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Fast-Track Regulation Agency Background Document

Agency name	Department of Health
Virginia Administrative Code (VAC) citation(s)	12VAC5-460
Regulation title(s)	Regulations Governing Tourist Establishment Swimming Pools and Other Public Pools
Action title	Fast-track Amendments to Remove Conflict with Virginia Uniform Statewide Building Code
Date this document prepared	November 8, 2018

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The Regulations Governing Tourist Establishment Swimming Pools and Other Public Pools (hereafter, "Regulations") were promulgated on March 1, 1962, to protect the health, safety, and welfare of patrons using swimming pools at Virginia's tourist lodging facilities. Environmental Health staff inspect these facilities for water quality and safe operation during hotel, campground, and summer camp annual inspections. At the time of the regulation's promulgation, Virginia's building codes contained few requirements for swimming pools and spas, and design and construction requirements for tourist lodging pools were incorporated into the Regulations. On July 14, 2014, the 2012 International Swimming Pool and Spa Code (ISPSC) was adopted by reference into the Virginia Uniform Statewide Building Code (USBC), increasing the specificity of pool design and construction standards found in the USBC. Virginia Code § 36-98 specifies that the design and construction criteria of the Virginia Uniform Statewide Building Code supersede the regulations of other state agencies. Therefore, design and construction

criteria contained in the Regulations are effectively void; this regulatory action removes the void provisions from the Regulation.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

- APA- Administrative Process Act
- DCHD- Department of Housing and Community Development
- ISPSC- International Swimming Pool and Spa Code
- Swimming pool- any swimming, wading, or spray pool, including all appurtenant equipment, structures, and facilities provided for the use of guests by transient lodging establishments.
- USBC- Virginia Uniform Statewide Building Code
- VDH- Virginia Department of Health

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

The State Board of Health approved these fast track amendments to the Regulations Governing Tourist Establishment Swimming Pools and Other Public Pools (12VAC5-460) on December 13, 2018.

Mandate and Impetus

Please identify the mandate for this regulatory change, and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, board decision, etc.). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

As required by Virginia Code § 2.2-4012.1, please also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.

As outlined above, the Regulations contain provisions for the design and construction of tourist lodging pools and spas, but these provisions are superseded by those contained in the ISPSC of the USBC. These superseded provisions must be removed from the Regulations to avoid confusion by regulated entities and VDH field staff.

This action is noncontroversial for two reasons:

- 1) The superseded design and construction provisions of the Regulations have no legal basis, and their removal affects no significant change in the requirements borne by tourist lodging pool and spa operators. The major effect of the action will be that the text of the Regulations will accurately reflect the health requirements in place, and the authority of VDH.
- 2) The Regulations will continue to be protective of the health, safety, and welfare of tourist lodging pool and spa patrons. Current maintenance and operation requirements will remain in place and unaltered by this regulatory action.

Legal Basis

Please identify (1) the agency or other promulgating entity, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity's overall regulatory authority.

The Virginia Department of Health has general authority to promulgate regulations pursuant to Virginia Code § 35.1-11, which states the Board shall make, adopt, promulgate, and enforce regulations necessary to carry out the provisions of this title to protect the public health and safety. Virginia Code § 35.1-13 states that the Board shall promulgate regulations for hotels, including minimum standards for swimming pools and spas. Additionally, Virginia Code §§ 35.1-16 and 35.1-17 authorize the Board to regulate swimming facilities at summer camps and campgrounds, respectively.

Virginia Code § 36-98 directs and authorizes the Board of Housing to adopt the USBC, and outlines that this code shall supersede any building codes and regulations of other state agencies, with the exception of public water supply systems, sewage treatment facilities, and solid waste facilities. Virginia Code § 36-98 also provides that state agencies are not prevented from requiring the maintenance of facilities in accordance with provisions of the USBC.

