authorities. The Department recognizes the American Red Cross, the YMCA, and ~~Ellis Associates~~ JEFF ELLIS AND ASSOCIATES, INC. as lifeguard certifying authorities.

(1) Other organizations that intend to qualify as certifying authorities shall submit materials, on an annual basis, to the Department to establish that their lifeguard training courses satisfy the criteria in subsection (b).

(2) The materials shall be submitted to the Department on or before June 30 of each year and shall include a completed form entitled "Application for Recognition as a Lifeguard Certifying Authority" in the submission.

(3) This form is available from the Department.

(4) The Department will publish a list of approved certifying authorities annually, on or before December 1 of each year, in the *Pennsylvania Bulletin*.

(b) Requirements for a lifeguard certifying authority. The Department will consider approval of a lifeguard certifying authority if the certifying authority's lifeguard training course satisfies the following requirements:

(1) The course is conducted pursuant to a written training plan, instructor's manual, and text book.

(2) The course provides for confirmation of course completion for certification in cardiopulmonary resuscitation.

(3) The course provides for certification in first aid.

(4) The course includes a system for evaluating swimming ability.

(5) The course provides for instruction in lifeguarding responsibilities.

(6) The course provides a method for testing and certification.

(7) The course includes a certificate which expires, in no longer than three years, if renewal criteria are not satisfied.

(8) The instructors of the course have successfully completed a training course that includes:

(i) Certification in lifeguard instruction.

(ii) Student evaluation.

(iii) Program planning.

(iv) Cardiopulmonary resuscitation.

(v) Conducting practice first aid and rescue sessions.

(c) Required number of lifeguards. A recreational swimming establishment shall have on duty an adequate number of certified lifeguards to protect the safety of users. To ensure an adequate number of certified lifeguards, the operator of a recreational swimming establishment shall comply with the following requirements:

(1) At least one certified lifeguard for every 4,000 square feet of water surface area, plus one certified lifeguard for any fraction thereof, equal to or greater than 1,000 square feet, shall be on duty at the waterside at all times the recreational swimming establishment is open to use by bathers for general swim purposes. At no time shall there be less than two certified lifeguards present and available to aid bathers whenever the recreational swimming establishment is being used by bathers WHEN THE RECREATIONAL SWIMMING ESTABLISHMENT IS OPEN TO THE GENERAL PUBLIC FOR RECREATIONAL SWIMMING.

(i) The water surface area shall mean the total surface area of water accessible to the bathers, including any wading pools.

(ii) The operator may reduce the water surface area by closing portions of the swimming area with a rope and float line, provided that the operator maintains adequate notification and supervision to prevent patrons from entering the closed portions of the swimming area. For the purposes of this section, "adequate" shall mean sufficient to accomplish the task, but it does not require any additional certified lifeguards above the minimum number established in this section.

(iii) Under circumstances where the ability of a certified lifeguard to survey 4,000 square feet of water surface area is impaired, such as when the size or shape, or both, of the recreational swimming establishment prevents the certified lifeguard from monitoring the assigned area from a designated location, the Department may require additional certified lifeguards to assure the safety of the bathers.

(2) The bather load of the recreational swimming establishment may not exceed the maximum bather load as defined in the permit application.

(3) During periods when swim meets, swim team practices, learn-to-swim programs, lifeguard training, or other special events in which the use of the recreational swimming establishment is restricted to only those persons participating in the special events, at least one certified lifeguard, whose sole duty is to protect the bathers, shall be present at waterside during the event.

(4) When a wading pool is open to the public, the certified lifeguard shall have an unobstructed view of the entire wading pool from a certified lifeguard's assigned station. If the certified lifeguard does not have an unobstructed view, an additional certified lifeguard shall be on duty to guard only the wading pool.

(5) If the recreational swimming establishment has a diving board or water slide, a certified lifeguard shall be on duty to monitor the diving well or catch area when the diving board or water slide is open to the public.

(i) The certified lifeguard shall be stationed within 50 feet of the diving well or slide catch area.

(ii) If the swimming area includes both a diving well and slide catch area, or the recreational swimming establishment has multiple slides or diving boards, the operator may not assign a certified lifeguard to monitor both areas unless that lifeguard is stationed within 50 feet of each and can monitor both areas simultaneously.

(iii) If the diving well or slide catch area is physically separated from the main swimming area, a certified lifeguard shall be assigned to monitor the diving well or slide catch area exclusively, and the operator shall exclude the water surface area of the diving well or slide catch area from the water surface area of the

recreational swimming establishment for the purpose of determining the number of additional certified lifeguards required under paragraph (1).

(6) While on duty to watch bathers, a certified lifeguard may not be assigned other tasks which may divert attention from the safety of the bathers, or which are outside the lifeguard's training and certification.

(d) Violation of certified lifeguard requirement. The Department may order to be closed to the public any recreational swimming establishment that it finds to be in violation of any of the provisions of subsection (c), until the Department has done the following:

(1) Performed a follow-up inspection.

(2) Found that the facility has met the requirements of subsection (c).

(3) Provided that facility with written authorization to reopen.

