

MINUTES OF COMMISSION MEETING  
January 25, 2017

Chairman Elliot F. Kaye convened the January 25, 2017, 10:00 a.m., meeting of the U.S. Consumer Product Safety Commission in open session. Commissioner Robert S. Adler, Commissioner Marietta S. Robinson, Commissioner Ann Marie Buerkle and Commissioner Joseph P. Mohorovic were in attendance. Chairman Kaye made welcoming remarks and summarized the matters.

Decisional Matter: Recreational Off-Highway Vehicles (ROVs) – Termination of Rulemaking (Briefing package dated November 22, 2016, OS No, 5169<sup>1</sup>)

Caroleene Paul, Project Manager for ROVs, Directorate for Engineering Sciences, and Barbara Little, Attorney from the Office of General Counsel, were present to respond to any questions. Chairman Kaye called for any questions for the staff. The Commission asked several questions of the staff and discussed the issue.

Chairman Kaye called for any motions. Commissioner Adler moved to direct the staff to conduct a retrospective review of the voluntary standards, ANSI/ROHVA 1-2016 and ANSI/OPEI B71.9-2016, no later than two years after effective dates and assess and report to the Commission on the effectiveness of the standards with specific parameters listed in the amendment. Commissioner Buerkle seconded the motion. Commissioner Adler explained the purpose of the amendment and the Commission discussed the amendment. Commissioner Robinson asked Commissioner Adler to amend the motion to include incident data in the assessment. Commissioner Adler agreed to the amendment. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted (3-2) to adopt the motion. Chairman Kaye, Commissioner Adler and Commissioner Robinson voted to adopt the motion and amendment. Commissioner Buerkle and Commissioner Mohorovic voted to not adopt the motion and amendment. (The adopted motion as amended is attached.)

Chairman Kaye called for any other motions. Commissioner Adler moved that the Commission defer the vote on whether to terminate the rulemaking until the industry could address two remaining items, rollover resistance and efficacy of hang tags. Commissioner Buerkle seconded the motion. Commissioner Adler explained the purpose of the motion and the Commission discussed the motion. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted (3-2) to not adopt the motion. Commissioner Robinson, Commissioner Buerkle and Commissioner Mohorovic and voted to not adopt the motion. Chairman Kaye and Commissioner Adler voted to adopt the motion.

Chairman Kaye called for any further motions. Commissioner Robinson moved that the Commission delay the vote on whether to terminate the rulemaking until after the retrospective review is completed and finds that the standard is sufficient. Commissioner Adler seconded the motion. Commissioner Robinson explained the purpose of the motion and the Commission

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<sup>1</sup> Commissioner Adler extended the due date for the vote from November 30, 2016 to December 5, 2016. Commissioner Mohorovic transferred the ballot vote to a decisional meeting.

discussed the motion. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted (4-1) to not adopt the motion. Chairman Kaye, Commissioner Adler, Commissioner Buerkle and Commissioner Mohorovic voted to not adopt the motion. Commissioner Robinson voted to adopt the motion.

Commissioner Mohorovic began to make a motion to vote directly the termination of the rulemaking. After discussing it with the Chairman, Commissioner Mohorovic withdrew his motion.

Chairman Kaye called for a vote on whether to terminate the rulemaking associated with ROVs. The Commission passed on any further discussion. The Commission voted (3-2) to not terminate the rulemaking associated with ROVs. Chairman Kaye, Commissioner Adler and Commissioner Robinson voted to not terminate the rulemaking. Commissioner Buerkle and Commissioner Mohorovic voted to terminate the rulemaking.

Chairman Kaye called for any closing statements. The Commissioners each made closing statements. Chairman Kaye closed this portion of the meeting at 12:20 p.m.

Chairman Kaye and Commissioner Buerkle submitted the attached statements regarding the issue.

Decisional Matter: Proposed Rule: Amendments to Fireworks Regulations  
(Briefing package dated December 14, 2016 and OS No. 5355)

Chairman Kaye reconvened the meeting at 1:00 p.m. After introducing the matter and making an opening statement, Chairman Kaye called for the meeting to begin. Rodney Valliere, Project Manager, Division of Chemistry, Directorate for Laboratory Sciences, and Meridith Kelsch, Attorney, Office of General Counsel, Aaron Orland, Division Director, Division of Chemistry, Directorate for Laboratory Sciences, and Howard Tarnoff, Senior Counsel for the Assistant Executive Director for Compliance were present to respond to questions. The Commissioners passed on asking questions of the staff.

