



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

Statement on the Commission's decision to extend the compliance date for the revocation of the interpretation of *unblockable drain* under the Virginia Graeme Baker Pool & Spa Safety Act

April 17, 2012

At staff's recommendation, the Commission voted to extend the compliance date for those who relied on the April 2010 interpretation of the term *unblockable drain* in the Virginia Graeme Baker Pool and Spa Safety Act (P&SS Act), which interpretation the Commission revoked in September 2011. The compliance date, originally May 28, 2012, is now May 23, 2013, for those who relied on our earlier interpretation. I voted for the extension because the Commission's decisions on the issue have seesawed back and forth and I thought it appropriate to give responsible pool operators more time to comply with the irresponsible reversal in our policy.

Background

Since Congress passed the P&SS Act in 2007, the Commission has made a series of determinations about pool drain covers. Specifically, the Commission first determined that affixing an unblockable drain cover atop a single main suction outlet rendered the drain unblockable within the meaning of the P&SS Act. I voted to adopt this interpretation because I accepted technical staff's conclusion that it was an acceptable interpretation of the term *unblockable drain* under the statute and that unblockable drain covers addressed the entrapment hazards. Nearly a year and a half later, with no external change (either in circumstances or in the statute), the Commission reversed itself over heated dissent. The result is that an anti-entrapment system must be added to pools, even those with unblockable drain covers. The Commission made no attempt to notify the public or to seek and consider public comments before the reversal. Indeed, my request to seek comments from the public was rejected.

The reversal spawned an avoidable regulatory mess.

The Commission's reversal, in my view, cannot be justified either substantively or procedurally. Responsible pool owners and operators spent their limited (often public) funds complying with the federal mandate before the reversal. The reversal negated their efforts to comply with the P&SS Act.

The reversal was substantively wrong: the staff's analysis showed that a properly installed unblockable drain cover was the best protection against the hazards of

entrapment. Nothing new contradicted that conclusion in the 17 months between the initial determination and the revocation.

Moreover, the reversal was procedurally wrong: a decision to revoke an important determination—relied upon around the country—should have only proceeded after giving the public adequate notice and a chance to comment. The only input we asked for concerned the appropriate effective date for the revocation, not the propriety of the interpretation. Asserting that this was only an interpretive rule—obviating the need for public input—does not make the rule less substantive (to say nothing of violating our own longstanding procedures).¹ After the revocation, numerous parties shared their concerns about the revocation with the Commission, citing cost and safety concerns. Their comments are the main reason the Commission is extending the compliance date. The Commission should have sought and considered these comments before moving precipitously to reverse policy rather than only asking for comments about the compliance date.

I believe the revocation betrayed a lack of gravity on the part of the Commission in dealing with this issue. As a government agency, we are tasked with enforcing the law and protecting the rights of citizens whose lives and livelihoods we affect, sometimes dramatically. Indeed, we are legally prohibited from changing our determinations without going through reasoned decision making. As the Supreme Court explained,

¹ Strictly speaking, the original interpretation only purported to identify an interpretation that a reasoned observer could have adopted without Commission guidance. This is the hallmark of interpretive rulemaking. See *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission*, 874 F.2d 205, 207 (4th Cir. 1989) (“[I]nterpretative rules simply state what the administrative agency thinks the statute means, and only ‘remind’ affected parties of existing duties.”). The revocation, however, did not merely rescind the original interpretation: in the *Federal Register* notice, the Commission stated that a pool operator who acted in line with the revoked interpretation would be in violation of the P&SS Act. Thus, actions that were reasonable under the statute before the interpretation, then endorsed by the interpretation, have now been declared forbidden. The delineation of rights and duties is a hallmark of substantive rulemaking, see *id.* (“[A] substantive or legislative rule . . . creates new law or imposes new rights or duties.”), and the Commission’s decision to describe its September 2011 action as the mere revocation of an interpretation does not change the nature of its action. As the Fourth Circuit Court of Appeals previously admonished us, “The Commission’s characterization of its statement as an exposition of its policy or interpretation of the standard does not preclude our finding that it is something more.” *Id.* Because the Commission’s actions here delineated the rights of affected parties, the Commission was required to go through notice-and-comment rulemaking under the law and our own procedures. See 5 U.S.C. § 553; 16 C.F.R. § 1101.1(a).

“[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”² Here, the Commission’s reversal lacked an impetus as strong as a substantial change in circumstances. When the Commission reverses itself without a change in circumstances, one must wonder at the justification. Before each vote, Commissioners must treat the decision seriously, thoroughly analyzing all relevant issues, including those of statutory construction. The absence of a circumstantial or statutory change means the Commission should have allowed the original interpretation to stand.

Finally, as the Commission moves away from its meanderings about the *unblockable drain* interpretation, one petition has been docketed that seeks to overcome the confusion we have created. (More may follow.) Absent this regulatory rigmarole, these petitions would not have been necessary. This regulatory process has consumed public and private resources for the regulated community and the agency alike—without any compelling reason. We created this morass ourselves. I wish it were not so.

² *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Automobile Co.*, 463 U.S. 29, 42 (1983) (finding that the National Highway Traffic Safety Administration could not rescind a passive restraint requirement without the requisite “reasoned analysis”).