DISTRICT DEPARTMENT OF THE ENVIRONMENT

NOTICE OF PROPOSED 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 a rulemaking action to amend the ban on swimming set forth in title 21,"Water and Sanitation," chapter 11, "Water Quality Standards," of the District of Columbia Municipal Regulations (DCMR). These rules will be proposed for adoption as final no sooner than thirty (30) days after this publication and will become effective immediately on the date of final publication.

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 subsections 1108.2 - 1108.20 to create an exception to the prohibition of swimming in the District's portion of the Potomac River and 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. & 2011 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.)), as amended; and Mayor's Order 2006-61, dated June 14, 2006, and its delegations of authority.

Summary:

The proposed rules require that prior to each proposed swimming event for 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, provided relevant permitting agencies with proof of insurance coverage, and ensured that the organization and event participants waive all liability of the District, and that the event organizer maintains a contingency plan for a determination by the Department that the river is unsafe for the swim.

Similar temporary suspensions of the swimming ban were authorized by statute in 2007 and by emergency rule in each of the years 2008 through 2011. Triathlon competitive swim events took place in the Potomac River during each of those years. The District has received no reports of illness resulting from the Potomac River's water quality from those events. The analyses conducted in each of those years demonstrated to the satisfaction of the Department that the water quality met applicable standards. The swim event part of the September 2011 triathlon was

cancelled, and the Department issued a letter prohibiting the swim event, due to determinations before the event that the water quality was, and would be, unacceptable.

This rulemaking is necessary to preserve the public safety, including the safety of persons who will be swimming in the Potomac River during similar 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. An earlier version of these rules was announced as an emergency rule on December 9, 2010, and became effective immediately on that date. 57 DCR 11971 (December 17, 2010). That emergency rulemaking expired one hundred twenty (120) days from the date of effectiveness. Identical proposed rules were published with notice on December 17, 2010. *Id.* The proposed rules published today supersede those proposed rules.

On June 13, 2011, the Department announced emergency rules similar to those published today, and they became effective immediately for one hundred twenty (120) days. 58 DCR 5191 (June 17, 2011). They have since expired.

Pursuant to the December 17, 2010, notice of proposed rulemaking, the Department conducted a public hearing on February 17, 2011, at the DDOE headquarters, 1200 First Street, NE, Washington, DC. A thirty-three (33)-page transcript was produced. At the hearing eight (8) witnesses testified, including District residents and triathletes, the past president of the DC Triathlon Club, and other athletes. The founder of the Nation's Triathlon and the DC Triathlon testified that the groups had conducted more than a dozen swim events and put more than 15,000 triathletes safely into and out of the Potomac River, and had conducted Potomac River events in the immediately preceding years. He stated that every such swim event had met the District's Class A water quality standards for bacteria, that safety boats and equipment were part of each event, and that participants were monitored with electronic chips. All of the witnesses supported the proposed rulemaking's event-specific suspension of the prohibition on swimming in the Potomac River for the triathlons.

The Department received a total of sixty-eight (68) written comments on the December 17, 2010, proposed rules. Among the comments, the medical director for the Nation's Triathlon, another triathlon, and the preceding year's DC Triathlon (DC Tri), stated that for four (4) years there had been no health issues with the Potomac. All of the comments were favorable, many describing the two (2) events as nationally important.

After considering the public comments and the rules' purpose and general requirements, the Department has determined that material changes should be made to the December 17, 2010, proposed rules to focus the rules on the Department's technical functions; apply the rules to all Potomac River swimming events; clarify protections for the public; and present the rules in the District's proper regulatory format.

The proposed rules define a qualifying special swimming event generically, so that the rules are not limited to named triathlons. They would require an event organizer to submit: a quality assurance project plan for water sampling (QAPP); reports of sampling tests, including US 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 still required. The event organizer must also pay a one thousand dollar ($1,000) fee to cover the Department's costs, including review and approval of the QAPP.

