STATE OF FLORIDA
DEPARTMENT OF HEALTH

15 JUL 27 PM 12:07
OFFICE OF THE CLERK

IN RE: Petition for Variance Under Section 120.542, Florida Statutes, Filed by:

Royal Spa Float Tank
Bob Dapper, Owner, Royal Spa Corp.
2041 West Epler Ave.
Indianapolis, IN 46217

Petitioner.
_____/

ORDER GRANTING PETITION FOR PERMANENT VARIANCE

On March 15, 2015, pursuant to section 120.542, Florida Statutes, Mr. Bob Dapper, owner of Royal Spa Corporation, (Petitioner), filed a Petition for a Permanent Variance from provisions of Chapter 64E-9, of the *Florida Administrative Code* to sell the Royal Spa Corporation's "2015 Pod" model, a special purpose public pool for use in Florida without meeting the following requirements:

RULE SECTION	TOPIC
64E-9.004(1)(d)2.	Chlorine or bromine residual required
64E-9.004(5)	Recirculation system must operate any time pool is open
64E-9.004(15)	Lighting requirements for indoor pools
64E-9.006(1)(a)	Water line tile
64E-9.006(1)(d)	Access shall consist of ladders, stairs, recessed treads or swimouts
64E-9.006(2)(a)1.	Clear deck width, deck slope
64E-9.006(2)(e)1.	Equipment enclosure must have minimum 3' x 6' opening;
64E-9.006(2)(e)2.	Equipment area lighting must provide 30 ft-candles
64E-9.006(2)(f)	Unisex restrooms must include a urinal
64E-9.007(1)	NSF/ANSI Std 50 certified recirculation and treatment equipment
64E-9.007(3)(b)5.	6" water line tile required for skimmer pools
64E-9.007(5)(a)	NSF/ANSI Std 50 certified filters with adequate capacity

64E-9.007(10)(e)	Main drain must be connected to a collector tank
64E-9.007(11)	Automatic makeup water control
64E-9.007(14)	Heater must be plumbed with a bypass and influent and effluent valves
64E-9.007(16)	NSF/ANSI Std 50 certified disinfection and pH adjustment auto feeder
64E-9.007(16)(d)2.	NSF/ANSI Std 50 certified ozone system
64E-9.007(16)(d)4.	Air flow meter required for ozone system
64E-9.007(16)(f)	UV light system validation requirements by USEPA method
64E-9.008(7)	Pool rules sign

Notice of the petition was published by the Department of Health (Department) on April 14, 2015, in Volume 41, Number 72, of the *Florida Administrative Register*. No comments from interested persons were received. Additional information was requested by the Department on April 23, May 8, 12, and 14, 2015. The information needed was submitted and the application was complete by May 15, 2015. Based on submissions by the Petitioner, they have agreed to the following, and these variance requests are removed from consideration: Rules 64E-9.007(1) and 64E-9.007(16) --- Petitioner will install an NSF International/ American National Standards Institute (NSF/ANSI) Standard 50 certified halogen feeder of sufficient capacity; Rule 64E-9.004(1)(d)(2) --- Petitioner will maintain a halogen residual; and Rules 64E-9.007(1) and 64E-9.007(5)(a)- Petitioner will install an NSF/ANSI Standard 50 certified filter of sufficient capacity.

Upon consideration of the Petition and supporting evidence, the Department makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Section 514.011(2), Florida Statutes, states in relevant part, "Public Swimming Pool means a watertight structure...used for bathing or swimming by humans, and filled with a filtered and disinfected water supply... Public swimming pool shall mean a ... special purpose pool...to which admission may be gained... but is not limited to, pools operated by or serving... health spas...".

2. Section 514.021, Florida Statutes, requires the Department to adopt rules prescribing minimum sanitation and safety standards for public swimming pools. The standards shall address water quality, treatment and disinfection, the safety of bathers, and the design of facilities that has impact on sanitation and safety of bathers using a public swimming pool.