Purpose

Please explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

1. Design and construction provisions of the Regulations have been superseded by the USBC.
2. This regulatory action will remove the superseded provisions, and where possible, reword existing requirements to accurately reflect VDH's authority to enforce standards already in the regulation. This approach, rather than repealing the entire regulation, is essential to protecting the health and safety of pool patrons, as it keeps the majority of health standards intact without misrepresenting VDH authority.
3. The goal of this action is to remove superseded and void provisions, make clear to the regulated public and VDH staff where VDH authority lies, and retain standards protective of the health and safety of tourist lodging pool and spa patrons.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

1. Four sections that pertain only to construction and design are repealed. (Shape and slopes, Diving boards, Suction cleaners, Spray pools: Slopes)
2. Two sections containing administrative provisions that conflict with the boundaries of VDH authority have been revised. The new language reflects VDH authority and describes procedures that differ only semantically from previous requirements and practices, or prescribes current practices in more detail than previously included in the regulation. These procedures will not present any additional burden to the regulated public. (Permits/Plan review, Commissioner approval)
3. Provisions that include both construction and operational regulations have been reworded; language is shifted from design and construction requirements to maintenance and operation.
4. Where operational standards are found in the ISPSC of the USBC (flow and circulation parameters, entrapment prevention and barrier protection), the language has been reworded to

retain existing standards only for pools constructed under a prior building code that did not address that operational standard.

Issues

Please identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

This regulatory action's primary advantage to the public and the agency is an increase in transparency regarding the authority of VDH, and an increase in clarity regarding health and safety regulations governing tourist lodging pools and spas. There is no disadvantage to either the public or the agency.

There are no other pertinent matters of interest to the regulated community, government officials, or the public.

Requirements More Restrictive than Federal

Please identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There are no requirements created by this regulatory change that exceed applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

No state agencies will bear any identified disproportionate material impact not experienced by other localities. While the Department of Housing and Community Development (DHCD), which oversees the USBC, has been involved in the development of the amendments, the changes proposed in this regulatory action do not affect how DHCD or local building officials implement the USBC.

No locality will bear any identified disproportionate material impact not experienced by other localities.

Owners and operators of tourist lodging facilities with swimming pools and spas will be positively affected by this regulatory action. The effect of this action will be these entities will experience greater transparency and clarity regarding the division of authority over tourist lodging facility pools and spas, specifically, including how the USBC solely governs the construction and design of tourist lodging facility pools and spas. No entity will bear a negative impact from this regulatory action.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, please identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Please keep in mind that this is change versus the status quo.

Impact on State Agencies

<i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources	Revision to reflect correct VDH authority may result in incidental cost savings to the agency related to legal defense or staff time spent on administrative actions resulting from improper application of authority.
<i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	No economic impacts to other state agencies are expected to result from this regulatory action.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	See above impact on VDH.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	No economic impacts to localities are expected to result from this regulatory action.
Benefits the regulatory change is designed to produce.	Revision to reflect correct VDH authority may result in incidental benefits to local administrators of the USBC.

Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	Little to no effect will be felt by other entities. Tourist lodging establishments that would have previously sought a construction permit from VDH will now undergo a plan review of items similar to those previously reviewed prior to the issuance of a construction permit, minus design and construction criteria. Local building official approval procedures will not be changed by this regulatory change.
Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses	There are approximately 1,000 tourist lodging pools and spas in the Commonwealth, the majority of which are estimated to be small businesses.

