

DISTRICT DEPARTMENT OF THE ENVIRONMENT

NOTICE OF FINAL RULEMAKING

Action to Amend the Ban on Swimming in the Potomac River

The Director of the District Department of the Environment (DDOE or the Department) hereby gives notice of the adoption of the following rules that amend the ban on swimming in the Potomac River, set forth in title 21, "Water and Sanitation," chapter 11, "Water Quality Standards," of the District of Columbia Municipal Regulations (DCMR).

These rules are effective immediately on the date of publication in the *D.C. Register* (DCR). These rules were published as proposed rules in the *D.C. Register* on June 29, 2012, at 59 DCR 7970. No changes have been made to the text of the rules as published.

This rulemaking amends § 1158 (Enforcement) of title 21 of the District of Columbia Municipal Regulations (21 DCMR § 1158) by deleting § 1158.5, the ban on swimming in the Potomac River, adding § 1108 RIVERS, inserting the ban at § 1108.1, and adding rules at §§ 1108.2 - 1108.20 to create an exception to the prohibition of swimming in the District's portion of the Potomac River, and to authorize qualifying swimming events in the Potomac River for limited amounts of time under limited conditions.

The authority for the proposed rulemaking is as follows: District Department of the Environment Establishment Act of 2005, §§ 101 *et seq.*, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code §§ 8-151.01 *et seq.* (2008 Repl. & 2012 Supp.)), as amended; Water Pollution Control Act of 1984, effective March 16, 1985 (D.C. Law 5-188; D.C. Official Code §§ 8-103.01 *et seq.* (2008 Repl. & 2012 Supp.)), as amended; and Mayor's Order 2006-61, dated June 14, 2006, and its delegations of authority.

Summary of Rules

The rules require that, prior to each proposed swimming event in the Potomac River, the event organizer conduct a study of the segment of the District's river where swimming will occur to determine whether the segment meets the District's water quality standards that are protective of human health. The study itself, and the results of the study, must be reviewed and approved by the Department in order for the event to occur. The event organizer must show that it has conducted the required sampling and testing; coordinated with government public safety agencies, providing relevant permitting agencies with proof of insurance coverage; and ensured that the organization and event participants waive all liability of the District; and that it maintains a contingency plan for a determination by the Department that the river is unsafe for the swim.

The rules define a qualifying special swimming event generically, so that the rules are not limited to named triathlons. They require an event organizer to submit: a quality assurance project plan for water sampling (QAPP); the reports of sampling tests, including US Environmental Protection Agency (EPA)-standard tests from before and on the event date; and a post-event incident report. The beneficial screening effect of event insurance is preserved through the requirement to report on proof of insurance provided to the relevant permitting agencies.

A contingency plan for cancellation of the swim event is required. Liability waivers regarding the District are required. The event organizer must also pay a \$1,000 fee to cover the Department's costs, including review and approval of the QAPP.

This rulemaking is necessary to preserve the public safety, including the safety of persons who will be swimming in the Potomac River during swimming events in the future, and to prevent threats to their health, safety and welfare as a result of their being exposed to pollutants or conditions that fail to comply with the District's water quality standards and criteria for Class A waters set forth in 21 DCMR § 1104.

Public Hearings and Comments

A similar version of this final rule was proposed on December 17, 2010, 57 DCR 11971. The Department received written comments and it conducted a public hearing on February 17, 2011, at its headquarters, 1200 First Street, NE, Washington, DC. A 33-page transcript of the hearing was produced. After considering the public comments and the proposed rules' purpose and general requirements, the Department changed the rules to focus on the Department's technical functions, apply the rules to all Potomac River swimming events, and clarify protections for the public.

Consequently, the Department published the revised proposed rules on June 29, 2012, 59 DCR 7970, and noticed a public hearing for July 18, 2012, 59 DCR 7847. Pursuant to the June 29, 2012, notices of proposed rules and of public hearing, the Department received written comments and it conducted the public hearing on July 18, 2012, at its headquarters. A 35-page transcript of this hearing was produced.

