



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action Commissioners Voting by Ballot*

Commissioners Voting: Acting Chairman Robert S. Adler
 Commissioner Elliot F. Kaye
 Commissioner Dana Baiocco
 Commissioner Peter A. Feldman

ITEM:

Petition VGBA 19-1: Petition for Classification of Vacuum Diffusion Technology as an Anti-Entrapment System under the Virginia Graeme Baker Pool and Spa Safety Act (Briefing package dated May 19, 2020, OS# 0017)

DECISION:

The Commission voted (3-1) to deny the petition to classify Vacuum Diffusion Technology as an anti-entrapment system under the Virginia Graeme Baker Pool and Spa Safety Act (VBGA) and direct staff to submit a draft denial letter for a vote by the Commission. Acting Chairman Adler, Commissioners Kaye and Baiocco voted to deny the petition. Commissioner Feldman voted to defer the petition. Commissioner Feldman filed a statement with his vote (see attachment).

For the Commission:

Alberta E. Mills
Secretary

*Ballot vote due June 1, 2020
(Commissioner Feldman extended the vote due date from May 27, 2020)

Attachment: Statement by Commissioner Feldman



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER PETER A. FELDMAN

**STATEMENT ON VOTE TO DEFER
THE PETITION FOR CLASSIFICATION OF “VACUUM DIFFUSION
TECHNOLOGY” AS AN ANTI-ENTRAPMENT SYSTEM UNDER THE VIRGINIA
GRAEME BAKER POOL AND SPA SAFETY ACT**

VGBA 19-1

June 1, 2020

The potential anti-entrapment benefits of vacuum diffusion technology (VDT) represent precisely the sort of safety innovation the “other systems” category of the Virginia Graeme Baker Pool and Spa Safety Act (VGBA) is intended to incentivize. As the only Commissioner to have worked directly on the drafting and passage of the VGBA, I can state with a high degree of confidence that the “other systems” category was included to promote safety innovations like VDT and to allow for new market entrants. This view is strongly supported by the VGBA’s legislative history, which explicitly contemplates new anti-entrapment technologies and cautions against picking winners and losers.¹ Under VGBA, the Commission may designate additional anti-entrapment systems when it determines they are “equally effective as, or better than, the [enumerated] systems ... at preventing or eliminating the risk of injury of death or injury associated with pool drainage systems.”² CPSC staff recommends denial of the petition because VDT “is not effective at preventing full body entrapment.”³ Staff’s singular focus on full body entrapment is misplaced. The VGBA’s legislative history identifies multiple submersion-related injuries and deaths, including various entrapment and entanglement scenarios, to justify why the legislation was needed.⁴ These include limb, hair and mechanical (clothing and jewelry) entrapments, among other things, in addition to full body entrapment.⁵ While full body entrapment represents a serious risk, it is the least common of several types of entrapment incidents reported to CPSC.⁶ Staff finds that VDT protects against limb entrapment and implies

¹ See *Examining Pool Safety Issues, Hearing Before the S. Subcomm. on Consumer Affairs of the Sen. Comm. on Commerce* 109th Cong., S. Hrg. 109-597 at 40-42 (2006) (statement of Sen. George Allen) (expressing view that the anti-entrapment provisions should be drafted not to stifle innovation and creativity and to avoid picking winners and losers).

² 15 U.S.C. § 8003(c)(1)(A)(ii)(VI) (2018).

³ Staff Briefing Package, U.S. Consumer Prod. Safety. Comm’n., VGBA 19-1, 2019 VACUUM DIFFUSION TECHNOLOGY PETITION, at 11 (2020).

⁴ See S. Rep. No. 110-182 at 2-3 (2007).

⁵ *Id.*

⁶ This is likely attributable to the efficacy and ubiquity of VGB-compliant drain covers. CPSC’s data now suggests hair and limb entrapment incidents to be significantly more prevalent than full body entrapment. See Qian Zhang, 2014–2018 REPORTED CIRCULATION/SUCTION ENTRAPMENT INCIDENTS ASSOCIATED WITH POOLS, SPAS, AND WHIRLPOOL BATH TUBS, at 6 (May 2019) (“[t]he [circulation entrapment] incidents reported to CPSC staff identified

that VDT may, in fact, do so better than existing systems.⁷ However, staff claims, without substantiation through testing, that VDT “could introduce new potential for hair or mechanical entrapment.”⁸ If, as petitioners claim, VDT offers better, albeit different, protection against a broader spectrum of the more common entrapment risks (limb, hair, and mechanical versus body alone), the Commission should grant this petition. Staff generally conducts extensive laboratory testing to establish the validity of claims submitted with previous VGBA petitions.⁹ Inexplicably, staff conducted no testing to inform its recommendations with respect to this petition or to verify data submitted by the petitioner. In 2009, Congress appropriated \$6 million to CPSC to construct a state-of-the-art testing facility in Rockville, MD, that includes a dedicated laboratory for testing pool and spa products.¹⁰ Additional testing is necessary, including to substantiate staff’s claim that VDT introduces new risks. Accordingly, I vote to defer this petition.

hair (6 victims, 55 percent) as the most frequent type of entrapments ... followed by limb (4 victims, 36 percent) and body (1 victim, 9 percent)”), *available at* https://www.cpsc.gov/s3fs-public/2019_Circulation_Entrapment.pdf?IzoaB1C1btP70RRVUJqPK3RI4Ikxyety (last accessed June 1, 2020).

⁷ *Supra* note 3 at 31-32 (finding that “[a]llowing ProteKtor™ to become a VGBA secondary system may reduce the already low incidence of limb entrapments...”).

⁸ *Id.* at 20.

⁹ *See, e.g.*, Staff Briefing Package, U.S. Consumer Prod. Safety. Comm’n., VGBA 12-1, 2012 VACUUM DIFFUSION TECHNOLOGY PETITION, at 15 (2012).

¹⁰ H.R. 1105, 111th Cong. (1st Sess. 2009).