<p>affected. Small business means a business entity, including its affiliates, that:</p> <ul style="list-style-type: none"> a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million. 	
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please be specific and include all costs including, but not limited to:</p> <ul style="list-style-type: none"> a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements. 	<p>As the regulatory revision removes design and construction criteria and maintains operations standards already in place, there are no costs associated with this regulatory action.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>Owners and operators of tourist lodging pools will benefit from greater transparency and clarity regarding the division of authority over tourist lodging facility pools and spas.</p>

Alternatives

Please describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

There are no viable alternatives to a regulatory change; the current regulations in place have been superseded by the ISPSC of the USBC, and are effectively null and void. The agency considered incorporating these amendments into a non-fast track action that also modernized existing standards, but this choice would leave superseded, and therefore void, provisions in the existing regulation for a greater amount of time. Due to the possibility of a misapplication of VDH authority under the current regulation, VDH elected to address these non-controversial and necessary amendments in a fast-track action. There is no other less intrusive or costly method to address the necessary changes in this regulatory action.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

1. There are no substantially different compliance or reporting requirements established by this regulatory action.
2. There are no compliance or reporting schedules in this regulation.
3. The regulatory action simplifies the understanding of compliance requirements, in that it removes superseded provisions.
4. The regulatory action removes design standards, and replaces several prescriptive requirements with performance standards.
5. This regulation cannot exempt small businesses and still provide equal health and safety protection to those who patronize the Commonwealth’s tourist lodging pools and spas.

Public Participation

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Detail of Changes

Please list all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation.

If the regulatory change will be a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory change. Delete inapplicable tables.

For changes to existing regulation(s), please use the following chart:

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
30		A construction permit issued by the VDH Commissioner is required before the installation of any tourist lodging swimming pool. Prior to permit issuance, plans and specification for the pool shall be submitted to VDH.	The written approval is renamed a plan review, and timing of approval is shifted from before construction to before operation. Plan review topics are itemized in new language; these items reflect those already currently reviewed in the previously-issued construction permits. Language regarding APA rights and procedures is added; this language is consistent with the APA.
40		Water used in pools must be from an approved source, and piping arrangements cannot allow for contamination with wastewater.	Reference to piping arrangements removed and emphasis placed on prohibition of contamination with wastewater. There is no change in language regarding requirement for an approved water source.
60		Section contains criteria for the material of a pool shell: shell must be reinforced	Criteria for materials and finishes was removed. Operational criteria have some overlap with topics covered in the ISPSC,

		concrete or equivalent, easily cleanable, and have a light-colored finish (to facilitate seeing to the bottom of the pool).	so for these topics, existing language was reworked to emphasize performance instead of prescriptive design criteria (the cleanliness of the pool shell and the ability to see any object or surface in all parts of the pool).
70		Section contains design and construction criteria for the slopes and shapes of pool walls and bottoms	Entire section repealed; all existing subject matter is under the authority of the USBC.
80		Pool decks must have a four-foot wide deck and constructed of impervious material with a specific slope to promote drainage. Decks must be constructed of material with a smooth and nonslip finish.	Construction criteria removed; decks shall be maintained to retain a smooth and nonslip finish and drain surface water away from the pool.
90		All pools shall be surrounded by a fence that is at least three feet in height..	Language regarding fence design specifics removed. Operational criteria (continued protection from undesired access and drowning) have some overlap with the ISPSC. Language was reworked to require maintenance of barriers required by the USBC. Where this topic is not prescriptively addressed in the building code in effect at the time of pool construction, there is a performance criterion of an effective barrier(s) against unsecure entry.
100		Section contains number and arrangement criteria for pool steps and ladders, and materials used shall be of nonslip design.	Language revised to eliminate design specifics, but states that numbers and arrangements required by the USBC must be maintained. Steps and ladders shall be maintained in good condition, and finishes shall be maintained to perform as nonslip.
110		Section contains detailed design and construction criteria for pool recirculation (overflow facilities and recessed gutters) that facilitates the removal of floating material or scum.	All design and construction criteria were removed, and replaced with language reworked to include with the performance standard that floating material and scum are not permissible.
120		Section outlines requirements for the design and configuration of inlets and outlets. Outlet drains shall be covered with grates that cannot be removed by or be a hazard to bathers.	Design and construction criteria have been removed
130		Depth markers are required at specific intervals along the pool wall, and these must be at least five inches in size.	Section revised to remove design requirement and emphasize maintenance of markers required by the USBC. Where the building code in effect at the time of the pool's construction may

