



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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approved and signed.

Memorandum

September 19, 2011

TO : The Commission
Todd A. Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel
Kenneth R. Hinson, Executive Director
Robert J. Howell, Deputy Executive Director for Safety Operations

FROM : DeWane Ray, Assistant Executive Director, Office of Hazard Identification and Reduction

SUBJECT : CPSC Staff Response to Commissioner Northup's Questions Regarding the Notice of Revocation of the Commission's Previously Approved Definition of "Unblockable Drain"

This memorandum is the U.S. Consumer Product Safety Commission (CPSC) staff's response to the questions asked by Commissioner Anne M. Northup in a September 9, 2011, memorandum to DeWane Ray, Assistant Executive Director, Office of Hazard Identification and Reduction. As noted below, the responses in this memorandum are those of the CPSC staff. CPSC staff notes that it has not made any recommendation regarding the Notice of Revocation.

Question 1

Following issuance of the Notice of Revocation, what options for compliance with the VGB Act will be available to public pools and spas with single main drains?

Response to Question 1

The Virginia Graeme Baker Pool and Spa Safety Act (VGB Act) enumerates the options for compliance. According to Section 1404 (c) of the VGB Act, each public pool and spa in the United States with a single main drain other than an unblockable drain shall be equipped, at a minimum, with one of the following devices designed to prevent entrapment by pool or spa drains: (1) a safety vacuum release system, (2) a suction-fitting vent system, (3) a gravity drainage system, (4) an automatic pump shut-off system, (5) drain disablement, or (6) other systems, *i.e.*, "any other system determined by the Commission to be equally effective as, or better than, the systems, mentioned above at preventing or eliminating the risk of injury or death associated with pool drainage systems." These devices must meet all applicable performance or consumer product safety standards.

Question 2

In light of the President's Executive Order 13579 requesting that independent agencies not issue unnecessarily costly or overly burdensome regulations, has the Commission's staff evaluated, or been directed to evaluate, the qualitative and/or quantitative, costs and benefits of revoking our previous definition of "unblockable drain"?

Response to Question 2

No, staff has not evaluated, nor has it been directed to evaluate, the qualitative and/or quantitative costs and benefits of revoking the CPSC's previous definition of "unblockable drain."

Question 3

Does any new entrapment data support revisiting this definition?

Response to Question 3

The decision to revisit the definition was not initiated by staff and a detailed review of new data has not been conducted. Staff's safety evaluation of the unblockable drain covers has not changed since the original briefing package was prepared and submitted to the Commission in February 2010.

Question 4

How many entrapment incidents have occurred in VGB-compliant pools/spas since passage of the VGB Act? How does the pre-VGB Act entrapment incident data compare to the number of entrapment incidents in the VGB-compliance pools/spas after the law was passed?

Response to Question 4

To determine how many entrapment incidents have occurred in VGB-compliant pools and spas since passage of the VGB Act, it would be necessary to determine: (1) which incidents were in *public* pools, and, therefore, subject to the requirements of the VGB Act; and (2) whether those particular pools where the incidents occurred were, in fact, VGB-compliant.

The VGB Act was enacted in December 2007, with an effective date in December 2008. During the timeframe of 2009 through August 31, 2011 (a period for which reporting is *incomplete*), there were eight incidents reported to CPSC staff. Five occurred in public pools, and three occurred in public spas. Of these eight incidents, seven resulted in an injury, and one had either no associated apparent injury or unknown injuries.

The above data do not indicate whether the public pool or public spa where the incident occurred was VGB-compliant. That information is not readily available. Because such information is not available, staff cannot compare the pre-VGB Act entrapment incident data with the number of entrapment incidents in the VGB-compliant pools/spas after the law was passed.

Question 5

Has an analysis been performed of the entrapment incidents, if any, that have occurred in pools/spas using unblockable drain covers to satisfy the unblockable drain requirement? Do you agree that such an analysis would help to clarify whether any risk of entrapment remaining today is attributable to failures to comply with the VGB Act or to the inadequacy of the existing interpretation of “unblockable drain” to ensure public safety?

Response to Question 5

CPSC staff does not know if any of the entrapment incidents have occurred in pools/spas using unblockable drain covers to satisfy the unblockable drain requirement; thus, staff has performed no such analysis.

CPSC staff has not formed an opinion on whether such an analysis would help to clarify if any risk of entrapment remaining today is attributable to failure to comply with the VGB Act or due to the inadequacy of the existing interpretation of “unblockable drain.”

Question 6

What input from the public on the Commission’s technical guidance and first interpretation of “unblockable drain” did the Commission solicit in 2009 and 2010 (e.g. public meetings, request for comments, etc.)?

Response to Question 6

On July 15, 2009, staff’s draft technical guidance on unblockable drains was posted on the CPSC website, and comments were requested by August 5, 2009. Sixty-nine comments were received by the due date, and an additional comment was received approximately one week after the due date [<http://www.cpsc.gov/LIBRARY/FOIA/FOIA09/pubcom/drains.pdf>].

On October 21, 2009, a *Federal Register* notice informing the public that a public hearing on the draft guidance titled, “July 2009 Staff Draft Technical Guidance on Unblockable Drains,” would be held on November 4, 2009. The public was invited to make oral presentations, and the notice indicated that any oral presentations would become part of the public record. The technical guidance on unblockable drains was published at: www.poolsafely.gov/unblockable.pdf. The agenda for the hearing and the texts of the oral presentations are posted on the CPSC website at: <http://www.cpsc.gov/library/foia/foia10/pubcom/unblockdrain.pdf>.