Chairman Kaye moved that the Commission adopt an amendment to the Federal Register notice to clarify that the Commission does not need to convene a chronic hazard advisory panel to review the health effects of two particular compounds in fireworks. Commissioner Robinson seconded the motion. Chairman Kaye explained the purpose of the motion and the Commission discussed the motion. After the discussion, Chairman Kaye called for a vote on the matter. The Commission voted (3-0-2) to adopt the motion and amendment. Chairman Kaye, Commissioner Adler and Commissioner Robinson voted to adopt the motion and amendment. Commissioner Buerkle and Commissioner Mohorovic abstained from voting on the motion. (The adopted amendment is attached.)

Chairman Kaye called for any other motions or comments. Hearing none, Chairman Kaye called for consideration of a motion of approval of the staff draft notice of proposed rulemaking, as amended, and publication of the same in the *Federal Register (FR)*. Chairman Kaye called for a vote on the matter. The Commission voted (3-0-2) to approve the notice of

proposed rulemaking to amend the fireworks regulations, as amended, and publish it in the *FR*. Chairman Kaye, Commissioner Adler and Commissioner Robinson voted to approve the notice, as amended. Commissioner Buerkle and Commissioner Mohorovic abstained from voting on the motion.

Chairman Kaye called for any closing statements. The Commissioners each made closing statements.

Chairman Kaye and Commissioner Buerkle submitted the attached statements regarding the issue.

There being no other business, Chairman Kaye adjourned the meeting at 1:30 p.m.

For the Commission:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson".

Todd A. Stevenson  
Secretariat

Attachments: The (Adopted) Motion of Commissioner Adler and amended by Commissioner Robinson regarding Retrospective Review of ROVs Voluntary Standards  
Statement of Chairman Kaye on the Denial of Termination of the Rulemaking for ROVs  
Statement of Commissioner Buerkle on the Failure of Termination of the Rulemaking for ROVs  
The (Adopted) Motion and Amendment of Chairman Kaye on the Proposed Rule: Amendments to Fireworks Regulations  
Statement of Chairman Kaye on the Proposed Rule: Amendments to Fireworks Regulations  
Statement of Commissioner Buerkle on the Proposed Revision to Fireworks Regulations

## **MOTION FOR RETROSPECTIVE REVIEW**

I move that CPSC staff be directed to conduct a retrospective review of the voluntary standards, ANSI/ROHVA 1-2016 and ANSI/OPEI B71.9-2016, at a time no later than two years after the effective dates of the standards, that will assess and report to the Commission on the effectiveness of the standards, including –

1. whether the provisions in the voluntary standards on Lateral Stability, Vehicle Handling, and Occupant Protection have eliminated or adequately reduced the risk of ROV rollover and occupant ejection based on incident data,
2. whether the provisions in the voluntary standards on Lateral Stability, Vehicle Handling, and Occupant Protection have been substantially complied with,
3. whether the provisions in the voluntary standards on Lateral Stability, Vehicle Handling, and Occupant Protection need to be made more stringent in order to provide necessary protections for consumers,
4. whether safety standards to address any new risks not addressed in the above standards are needed to further protect consumers



**U.S. CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814**

**STATEMENT OF CHAIRMAN ELLIOT F. KAYE  
ON THE DENIAL OF TERMINATION OF THE RULEMAKING  
FOR RECREATIONAL OFF-HIGHWAY VEHICLES**

**January 27, 2017**

On January 25, 2017, the Commission voted 3 - 2 to deny, at this point, termination of the rulemaking to promulgate a safety standard for recreational off-highway vehicles (ROVs). The Commission also voted 3 - 2 to approve a motion by Commissioner Adler providing for retrospective review of the voluntary standards for ROVs at a time no later than two years after the effective date of those standards. Another motion by Commissioner Adler, which I supported, would have deferred the vote on whether to terminate the rulemaking until industry could address two remaining items that I believe are central to the decision to terminate the rulemaking. Unfortunately, this motion failed by a vote of 2 - 3. Because Commissioner Adler's second motion did not pass, I could not support terminating the rulemaking at this time without assurances regarding those two critical safety issues.

Many of us were disappointed that we do not yet have resolution. I am disappointed that I have not seen a real willingness to find common ground at the time when it is needed most. I commend Commissioner Adler for offering an extremely reasonable path forward as a way to enhance the standard in a manner consistent with the CPSC staff's excellent work on this matter and their recommendation to terminate. While Commissioner Adler's deferral motion did not pass, I am willing to support immediately bringing this package back up for a vote if the two achievable conditions he outlined are met.

