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

November 22, 2002

Honorable Robert Zimmerman, Jr., Secretary
Department of Health
802 Health and Welfare Building
Harrisburg, PA 17108

Re: Regulation #10-155 (IRRC #2288)
Department of Health
Recreational Swimming Establishment
Lifeguard Requirements

Dear Secretary Zimmerman:

Enclosed are the Commission's Comments which list objections and suggestions for consideration when you prepare the final version of this regulation. These Comments are not a formal approval or disapproval; however, they specify the regulatory criteria which have not been met.

The Comments will soon be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce
Executive Director
evp
Enclosure

cc: Honorable George T. Kenney, Jr., Majority Chairman, House Health and Human Services Committee
Honorable Frank L. Oliver, Democratic Chairman, House Health and Human Services Committee
Honorable Harold F. Mowery, Jr., Chairman, Senate Public Health and Welfare Committee
Honorable Vincent J. Hughes, Minority Chairman, Senate Public Health and Welfare Committee
Nia Wilson, Legal Counsel, House Health and Human Services Committee
Stanley Mitchell, Chief Counsel, House Health and Human Services Committee

Comments of the Independent Regulatory Review Commission

on

Department of Health Regulation No. 10-155

Recreational Swimming Establishment Lifeguard Requirements

November 22, 2002

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which have not been met. The Department of Health (Department) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

GENERAL PROVISIONS

1. Section 18.1. Definitions. – Clarity.

The term “bather” is defined as “a person using a recreational swimming establishment...for the purpose of swimming, water sports or other recreational activity.” The final-form regulation should clarify if “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.

SECTION 18.42. CERTIFIED LIFEGUARDS.

2. Section 18.42(a)(1) – Clarity.

This 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 placed under the new Paragraph (b). Current Paragraphs (b), (c) and (d) should also be renumbered accordingly.

3. Section 18.42(c)(1) – Legislative Intent; Reasonableness; Economic Impact; Clarity.

Paragraph (c)(1) requires at least one lifeguard for every 4,000 square feet of water surface area “at all times the establishment is open to use by bathers for general swim purposes.” In the Preamble, the Department notes “nationally recognized lifeguard training organizations, such as the Red Cross and Ellis and Associates, recommend that each lifeguard be able to survey the lifeguard’s assigned area every 10 seconds and be able to respond to a distressed swimmer within 20 seconds.” The Department further notes that the “10/20 rule,” is the basis upon which most lifeguards are trained. We have several questions.

- Given that the Red Cross and Ellis and Associates are listed in the proposed regulation as recognized lifeguard certifying authorities, why didn’t the Department utilize the “10/20 rule” for determining lifeguard staffing requirements?

- Did the Department consider allowing 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?
- Has the Department considered reviewing lifeguard coverage plans for individual facilities?
- Alternatively, has the Department considered including provisions in the regulation which would allow a swimming establishment to petition the Department for a waiver of the standard lifeguard requirements where the facility can demonstrate that an alternate lifeguard coverage plan achieves an adequate level of safety?

Furthermore, a review of the House of Representative’s Legislative Journal leads us to question whether the proposed regulation is consistent with the legislative intent of Act 75 of 1998. The prime sponsor of Act 75, Senator Michael L. Waugh, during the floor debate on the legislation stated, “The two amendments primarily will require that the Department of Health use industry standards when creating regulations for the required numbers of lifeguards at public bathing facilities...” (1998 House Legislative Journal, page 1457). We request the Department explain how the proposed requirement for one lifeguard for every 4,000 square feet is consistent with the legislative intent of Act 75.

In addition, some commentators are concerned that the proposed lifeguard staffing requirements will significantly increase facility operating costs without enhancing bather safety. Commentators have suggested that a more effective approach would be to require each swimming establishment to submit a lifeguard coverage plan for the Department’s review and approval. They assert this approach would allow more flexibility in determining the required minimum number of lifeguards, while maintaining safety.

Representative Keith R. McCall commented on this issue on behalf of Palmerton Memorial Park Association (PMPA). He writes that “PMPA believes that lifeguard staffing is best suited to times of the day and attendance at the pool.” We note that the square footage standard contained in the proposed regulation does not take into account the number of patrons using the facility. Will sole reliance on the square footage standard create an undue financial burden on facilities at times when there are only a small number of bathers using the facility?

4. Section 18.42(c)(1)(iii) – Clarity.

This provision requires a minimum of “two certified lifeguards present and available whenever the recreational swimming establishment is being used by bathers.” There are two issues.

First, commentators assert that during restricted access swimming periods, such as early morning lap swimming, requiring two lifeguards is neither feasible nor necessary. They suggest amending the regulation to require a minimum of two lifeguards “when the establishment is open to the general public for recreational swimming.” It is our understanding that during restricted swimming access, only one certified lifeguard is required under Paragraph (c)(3). The language suggested by commentators would clarify this provision. Therefore, the Department should adopt the revision.

Second, the phrase “present and available” is vague. Does this phrase mean that both lifeguards are required to be at the waterside at all times? Or does the lifeguard location depend on the square footage of the water surface area?

5. Section 18.42(c)(1)(iii) – Clarity.

This paragraph provides that the Department may require additional lifeguards under certain circumstances, such as when the shape or size of the pool prevents the lifeguard from monitoring the assigned area. Does the Department make this determination as part of the initial permitting process? The final-form regulation should specify how and when the swimming establishment will be notified that additional lifeguards are required.

6. Section 18.42(c)(3) – Clarity.

This paragraph addresses instances in which access to the swimming establishment is limited, such as swim meets, swim team practices, learn-to-swim programs, lifeguard training and other special events. During these activities, “at least one certified lifeguard, whose sole duty is to protect the bathers, shall be present at waterside during the event.” The Department should clarify whether the certified lifeguard is required to be an employee of the swimming establishment, or if the group holding the special event can provide the certified lifeguard.