The proposed rules also move and renumber subsections. The present 21 DCMR § 1158.5, banning swimming in the Potomac River, is moved to a new section § 1108, without substantial change to the text. Then the proposed rules providing the exception for limited swimming events, similar to the subsections of the most recent emergency rule, are inserted as subsections 1108.2-.20. These proposed rules also correct typographical errors in the December 17, 2010, proposed rules and add additional definitions.

The Department will take additional comments on the revised proposed rules. The Department intends to analyze comments, determine if further changes are needed, and take regulatory action in advance of the September 9, 2012, Nation's Triathlon and its proposed swim event. Instructions on how to get a copy of this notice and the proposed rules, and the manner and time period for giving public comment, appear at the end of the following proposed rules.

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.

Persons may obtain a copy of the Notice of Public Hearing or the Proposed Rules by either: (1) visiting DDOE's website, www.ddoe.dc.gov, and clicking on "Regulation & Law", cursoring over the pull-down "Public Notices & Hearings", then clicking on the announcement for this rulemaking, and following directions to download the document in PDF "cut-and-paste" format; (2) e-mailing a request to ddoe.swimrules@dc.gov with "Request copy of proposed river swimming rules" in the subject line; (3) stopping by DDOE's offices and asking for a copy at the 5th floor reception desk at the following address (mention "DDOE River Swimming Rules"); or (4) writing DDOE Water Quality Division, 1200 First Street, N.E., 6th Floor, Washington, DC 20002, "Attention: River Swimming Rules, requesting a copy" on the outside of the letter.

Persons who wish to testify are requested to notify DDOE in writing to the attention of "River Swimming Rules" at the above address of DDOE's Water Quality Division, or by email to ddoe.swimrules@dc.gov, and to provide a written statement, including name, address, telephone number, and the organization represented, if any. Written statements should be clearly marked to refer to "River Swimming Rules". DDOE requests written statements to be filed by the day of the hearing, however, they may be filed with DDOE by the later of thirty (30) days after the date of publication of this notice in the *D.C. Register,* or July 31, 2012. Testimony and written statements will be treated as comments to the proposed rules. Others present at the hearing who wish to be heard may testify after those on the witness list have been called.

Persons who wish to provide comments should clearly marked them with "River Swimming Rules", and either: (1) mail or hand-deliver them to DDOE's Water Quality Division, 1200 First Street, N.E., 5th Floor, Washington, DC 20002, Attention: River Swimming Rules; (2) e-mail them to ddoe.swimrules@dc.gov, with the subject indicated as "River swimming rules comments"; or (3) deliver them in person, orally or in writing, at the public hearing. DDOE will consider each timely-received, identified comment before publishing a final rule.

DDOE is committed to considering the public's comments in a rulemaking process that is open and observes the privacy rights of commenters. Ordinarily, DDOE will look for the commenter's name and address on the comment. If a comment is e-mailed, the email address will be automatically captured, included in the public record, and made available on the internet. If DDOE cannot read a comment due to technical difficulties or the email address contains an error, DDOE may not be able to contact the commenter for clarification, or consider the comment. Including the commenter's name and contact information in the comment will help avoid this difficulty.

Except as stated below, DDOE will not consider anonymous comments. Unless a comment contains copyrighted material, confidential personal or business information, or other information whose disclosure is restricted by statute ("non-public"), all comments will be treated as public documents, and will be made available for public viewing on DDOE's internet website. If a commenter considers information to be non-public, the commenter must advise DDOE in writing when the comment is submitted. When DDOE identifies a comment containing copyrighted material, DDOE will provide a reference to that material on the website. When DDOE identifies information that has been correctly described as non-public, DDOE will either (1) return the entire comment and decline to consider it; (2) redact or otherwise conceal the non-public information and consider the rest of the comment; or (3) communicate with the commenter to determine what part, if any, of the comment DDOE might consider as part of the public record.