My hope is that cooler heads will prevail — as they did in 2014 — and we can address these last items in the cooperative, collaborative and constructive spirit in which all parties have worked in the past two years. I pledge that CPSC staff will stay engaged with the voluntary standards process, as long as there is something with which to stay engaged. I am also very grateful for the decade-long contributions from the Consumer Federation of America, especially Rachel Weintraub, who has been a champion for safety on this issue for years. I also know individuals from industry, especially Paul

Vitrano from Polaris Industries and Erik Pritchard from the Recreational Off-Highway Vehicle Association, have put in so much time and energy to get us to where we are today. And we are so close to the finish line.

I admit that I am confused as to why there is suddenly so much counterproductive rigidity. As an initial matter, industry already has the clarity and certainty it needs. Throughout the Notice of Proposed Rulemaking (NPR) process, we heard over and over again that the rulemaking moving forward was creating design and manufacturing uncertainty that was hurting business. They needed clarity. They needed certainty. They needed to know that there was just one set of standards to follow. They have that clarity and certainty now. The only standards they have to follow starting with model year 2018 vehicles are the voluntary standards from last year. This vote does not change that fact.

The mandatory standard is not moving forward at this time, and we all know it. The failure to terminate does not mean anything more than the failure to terminate. It obviously does not mean that the rulemaking goes forward, because, absent engaging in expensive and unnecessary testing resulting in wasteful spending of thousands of taxpayer dollars to study the feasibility of something already technically resolved, as the appropriations rider would require, moving forward is not legally permitted at this point or in the foreseeable future. While it is understandable to want termination, to make this vote into something it is not is disingenuous and counterproductive.

There was no reason to make a stand, claiming that the rulemaking had to be terminated this week or else. That is just a false narrative. We could have just as easily moved the vote or voted to provide more time not only to sort out concerns over the hang tag, but also to work together to make it more effective. For those who would minimize or marginalize concern over the hang tag, I would just say that it is the linchpin in the first line of defense in the standards against injury or death. I am talking about rollover. Even before you might need occupant protection, you need to avoid rollover. And even before you might attempt to avoid rollover from dynamic instability resulting from a sharp turn, you need to avoid rollover from driving slowly on a sloped surface.

The point of the hang tag is to drive consumer demand and engineering competitiveness toward more inherently stable vehicles. Staff stated strongly that the tilt table threshold in the standards, which is industry's preferred stability metric, alone is weak and unlikely to make any discernable safety difference. That is why getting the hang tag right is so important. Without an effective hangtag, the remainder of the rollover resistance part of the standard is useless since that part alone has not caused industry to design more stable vehicles.

It is also important to have some assurances regarding substantial compliance. It is not clear why our colleagues did not support this request in Commissioner Adler's motion either. We are only talking about a letter from each Standards Development Organization after surveying their members. Similar to the hang tag concerns, having a commitment on likely compliance matters to us. So while some might be upset about the result, please do not just brush our concerns off as trivial or pretextual. They are neither.

There is much to commend in the standards, and I acknowledge all the work that went into them from all parties. By knowing the mandatory rulemaking is not moving forward anytime soon, industry has the clarity and certainty they needed. Now we need some clarity and certainty on two final components — the hang tag and compliance with the standards.

There is still a path forward for further consideration well before the Commission composition changes. As always, the CPSC staff and my office and I are ready to roll up our sleeves once more and work to find a path forward. I know Commissioner Adler and his staff are as well.

Again, I want to thank the CPSC ROV staff team for their perseverance and tenacity in working with the ROV industry to craft voluntary standards that they believe will genuinely enhance consumer safety. This effort required highly technical engineering analyses and years of perseverance. They have made a real difference for safety, as have those from industry who have been a vital part of this effort. Let's now finish the remaining work together.

**Chairman Kaye Amendment to the Proposed Rule: Amendments to Fireworks Regulations**

Amend the Proposed Rule: Amendments to Fireworks Regulations (draft dated December 14, 2016) as follows:

On p. 30, line 1, delete the phrase "For these reasons,"

On p. 30, line 2, add: "This proposed provision covers only health effects relating to non-carcinogenic liver effects and developmental effects including anatomical variations or delayed development (but not including malformations) associated with HCB and hematological, gastrointestinal, cardiovascular, renal, and neurological toxicity associated with lead tetroxide and other lead compounds."