			not require depth markers, a performance standard (depth of all sections can be determined by bathers) is established.
140	Repealed	Section contains design criteria, including height, water depth, and headboard requirements, for diving boards.	Entire section repealed; all existing subject matter is under the authority of the USBC.
150		Section contains requirement for pools used after dark to be equipped with lighting systems that illuminate all parts of the pool.	Language reworked to remove installation reference, and emphasize maintenance, use, and performance of the lighting system.
170		Recirculation systems are required, and shall be designed for an eight hour turnover of the pool water.	Language reworded to emphasize maintenance and operation; design requirement is in effect only for facilities where rate of flow indicators are not prescribed by the building code in effect at the time of the pool's construction.
200		Section contains specifics for the installation of hair and lint catchers, and states that they shall be easily cleanable.	Section reworded to replace installation specifics with performance function of hair and lint catchers (debris may not accumulate in water).
210		Section describes requirement for a pool's recirculation system to filter water at a specific rate. Filtering requirements for sand and other filter types, and maintenance for these filters is addressed. Section includes the statement that the design of the systems are at the discretion of the State Health Commissioner.	Specific language regarding turnover rates is removed; this material is covered in the USBC. Specifics on filter types are unchanged, as these topics are not addressed by the USBC. Statement on Commissioner authority removed; while partially correct, it is not necessary in the regulation.
220		Rate of flow indicators are required, specifics for function are included.	Language reworded to emphasize maintenance and operation; design requirement is in effect only for facilities where rate of flow indicators are not prescribed by the building code in effect at the time of the pool's construction. *note: this section uses similar terms as section 170; 170 addresses turnover of water, 220 addresses filtration of that water during turnover.
230	Repealed	Section required construction to include suction cleaners and specifics for their orientation and flow throttling.	Entire section repealed; all existing subject matter is under the authority of the USBC.
240		Section requires the installation of specific types of chemical feeding equipment.	Language reworded to emphasize the operational nature of the existing requirements and remove reference to installation.
330		Section describes that the VDH Commissioner is	Design and construction language is removed and text reworded to describe

		authorized to require certain materials and methods of construction and design for swimming pool features.	the Commissioner's authority regarding pool operation and maintenance.
350		Wading pools must be constructed with specific slopes, and may not be located where drainage of the surrounding area can contaminate the pool.	Language regarding specific slopes was removed, other language on contamination remains unchanged.
360		Wading pool decks must have a four-foot wide deck and constructed of impervious material with a specific slope. Decks must be constructed of material with a smooth and nonslip finish.	Construction criteria removed; decks shall be maintained to retain a smooth and nonslip finish.
370		Section requires protection features (barriers, fencing) between wading pools and main swimming pools.	Language reworded to state this requirement for facilities where a barrier or barrier type is not prescribed by the USBC.
380		Section requires the installation of a wading pool recirculation system, and establishes a specific water turnover rate.	Language reworked to remove installation requirements and emphasize maintenance. Existing provisions for turnover rate are applicable when not otherwise prescribed by the building code in effect at the time of the pool's construction.
400		Spray pool water supplies must be approved, and must be installed in a way where submergence and clogging cannot occur.	Language reworked to remove installation requirements and emphasize maintenance. Water approval requirements are not changed.
410		Section contains specifics for spray pool finish construction.	Language reworded to remove reference to construction and emphasize maintenance of finish.
420		Section contains requirements for spray pool slopes.	Entire section repealed; all existing subject matter is under the authority of the USBC.
430		Section contains requirements for the design of spray pool drains.	Reference to design is removed and replaced with operation and maintenance.
440		Spray pool decks must have a three-foot wide deck and constructed of impervious material with a specific slope. Decks must be constructed of material with a smooth and nonslip finish.	Construction criteria removed; decks shall be maintained to retain a smooth and nonslip finish.