All of the comments received were supportive of the proposed rules. No comments suggested changing the text of the proposed rules. A copy of the written comments, the transcripts, and the Department's responses are available for review at the Department's headquarters and on the Department's website as follows: Go to <http://www.doe.dc.gov>; click on "Regulation & Law"; and then click on the pull-down menu "Water Quality Regulations".

Final Action

The Department analyzed all comments received, and determined that no changes were needed to the proposed rules. Consequently, the Director of the Department took final rulemaking action to adopt the following as final rules on August 3, 2012:

Title 21, WATER AND SANITATION, Chapter 11, WATER QUALITY STANDARDS, of the DCMR is amended by deleting § 1158.5 and adding § 1108, RIVERS, specifically §§ 1108.1 through 1108.20, to read as follows:

1108 RIVERS

1108.1 Except as otherwise provided in this section, primary contact recreation shall be prohibited in the Potomac and Anacostia Rivers and Rock Creek until such time as the standards in § 1104.8 for Class A beneficial use are consistently maintained.

1108.2 The Director may issue a decision that allows a special swimming event in the Potomac River, if:

- (a) A study conducted by the special swimming event organizer shows that the numeric criteria for Class A listed in §1104.8 are being attained; and
- (b) The other provisions of this section have been satisfied.

1108.3 The study required by § 1108.2 shall be conducted as follows:

- (a) At least twenty-eight (28) days before collecting samples, the special swimming event organizer shall submit to the District Department of the Environment (the Department) for review and approval a quality assurance project plan (QAPP) that shall be prepared and implemented by a qualified professional environmental monitoring firm in accordance with:
 - (1) "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001 or subsequently issued guidance); or
 - (2) Equivalent documentation as determined by the United States Environmental Protection Agency (US EPA);
- (b) Samples shall not be collected before the QAPP is approved;
- (c) All samples shall be collected as required in the approved QAPP;
- (d) Samples for *Escherichia coli* (*E. coli*), pH, and turbidity shall be collected and analyzed according to US EPA regulation 40 CFR Part 136;
- (e) The qualifications of each person undertaking the sample collection and analysis for the special swimming event organizer shall be subject to the Department's review, for verification that the person meets minimum technical background and experience requirements; and
- (f) The laboratory conducting the sample analysis shall:
 - (1) Be capable of providing complete environmental analytical services, consistent with US EPA protocols, and according to a Laboratory Quality Management Plan; and
 - (2) Be accredited or certified to perform the analysis, including the specific methods identified in the QAPP.

- 1108.4 The study and report of the sample analysis shall be submitted to the Department at least forty-eight (48) hours before a scheduled special swimming event.
- 1108.5 Failure to submit the study and report by the deadline will result in the Director's denial of authorization for the special swimming event.
- 1108.6 The study and report shall include:
- (a) Each completed chain of custody form and lab report;
 - (b) An assessment of whether the water quality criteria for Class A in 21 DCMR § 1104 have been attained; and
 - (c) An evaluation of each relevant factor, including:
 - (1) Rainfall;
 - (2) Upstream sewage or chemical releases; and
 - (3) Other environmental conditions that may affect the water quality.
- 1108.7 The Director shall deny permission to swim in the Potomac River if the results of the study or the Director's independent investigation indicate:
- (a) The water quality standards are not being attained;
 - (b) An emergency health hazard caused by a hazardous pollutant or condition has occurred; or
 - (c) There may be a health risk from a known pollution source, including:
 - (1) Combined sewer overflow;
 - (2) Failing sewer infrastructure;
 - (3) Chemical release; or
 - (4) Wastewater treatment discharge.
- 1108.8 At least twenty-eight (28) days before a special swimming event, the special swimming event organizer shall submit to the Director verification that a Certificate of Insurance, or other proof of coverage, that has been signed by an authorized representative of the insurer, has been provided to each appropriate permitting agency.