On p. 30, line 20, delete the phrase "(such as cancer)"

On p. 32, line 11, delete the phrase "such as cancer,"

On p. 32, line 17, delete the phrase "including developmental toxicity and cancer"





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4330 EAST WEST HIGHWAY  
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**STATEMENT OF CHAIRMAN ELLIOT F. KAYE  
ON THE NOTICE OF PROPOSED RULEMAKING  
ON AMENDMENTS TO THE FIREWORKS REGULATIONS**

**January 27, 2017**

On January 25, 2017, the Commission approved a Notice of Proposed Rulemaking (NPR) on Amendments to the Fireworks Regulations. This NPR is a result of a successful process built on collaboration that includes Commission initiative, our excellent expert staff, extensive industry experience and sound regulatory practice.

Even though the Commission issued an Advance NPR in 2006, the agency was not able to focus on fireworks because of other pressing safety issues and the implementation of the Consumer Product Safety Improvement Act of 2008. We resumed work on this issue after Commissioner Robinson returned from a visit to China, where she saw first-hand how fireworks are made. They are literally made by hand, which adds a real complexity to regulating to specific criteria. After her trip, she offered an amendment for staff to undertake a complete rule review of our fireworks regulations as part of our Fiscal Year 2015 Operating Plan. The Commission approved that amendment.

At the end of 2015, CPSC staff produced an excellent and thorough briefing package with options to modernize and streamline our regulations in furtherance of consumer safety. And that last part is extremely important. While improving our regulations is a worthy cause, I believe that precious resources spent reviewing rules is best spent where we can improve consumer safety.

As Chairman, I have been supportive of using our resources to methodically review the rules we have on our books and was pleased to work with Commissioner Mohorovic to have the Commission revive our rule review process. In particular, I have been interested in those rules that may be outdated or in need of strengthening. This package is a perfect example of how rule review should work. CPSC staff's proposed revisions and clarifications are aimed at increasing safety, better reflecting the current fireworks market and technologies, reducing testing burdens and promoting uniformity with other federal and industry standards.

It is not easy to accomplish all of those objectives in one package, but I believe this one does so. I want to thank the CPSC fireworks team for their thoughtful and pragmatic approach to enhancing consumer safety through this NPR.

I am proud to support the publication of this NPR and look forward to receiving all of our stakeholders' comments on what the Commission is proposing.

## Statement of Commissioner Ann Marie Buerkle on the Failure to Terminate Rulemaking on Recreational Off-Highway Vehicles

I want to thank the staff for the many, many hours they worked on developing the two voluntary standards that led to today's vote. The industry stakeholders and trade association leaders also deserve the same credit for the countless hours and resources they spent building consensus. These are not status quo standards—they will force pro-safety changes in design at many companies.

I also applaud the interactive engagement between the Commission staff and the outside stakeholders. My staff and I personally attended a number of the technical meetings. I was impressed by the candor as well as the caliber of the exchanges. These standards represent a technical achievement of the sort we can and should be proud of. I would like to see more of such engagement in the coming years, and I only hope that those efforts will bear fruit like this. This is the type of interaction that we should strive for as a regulatory agency.

This is why there is such a strong preference for voluntary standards enshrined in our CPSC statutes. No one has a monopoly on safety "know-how." We work best when we work together with outside agents, each contributing to and having a stake in the final product. Again, these standards illustrate the point and should be the model going forward. At times throughout this process, the industry came up with alternative ways to achieve the CPSC's objective, and the staff studied the alternative and found it perfectly acceptable. That is cooperative problem solving at its best—the classic win-win--and I admire and appreciate the process as well as the end product.

Apart from the usual statutory preference for voluntary standards, we heard from Congress far more specifically in this case. Congress directed us to focus on voluntary standards rather than a mandatory standard. While it took us a while to get that message, we finally did—or so I thought.

Instead, after all the effort invested in the voluntary standards, the majority Commissioners voted against terminating the rulemaking because they can think of even more pro-safety provisions that they wish had also been incorporated in the voluntary standards.

I say the following more out of disappointment and sorrow than anger. My colleagues have changed the rules unilaterally. Our staff recommended terminating the rulemaking because they believe the voluntary standards will adequately reduce the risks we set out to address. No one imposed that view on them; they reached that position after mature, professional and careful consideration. At this late stage in the process—many months after the standard was published—to insist that they should have gotten more is disgraceful.

Today's outcome also betrays those on the industry side who worked so hard to make this happen. Implicit in this situation was a bargain—you agree to a tough voluntary standard, and we will terminate our rulemaking. That understanding was practically made explicit by our Chairman in Congressional hearings. In testimony before the House Appropriations subcommittee, he referred to the two different organizations working on voluntary standards and said he found their progress "extremely encouraging." He explained to the Committee that after the standards were published, our staff would make an assessment of the standards and send up a recommendation to the Commission. He concluded: "If it happens the way it seems to be happening, I know our staff has indicated, to date, that they've been pleased with the direction that the voluntary standards has taken, then I would imagine that we would proceed accordingly, based on their recommendation." As far as I'm concerned, the majority's vote breaks faith with that understanding and does so without proper and adequate justification. The voluntary standards organizations, under the ANSI umbrella, kept their side of the bargain, but we reneged on ours.