3. Section 514.021, Florida Statutes and Rule 64E-9.005(1)i, of the *Florida Administrative Code*, require each public pool must receive an operating permit from the Department, and receive a construction permit approval under the Florida Building Code.

4. Petitioner states they will manufacture their "2015 Pod" model sensory deprivation float tank to the allowable specifications in this final order. Petitioner states they will sell their "2015 Pod" model sensory deprivation float tank to Florida facilities and these facilities will be required by law to obtain a public swimming pool operating permit from the Department.

5. Petitioner states that "There are no existing components to make a 180 gallon system work as a commercial pool. The economic hardship created by the new

components make the product unbuildable. The NSF has told us that the initial approvals are not coming soon. Engineering characteristics of the larger equipment make them inappropriate... Because there are many requirements in 64E-9 with which the tanks do not and cannot comply, this variance petition (aka 'Section 120 variance') is necessary." Without the allowances in this order, Florida facilities will not be able to acquire an operating permit from the Department for the use of these pools.

6. Rule 64E-9.004(5), of the *Florida Administrative Code*, requires a pool water treatment system to operate when it is open for use. Petitioner requests they not be required to operate the recirculation system while a patron is in tank in order to achieve the special purpose goal of quiet and stillness. Petitioner further states that the system being run for 27 minutes at 35.5 gallons per minute with five water volume turnovers between uses is adequate to treat the water.

7. The Department concurs that five turnovers is generally recognized in the swimming pool industry and by NSF International as the point of diminishing returns, where approximately 98% suspended solids removal has occurred and the asymptote curve flattens for the graph of turnover count vs. suspended solids removal for NSF/ANSI Standard 50 certified filters. The Department finds that five complete water volume turnovers are necessary to kill or inactivate the majority of pathogens and filter the majority of suspended solids between different patrons' use.

8. Rule 64E-9.004(15), of the *Florida Administrative Code*, specifies minimum lighting needed to clearly see pool deck edge and obstructions. Petitioner expects that the facility lighting levels will be lower than those required. The Department concurs

that this is likely in float facility rooms, is practically beyond the control of the Petitioner, and that a higher luminosity is not necessary due to the anticipated single person usage, the wall height of the tank, and very shallow (less than 1 foot) water depth.

9. Rule 64E-9.006(1)(a), and 64E-9.007(3)(b)5.,of the *Florida Administrative Code*, specifies water line contrasting tile at the water level. The Petitioner suggests this is not needed for the safety reason it was intended in conventional skimmer pools and spas, and would be difficult to install. The Department concurs that due to the shallow depth of this special purpose pool, no significant additional safety would be achieved by adding it.

10. Rule 64E-9.006(1)(d), of the *Florida Administrative Code*, requires access to the pool be with permanent ladders or stairs. Petitioner states this cannot be feasibly accomplished in the construction of the tank, but can be done with temporary stairs outside the tank, or a handrail adjacent to the tank. The Department concurs this can be accomplished with temporary stairs or handrail, and due to the two foot height of the entry/ exit wall, this must be provided for patrons to safely enter and exit the tank.

11. Rule 64E-9.006(2)(a)1., of the *Florida Administrative Code*, requires unobstructed space surrounding the pool and a sloped floor to drain. Petitioner states that these will not be available at some facilities, a three foot clear space will be available at the tank's front entry point. The Department concurs sloped flooring for drainage will not be possible to retrofit easily or for a low cost, and can be mitigated in other ways, and that the safety of the patron will not be negatively impacted by an obstructed deck space that is away from the front entry point to the tank.

12. Rule 64E-9.006(2)(e)1., of the *Florida Administrative Code*, requires an equipment housing opening larger than is provided with this float tank; and Rule 64E-9.006(2)(e)2., requires more equipment room lighting than provided. Petitioner states that the larger opening is not needed, and that 30 foot-candle lighting may not be provided. The Department concurs that the housing opening is adequate due to the readily accessible manufactured assembly, and that additional lighting, if needed, can be provided by the public pool permittee.

