



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER NANCY A. NORD

**Statement on the Commission's vote to deny the petition to classify
BeeSafe Systems products as "other" anti-entrapment systems under
the Virginia Graeme Baker Pool & Spa Safety Act**

December 7, 2012

Today, I joined with my colleagues to reject a petition from BeeSafe Systems to classify their products as "other systems" under the Virginia Graeme Baker Pool and Spa Safety Act. Based on the evidence presented in the staff's briefing package, I am persuaded that the BeeSafe products do not meet the VGBA's requirements. I believe, however, that the analysis our staff used to reach this result is flawed, and I am concerned that the petition process will be warped by misapplication of the law. To avoid stifling technological innovation that could make swimmers safer, I explain below how we should correct our current analysis and process.

A flawed reading of the VGBA

The now-conventional (but I believe mistaken) reading of the VGBA is that it demands both primary and secondary anti-entrapment systems on public pools with a single main drain in order to provide "layers of protection." However, the statute does not impose a requirement for two anti-entrapment systems. The "layers of protection" concept appears only in the VGBA's findings section, which calls for the "installation of barriers or fencing, as well as additional layers of protection." Any pool with a fence, then, can meet the goals of that finding by installing any other protective system, not just any particular anti-entrapment device.

The text of the provisions that require an anti-entrapment system, moreover, does not create a requirement for a second system. The misunderstanding is understandable: the section of the Act that discusses drains does, in fact, require equipment to perform two functions. One is a cover, as defined by industry performance standards. The second is "1 or more . . . devices or systems designed to prevent entrapment."¹ Terms like "second," "separate," "another," or "in addition" do not appear at all, let alone near the word "device." The Act requires two *functions*—coverage and anti-entrapment—but there is nothing to indicate those functions must be performed by separate *devices*.

¹ Pub. L. 110-140 § 1404(c)(1)(A)(i) & (ii).

To understand this distinction, I suggest an analogy. Suppose you asked a clothing salesperson to find you outerwear to protect against cold temperatures and to protect against rain. If the salesperson returned with a heavy sweater and a poncho, your requirements would be met. Those requirements would also be met if the salesperson suggested a waterproof winter coat. Regardless of the number of items you purchased, you would get both functions.

Under the current CPSC reading of the VGBA, only the sweater and poncho combination approach is available. But that is not the only option under the statute, which, by its plain text, allows the waterproof winter coat approach. If a system meets the anti-entrapment standard *and* the cover standard, then it has satisfied the VGBA as written. The current reading, however, has trapped the CPSC and the pool industry in the more limiting box of a separate-device mandate.

The strongest support for the flawed current reading of the anti-entrapment provisions comes from trying to identify the characteristics common to the five statutorily-approved systems. They share at least two common features. First, they all guard against one or more (although not all²) of the five entrapment hazards. Second, they all operate away from the drain itself, either through basic physics or through a mechanical device. The agency currently focuses on the second shared feature, the locus of operation, as evidence that Congress intended any VGBA “other systems” to function similarly.

But we can look to the other common feature—at least partial entrapment protection—to identify systems that are “equally effective as, or better than, the systems described” in the law. Moreover, the purposes of the Act (and indeed all our statutes) are to protect consumers as best as possible. Reading the VGBA to require anti-entrapment devices to function away from the drain forecloses the possibility of new technologies that could better protect against entrapment simply because they do so at the drain. I do not believe this fits Congress’s intent, as manifested by the text it passed.

The current reading of the VGBA is backed by inadequate process

Beyond the direct limitations for innovators and consumers, this flawed reading also creates risk of litigation, in particular from those whose innovations have been foreclosed by our constrained approach. If my colleagues believe that Congress wished us to apply the “other systems” clause only to derivations from the systems already approved, then we should make that requirement plain through proper rulemaking, not

² *Virginia Graeme Baker Pool and Spa Safety Act: Final Interpretive Rule on Unblockable Drains*, U.S. Consumer Product Safety Commission, 8 (Mar. 30, 2010), <http://www.cpsc.gov/library/foia/foia10/brief/unblock.pdf>.

simply establish it de facto through the petition process. Not only would this give more opportunity for consumers, businesses, and even members of Congress to weigh in through comments, it would better shield our decisions in this area from judicial overturn.

Conclusion

The BeeSafe products attempted to address both functions—coverage and anti-entrapment—with one device. Our staff’s technical analysis of the BeeSafe products has convinced me that, even if they were analyzed through the framework of what I believe the VGBA actually requires and authorizes, they does not appear to meet those statutory requirements. That said, there might be a product that does the job well enough or perhaps even guards effectively against all five forms of entrapment, a claim no current system can make. I hope we will not reject that innovation just because our flawed reading of the statute requires it do that work away from the drain.