One of the most troubling aspects about this outcome is the adverse effect it may have on CPSC's efforts in the future. It is not going to help the staff negotiate tougher

standards if their assurances of adequacy carry no weight with the Commissioners. The failure to terminate this rulemaking undermines the credibility of our Agency.

## Statement of Commissioner Ann Marie Buerkle on the Proposed Revision to CPSC Fireworks Regulations

I want to thank the staff for all of their efforts on this package. I would also like to commend my colleagues, Commissioner Mohorovic and Commissioner Robinson, for their leadership on this subject. Both of them have focused on specific fireworks issues and contributed significantly to the proposal before us today.

I have decided to abstain from voting on this notice of proposed rulemaking because I believe we should honor the temporary regulatory “freeze” ordered by the new Administration, even if it does not apply to us as a strictly legal matter. On Inauguration Day, January 20, 2017, the new White House Chief of Staff, Reince Priebus, issued a memorandum to the heads of Executive departments and agencies, asking them to implement a moratorium on new regulations, with certain exceptions. Apparently, this was the same as the approach taken at the start of the Obama and earlier administrations.

No one at the Consumer Product Safety Commission has received a copy of this memorandum or other instructions from the new administration. It is not clear that the regulatory freeze is even intended to apply to independent agencies. Nevertheless, as a policy matter, the CPSC often follows the spirit of Executive Orders and other White House directions, even when they are not directly applicable to independent agencies. I

believe that course is appropriate here, particularly in the earliest days of the transition from one administration to another.

Despite my abstention, I want to mention a few concerns about this notice of proposed rulemaking.

Some provisions of the proposed rule lack support in the record. Unless those gaps are filled, they would prevent us from making the findings needed for a final rule under the Federal Hazardous Substances Act (FHSA). Therefore, I want to strongly encourage all stakeholders to share their views and data with the Commission, particularly with regards to the safety benefits of the rule as well as the cost impacts. This proposed rule covers a lot of territory, adding new requirements and limits, and restricting additional chemicals.

Many of the proposed requirements are based on provisions of the American Pyrotechnics Association (APA) voluntary standard 87-1. Under our law, even though we are proposing a requirement reflected in a voluntary standard, we are not relieved of the need to support that requirement with findings. We must show that the requirement is adequate to address the risk and that it is the “least burdensome” requirement that will address the risk.

I am particularly interested in hearing comments on staff’s proposed recommendation to align the mandatory standard with the American Pyrotechnics Association Standard 87-1 on the method for determining which fireworks are intended to produce an audible effect. Instead of the

notorious “ear test,” the proposal would use fine metal content to determine which fireworks devices are intended to produce an audible effect and therefore are subject to the 2-grain limit on pyrotechnic content. Staff is looking for further information to support the proposal or any alternative proposed. I believe it is also very important to establish that the new test is generally equivalent to the old, or if not, to justify any change in scope or stringency.

At the recent staff briefing on January 11, 2017, Dr. Orland stated that CPSC staff has been working with the APA on updating the APA 87-1A standard, but the process has come to a standstill, at least until our package is released for notice and comment. Dr. Orland indicated at the briefing that the APA was waiting to see our NPR before further advancing changes to APA’s standard. Nevertheless, he seemed confident that the APA standard and the proposed rule could be aligned and reconciled. I am very interested to learn of the progress of the APA 87-1A standard once our proposed rule is out for notice and comment.

I am also very interested in stakeholders’ comments on the proposal to add lead, lead components and HCB to the prohibited chemical list and setting contamination limits for these prohibited chemicals. At the CPSC briefing, my colleague, Commissioner Mohorovic, inquired as to the need for a Chronic Hazard Advisory Panel (CHAP) to address certain prohibited chemicals. This issue may now be moot in light of an amendment offered by the Chairman and approved by a majority. Nevertheless, it remains important to pinpoint the rationale for regulation of all such chemicals and



to make sure that the restriction specified in the standard matches the stated rationale. This is another topic on which I want hear more discussion from stakeholders.

The changes being proposed today could have the effect of imposing greater restrictions on consumer fireworks than our current CPSC regulations. Therefore, it is very important to hear directly from our stakeholders, and I strongly encourage your feedback.