ATTACHMENT 1

**APPLICATION FOR RECOGNITION AS A LIFEGUARD CERTIFYING
AUTHORITY**

Instructions: Please complete and forward this application to Pennsylvania Department of Health, Environmental Health Administrator, 628 Health and Welfare Building, Harrisburg, PA 17120. Be advised that the applicant must meet the requirements of Title 28, Chapter 18.42(a)(b) of the Pennsylvania Code. Please respond to ALL of the following questions. Use additional sheets of paper if necessary and attach them to this application. **COPIES OF THE WRITTEN LESSON PLAN, THE TEXTBOOK, AND THE INSTRUCTOR'S GUIDE MUST BE SUBMITTED WITH THE COMPLETED APPLICATION.**

1. Date of Application _____
2. Application is: Original Renewal
3. Applicant's Name _____
4. Applicant's Address _____
City _____ State _____
Zip Code _____ County _____
5. Applicant's Telephone # _____ e-mail address _____
6. Contact Person's Name _____
7. Contact Person's Address _____
City _____ State _____
Zip Code _____
8. Contact Person's Telephone # _____ e-mail address _____
9. Is your course conducted pursuant to a written training plan, instructor's manual, and textbook? Yes No Briefly explain the training plan. _____

10. Does your course provide for certification in cardiopulmonary resuscitation? Yes No Briefly explain the certification process. _____

11. Does your course provide for instruction in first aid? Yes No
Briefly explain the first aid instruction. _____

12. Does your course include a system for evaluating swimming ability?
 Yes No Briefly explain the evaluation process. _____

13. Does your course provide for instruction in lifeguarding responsibilities?
 Yes No Briefly explain that instruction. _____

14. Does your course provide a method for testing and certification? Yes No
Briefly explain those methods. _____

15. Does your course include a certificate which expires if renewal criteria are not
satisfied? Yes No
16. Have the instructors of your course completed training that includes certification in
lifeguard instruction, student evaluation, program planning, and conducting practice first
aid, cardiopulmonary resuscitation, and rescue sessions? Yes No Briefly explain
those methods. _____

Commonwealth of Pennsylvania



DEPARTMENT OF HEALTH

HARRISBURG

THE SECRETARY

October 7, 2004

Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, 333 Market Street
Harrisburg, Pennsylvania 17101

Re: Department of Health – Final Regulations No. 10-155
Recreational Swimming Establishment Lifeguard Requirements (28 Pa. Code
Chapter 18)

Dear Mr. Nyce:

Enclosed is a copy of final-form regulations for review by the Independent Regulatory Review Commission (Commission) in accordance with the Regulatory Review Act (71 P.S. §§745.1-745.15). These regulations are intended to facilitate implementation of the changes made to the Public Bathing Law (35 P.S. §§ 671-680d) by the Act of June 18, 1998 (P.L. 531, No. 75).

Section 5.1(a) of the Regulatory Review Act, 71 P.S. §745.5a(a), provides that upon completion of the agency's review of comments following proposed rulemaking, the agency shall submit to the Commission and the Standing Committees a copy of the agency's response to the comments received, the names and addresses of the commentators who have requested additional information relating to the final-form regulations and the text of the final-form regulations which the agency intends to adopt.

A list of the names and addresses of the commentators who are receiving copies of the final-form regulations is enclosed. Their comments were previously forwarded to the Commission by the Department.

Section 5.1 (e) of the Regulatory Review Act, 71 P.S. § 745.5a(e), provides that the Commission may have until its next scheduled meeting which occurs no less than 30 days after receipt of these regulations, to approve or disapprove the final form regulations.

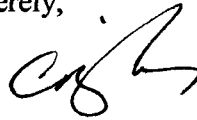
Robert E. Nyce

- 2 -

October 7, 2004

The Department will provide the Commission with any assistance it requires to facilitate a thorough review of the regulations. If you have any questions, please contact Dawn Anderson, Director of the Office of Policy at (717) 787-4825.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Johnson', written in a cursive style.

Calvin B. Johnson, M.D., M.P.H.
Secretary of Health

Enclosures

**Commentators
Reg. No. 10-155
Recreational Swimming Establishment
Lifeguard Requirements**

Joseph Minninger Dorney Park 3830 Dorney Park Rd. Allentown, PA 18104	Tom Griffiths Penn State University McCoy Natatorium University Park, PA 16802	Jeff Davis Sesame Place 100 Sesame Road Langhorne, PA 19047
Mathew J. Mandia Township of Derry Department of Parks and Recreation Cocoa Av Plaza Hershey, PA 17033	Larry Arner Pool Manager Palmerton Memorial Park Association Third Street Palmerton, PA 18071	Kimberly K. Baver East Cocalico Recreation Board 100 Hill Road Denver, PA 17517
Amy W. Swartz Olmstead Regional Recreational Board 55 West Water Street Middletown, PA 17057	Ronald J. Woodhead Todd A. Roth Centre Region Parks and Recreation Board 131 South Fraser St., #3 State College, PA 16801-3885	

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 10-155
SUBJECT: Public Swimming and Bathing Places
AGENCY: Department of Health

2288

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

RECEIVED
OCT 17 2004
REGULATORY REVIEW ACT

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
10/7	<i>A. Kucker</i>	HOUSE COMMITTEE ON HEALTH & HUMAN SERVICES
10/7	<i>J. Chan</i>	
10/7	<i>J. Mitchell</i>	SENATE COMMITTEE ON PUBLIC HEALTH & WELFARE
10/7	<i>Jack Humes</i>	
10/7/01	<i>J. H. H.</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____	ATTORNEY GENERAL (for Final Omitted only)
_____	_____	LEGISLATIVE REFERENCE BUREAU (for Proposed only)