- 1108.9 The Director shall not authorize the special swimming event unless the verification is submitted to the Director in the time required by § 1108.8.
- 1108.10 The special swimming event organizer's verification shall state in writing that:
- (a) The special swimming event organizer has obtained the following coverage for the event period, and the amount of coverage, if any, for each of the following:
 - (1) Comprehensive coverage;
 - (2) Bodily injury liability coverage;
 - (3) If the owner of a vehicle, including a boat, liability coverage for use of the vehicle;
 - (4) Workers' compensation insurance; and
 - (5) Coverage of the District as an additional insured;
 - (b) Each insurance policy is written with a responsible company licensed by the District; and
 - (c) Each insurance policy provides for at least twenty-eight (28) days' written notice to the District prior to termination or material alteration.
- 1108.11 If an approval required by this section is denied, canceled, not renewed, or materially altered, a special swimming event organizer shall:
- (a) Notify the Director immediately by phone and email; and
 - (b) Confirm to the Director by letter and fax within twenty-four (24) hours.
- 1108.12 Upon receiving notice of a material change in a required approval, the Director may rescind authorization for the special swimming event.
- 1108.13 As a condition of event authorization, the special swimming event organizer shall secure from each employee, contractor, and volunteer of the special swimming event organization and from each participant a signed, Department-approved statement that expressly:
- (a) Assumes the risk of event participation; and
 - (b) Waives liability of the District Government, its officers, employees, and agents for any damage or injury arising out of the person's participation in the event.

- 1108.14 The special swimming event organizer shall take each step which:
- (a) The Director deems necessary to ensure that the requirements of this section are satisfied; and
 - (b) Shall include presenting each required report or form to the Director within twenty-eight (28) days after the event.
- 1108.15 The special swimming event organizer shall pay a fee of one thousand dollars (\$1,000) per event for the costs the Department incurs, including review and approval or denial of the QAPP and other submittals.
- 1108.16 Payment of the fee shall:
- (a) Occur by the time the application is submitted; and
 - (b) Be a precondition for review of the QAPP, related studies, and other submittals.
- 1108.17 The special swimming event organizer shall provide to the Director at least seven (7) days in advance of the special swimming event documentation showing:
- (a) Coordination with each relevant public safety agency; and
 - (b) A contingency plan for the special swimming event in the circumstance that either the Director or the special swimming event organizer determines that swimming would not be safe.
- 1108.18 The special swimming event organizer shall provide to the Director within fifty-six (56) days (eight weeks) after the special swimming event a report of:
- (a) Each recorded incident from each relevant public safety agency;
 - (b) Each medical issue or incident involving an on-site first aid facility;
 - (c) Use of the contingency plan for unsafe swimming; and
 - (d) Sampling of each event day's water at the event site, and the subsequent testing of each sample.
- 1108.19 With respect to this section, a person adversely affected or aggrieved by an action of the Department shall exhaust administrative remedies by timely filing an administrative appeal with, and requesting a hearing before, the Office of Administrative Hearings (OAH), in accordance with the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76;

D.C. Official Code, §§ 2-1831.01 *et seq.* (2007 Repl. & 2011 Supp.)), as amended, and OAH's rules.

1108.20 The following general rules apply to this section:

- (a) A person who is regulated pursuant to this section may empower an agent to act for that person; however, empowering an agent does not change or eliminate that person's duty, responsibility, or liability; and
- (b) The special swimming event organizer shall, if not a natural person, be represented by an officer, chief executive, or other responsible natural person, who shall:
 - (1) Sign and certify each application and report; and
 - (2) Take responsibility for the duties and conduct of the special swimming event organizer.

Title 21, WATER AND SANITATION, chapter 11, WATER QUALITY STANDARDS, section 1199, DEFINITIONS, of the DCMR is amended to add the following definitions, and these additional definitions shall be inserted in the correct alphabetical order in § 1199, to read as follows:

1199 DEFINITIONS

1199.1

Special swimming event – A single-day event requiring full body contact in water in which swimming is generally prohibited, including a triathlon swimming leg, a group plunge, or a swim meet, and, if any, a companion preceding single-day practice event.

Special swimming event organization – An organization, business, government agency, or other entity which organizes and sponsors a special swimming event.

Special swimming event organizer – The special swimming event organization principally responsible for staging the special swimming event.

1199.2

US EPA – United States Environmental Protection Agency.