13. Rule 64E-9.006(2)(f), of the *Florida Administrative Code*, requires a urinal in unisex restroom, and Petitioner implies this is not necessary due to only one person to one float tank; resulting in special purpose float tank pools having a much lower patron count than conventional pools. The Department concurs with this exclusion of the urinal requirement.

14. Rule 64E-9.007(1) and (5)(a), of the *Florida Administrative Code*, require treatment and recirculation equipment to meet the NSF/ANSI Standard 50 for public pool equipment, specifically the skimmer, the filters, and the ozone generator / UV light unit. The Petitioner states that other NSF or other national standards are met for these items, but not the code required NSF/ANSI Standard 50. Rule 64E-9.007(1), FAC, has incorporated by reference the NSF/ANSI Standard 50-2007 titled "Equipment for Swimming Pools, Spas, Hot Tubs and Other Recreational Water Facilities". As previously stated, the Petitioner will use filters in accordance with the rule. The Department accepts the use of the proposed skimmer due to their successful demonstrated use in private pools. The non-certified ozone generator and/or UV light

unit MAY also be installed as supplemental water treatment to the primary disinfectant halogen feeder.

15. Rule 64E-9.007(10)(e), of the *Florida Administrative Code*, requires that the main drain must be connected to a collector tank to create gravity drainage instead of direct suction, yet the 2012 statutory revision to s. 514.0315(2), Florida Statues, allows for a dual drain system or a safety vacuum release system. The Department finds the current drainage system acceptable due to safety features provided by the Petitioner's current dual drain system, the very shallow depth of the tank, and the computer controlled cessation of pump operation during patron use.

16. Rule 64E-9.007(11), of the *Florida Administrative Code*, requires an automatic water make-up water controller and the Petitioner states this is redundant and unnecessary. The Department concurs and finds this equipment is not necessary for this special purpose pool.

17. Rule 64E-9.007(14), of the *Florida Administrative Code*, requires that heaters be plumbed with by-pass piping to allow for servicing, and not interfering with water treatment. The Petitioner implies that the float tank will be shut down during heater servicing, or will not be heated.

18. Rule 64E-9.007(16), of the *Florida Administrative Code*, requires that automatic feeders be used for pH control. The Petitioner states the pH control is not of great concern given the salt solution buffering ability. The Department concurs that for this small volume of water (180 gallons) the pH adjustment needs should be minimal, yet may be difficult to control with an automated feeder that is connected to the halogen

feeder, and therefore should be conducted manually once per day, or more often as needed when patrons are not in the water. Thus, a pH adjustment feeder is not required to be installed.

19. Rules 64E-9.007(16)(d)2.& 4., and 64E-9.007(16)f., of the *Florida Administrative Code*, requires that the ozone generators be certified under standard NSF/ANSI 50 for commercial facilities, and UV light devices be validated under a US EPA criteria. The Petitioner states these proposed models are not NSF/ANSI 50 certified or validated, but are routinely used effectively in private pools. The Department has determined that the halogen feeder must be the primary water disinfection system and the proposed ozone generator and/or the UV light device may only be used as a supplemental water treatment, as stated above in paragraph 14.

20. Rule 64E-9.008(7), of the *Florida Administrative Code*, requires that there be rules for bathers posted at the pool, and Petitioner states that most code cited rules do not apply to float tanks and that patrons will be provided instructions on proper procedures. The Department concurs that some of the adopted bather rules do not apply to this special purpose pool, but disagrees that a rule sign is not needed for the remainder that do apply. The float tank facility permittee will be required to post the appropriate rules as listed in the conclusions of law below, and this Petitioner is required to create and provide a sign with these rules to the permittee.

21. Petitioner states, that the purposes of the underlying statute will be met as follows:

All of the equipment used in the [Royal Spa 2015 Pod] tank system has been used successfully in the past for aquatics installations, both commercial and residential in nature. Where the products do not carry an NSF certification, they have been certified by a third-party testing service and carry the respective designation. From a materials safety standpoint, all will be acceptable for use in the intended purpose and will not pose a threat to users of the tanks.