In February 2010, staff sent a briefing package to the Commission regarding unblockable drains, public accommodations, and implementation of the Section 1405 State Grant Program <http://www.cpsc.gov/library/foia/foia10/brief/vgb.pdf>. Tab A of the briefing package was a response to the comments that had been received on unblockable drains.

On April 27, 2010, the Commission issued a final interpretive rule in the *Federal Register* regarding unblockable drains [75 FR 21985]. Because it was a final rule, the public’s input was not requested. However, Commissioner Adler received 156 comments asking for a re-examination of his decision on the final interpretive rule. These letters are posted on the CPSC website at: <http://www.cpsc.gov/library/foia/foia11/pubcom/unblockdrain.pdf>. These letters,

many of which were form letters, all stated that in the opinion of the signatory the intent of the law was to “incorporate several layers of protection” and characterized these back-up systems as “life-saving devices.”

Question 7

What input from the public is being solicited with regard to this new interpretation /revocation?

Response to Question 7

No public input is being sought on the revocation.

Question 8

In 2009 and 2010, staff indicated that the safest option for pools and spas under the VGB Act would be a drain cover that would render a drain “unblockable” because such a drain cover protects against all 5 forms of entrapment. On the other hand, according to staff:

“...the “back-up” systems mentioned as secondary requirements in the VGB Act address some, but not all, potential hazard patterns. The “back-up” systems primarily address suction body entrapment and may address some limb entrapments. However, these back-up systems do not address the hair and mechanical entrapments, or the evisceration injuries associated with entrapments. Moreover, the back-up devices require the incident to occur before they respond and, depending on the type of entrapment and the circulation system present, the response may not prevent the entrapment or the injury.”¹

Has the staff’s technical opinion on the safety advantages of unblockable drain covers over other types of anti-entrapment devices changed?

Response to Question 8:

Staff’s safety evaluation of the unblockable drain covers has not changed since the original briefing package was prepared and submitted to the Commission in February 2010. The package described the safety issues as follows:

As a drowning prevention law, the layers of protection are clearly applicable to incidents involving children getting unfettered access to swimming pools in residential locations. In these cases, barriers and warnings, such as, doors, door alarms, motion detectors, pool covers, fences with self-closing, selflatching gates, etc. can all be used to delay and/or prevent access to the hazard. However, for entrapment incidents the logical approach to prevention is different. Five different types of entrapment have been identified: body, limb, evisceration, hair and mechanical-related. The mechanisms of entrapment can be slightly different with each. The common element in all these entrapment scenarios is the necessity of an outlet cover as a layer of protection. All five of the entrapment

¹ <http://www.cpsc.gov/library/foia/foia10/brief/unblock.pdf>

issues are addressed by the appropriate rating and size of the cover when the cover remains in place. Currently, the 'back-up' systems mentioned as secondary requirements in the Act address *some* of the potential hazard patterns, but not all. The "back-up" systems primarily address suction body entrapment and may address some limb entrapments. However, these back-up systems do not address hair, mechanical and evisceration injuries associated with entrapments. Moreover, the back-up devices require the incident to occur before they respond and, depending on the type of entrapment and the circulation system present, the response may not prevent the entrapment.

Question 9

Has staff obtained any data showing the rate of compliance with the VGB Act of pools and spas on any one or more states?

Response to Question 9

No, since no one state has had every public pool and spa inspected for compliance with the VGB Act, staff has no data showing the rate of compliance in any state.

Question 10

Do you agree that an unblockable drain cover is a more effective safety device than a back-up system because it can cost less than a back-up system and protects against all five forms of entrapment? In what way, if any, do you believe the proposed revocation of the current definition of "unblockable drain" will impact the incentive of public pool and spa owners to purchase unblockable drain covers, given that such covers would represent an additional, but legally not required, cost?

Response to Question 10

As noted above in the response to Question 8, staff's safety evaluation of the unblockable drain covers has not changed since the original briefing package was prepared and submitted to the Commission in February 2010. Technical staff has not conducted an analysis of the cost associated with unblockable drain covers or any backup systems. Consequently, staff cannot comment on the cost effectiveness of these systems or on what impact the proposed revocation may have on public pool and spa owners' incentive to purchase unblockable drain covers.

Question 11

Has staff obtained any data on the number of pools/spas, if any, that have ceased operation or opted not to open in the first place due to the cost of compliance with the current "unblockable drain" definition or any other VGB Act requirements? Given that drowning by children who have not learned to swim is recognized to be the greatest risk posed to children by pools, has staff considered whether the potential loss to access to swimming facilities due to closures by owners unable to afford compliance with this new change in the definition of "unblockable drain" may present a greater long term risk of drowning than any risk of entrapment presented by pools with an unblockable drain cover but not a back-up system?

Response to Question 11

CPSC staff has heard anecdotal information to indicate that some pools have closed or were late in opening due to expenses associated with meeting the VGB Act requirements or the unavailability of drain covers meeting the standard. CPSC staff has not done a systematic collection of data related to pool closings as a result of VGB requirements.

CPSC staff has not considered whether the potential loss of access to swimming facilities due to closures by owners unable to afford compliance with this new change in the definition of “unblockable drain” may present a greater long-term risk of drowning than any risk of entrapment presented by pools with an unblockable drain cover but not a back-up system.