With regard to operational safety, the manufacturer has developed failsafe measures to ensure that entrapment, evisceration and hair entanglement cannot occur. The proposed water treatment regime is very aggressive and will be effective in preventing any instance of waterborne disease.

These types of float tanks have been in extensive use throughout the U.S. and Canada, and the world, for decades with an extremely proven safety record. This manufacturer in particular is very intent on water quality and user safety and in fact has submitted the entire tank and treatment system for NSF 50 certification, which is anticipated to be issued before the end of this year. The [Royal Spa 2015 Pod] float tank will be constructed and operated in a manner which will

enable it to meet the intent of 64E-9, FAC, which is to provide a safe experience for users of commercial aquatics equipment in the state of Florida.

22. Petitioner indicates that meeting the requirement of these rules would present a substantial financial hardship.

CONCLUSIONS OF LAW

1. Pursuant to section 120.542, FS, state agencies are authorized to grant variances and waivers to requirements of their rules when the party subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means and that application of the rule would create a substantial hardship or violate principles of fairness.

2. The primary purpose of section 514.031, FS, is to ensure that public pools have and maintain appropriate sanitary treatment of the water and safety features to reduce or eliminate patron illness and injury.

3. Petitioner's float tank is considered a public pool under statutory definition of section 514.011(2), Florida Statutes. However, the "2015 Pod" float tank is considered a special purpose pool.

4. Rule 64E-9, of the *Florida Administrative Code*, was promulgated primarily to implement Chapter 514, Florida Statutes.

5. Substantial hardship means a demonstrated economic, technological, legal or other type of hardship experienced by the person requesting the variance.

6. As described in the Findings of Fact, Petitioner has demonstrated that they would sustain an economic hardship modifying certain aspects of their construction to meet the rule requirements.

7. Petitioner's request to turn off the recirculation system during patron use is acceptable only if five complete water volume turnovers are recirculated, filtered and disinfected between each patrons' use. To assure that this process is sufficient to provide for zero fecal-indicator bacteria carry-over between patron float sessions, laboratory tests for water quality microbiology are required upon initiation of operation for 6 weekly samples.

8. Petitioner's request for a variance to Rule 64E-9.008(7), is acceptable to the extent that the posted rules may be reduced to only the following special purpose applicable items: Rules 64E-9.008(7) 1., 5., & 6., and 64E-9.010(14)(a)&(c).

9. The anti-entrapment safety features required by section 514.0315, Florida Statutes, apply to all public pools. Further the section 120.542, Florida Statutes, does not allow a variance from statute. Petitioner's proposed assurances that a patron would not enter the pool when it is operational would not achieve compliance with the statute.

10. Petitioner has satisfied the underlying purposes of the above identified statutes and rules by:

a) Providing evidence that products and equipment used are certified under another satisfactory national standard;

b) Demonstrating that certain requirements for conventional swimming pools are not essential for patron safety or sanitation for this type of special purpose swimming pool; and

c) Demonstrating that equipment and products are used meet the intent in an alternative way for ease of access and maintenance specified.

WHEREFORE, based on the foregoing findings of fact and the conclusions of law, the Petition for a permanent variance filed on behalf of Royal Spa Corporation, is hereby GRANTED with the following conditions:

1. The Petitioner will ensure that the recirculation treatment computer operating system provides complete water treatment for at least five full water volume turnovers between each float session; and will ensure that this information is relayed to each float tank purchaser intending to use the Petitioner's product as a public pool. The public pool permittee must comply with this water treatment regimen.

2. Within 2 days of starting float sessions, the operator/permittee shall use a Department-certified water laboratory to test for and enumerate *E. coli* bacteria from one 100 mL sample collected from the float tank after numerous sessions have occurred, once per week for 6 consecutive weeks, and shall provide copies of microbiology test results and water chemistry field test kit results for halogen residual and pH to the Department's Bureau of Environmental Health Water Programs Administrator, Bob Vincent, at email Bob.Vincent@FLHealth.gov, within 2 days of receipt of lab results.

3. Petitioner must construct the public pool with an NSF/ANSI Standard 50 certified halogen feeder to assure that it maintains the appropriate halogen residual for a special purpose pool; as well as construct it with an NSF/ANSI Standard 50 certified filter.

4. The applicable standards for suction outlet drain covers and equipment area safety features provided in section 514.0315, Florida Statutes, must be met in the manufacturing of this special purpose public pool by the Petitioner, and then maintained over the life of the float tank by the operating permittee to remain in compliance with the law.

5. The Petitioner must provide entrance/ exit access on the floor adjacent to the tank wall with temporary stairs or a support handrail. The Petitioner must create and provide a pool rules sign for the purchaser/ permittee to post that complies with paragraph 8 in conclusions of law, above.

6. Petitioner must provide a copy of this variance to all operators of a Royal Spa Corporation "2015 Pod" model for public use, so that the operator/ permittee understands the conditions under which the variance was granted and the requirements that are the duty of the permittee.

This permanent variance, as approved with the aforementioned conditions, applies only to those sections of the *Florida Administrative Code* for which the variance was requested. Additionally, this variance only applies to the Petitioner stated in this final order and to the operator of a Royal Spa Corporation "2015 Pod" float tank at any permitted Florida public pool location. This variance in no way exempts compliance with

other state and local regulations. Failure to comply with the conditions above shall void approval.

DONE and ORDERED this 24th day of July, 2015, in Tallahassee, Leon County, Florida.

John H. Armstrong, MD, *FACS*
Surgeon General & Secretary

By: _____
Celeste Phillip, MD, MPH
Deputy Secretary for Health

FILED ON THIS DATE PURSUANT TO § 120.52
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED

Shannon Lewis
Clerk

7/27/15
Date

NOTICE OF RIGHTS

This order is final and effective on the dated filed with the Clerk of the Department unless a timely petition for an administrative hearing is filed. A party whose substantial interests are affected by this order may petition for an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes. Florida Administrative Code Chapter 28-106 governs such proceedings. A petition for a hearing must be in writing and must be received by the Agency Clerk for the Department within twenty-one (21) days from receipt of this order. The mailing address for the Agency Clerk is 4052 Bald Cypress Way, BIN #A02, Tallahassee, Florida 32399-1703. The physical address is 2585 Merchants Row Blvd., Tallahassee, FL 32399-1703. The Agency Clerk's facsimile number is (850) 413-8743.

Mediation is not available as an alternative remedy.

The failure of any person to file a petition for hearing within 21 days from receipt of this order will constitute a waiver of that person's right to an administrative hearing.

A party adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings may be commenced by filing a Notice of Appeal with the Clerk of the Department of Health and a copy accompanied by the filing fee with the District Court of Appeal in the appellate district where the party resides or the First District Court of Appeal. The notice must be filed within 30 days of the filing of this Final Order.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order Granting Petition for Permanent Variance sent by U.S. Mail, interoffice mail, or hand delivery to each persons listed this 27th day of July, 2015.

Shannon Revels

Shannon Revels, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin # A02
Tallahassee, FL 32399-1703

Copies furnished to:

Bob Dapper, Owner
Royal Spa Corp.
2041 West Epler Ave.
Indianapolis, IN 46217

Andrew Reich, Acting Chief
Bureau of Environmental Health
Department of Health
4052 Bald Cypress Way, BIN #A08
Tallahassee, FL 32399-1710

Amanda Bush, Senior Attorney
Office of the General Counsel
4052 Bald Cypress Way, Bin # A02
Tallahassee, FL 32399-1703

Marjorie Holiday
Chief Attorney
Joint Administrative Procedures Committee
Room 120, Holland Building
600 S. Calhoun Street
Tallahassee, FL 32399-1300