



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

MINUTES OF COMMISSION MEETING
May 19, 1994
4330 East West Highway
Bethesda, Maryland

The May 19, 1994, meeting of the Consumer Product Safety Commission was convened in open session by Chairman Ann Brown. Commissioners Mary Sheila Gall and Jacqueline Jones-Smith were present.

Agenda Items

1. Five-Gallon Buckets

The Commission considered options for Commission action to address the risk of children drowning in containers referred to as 5-gallon buckets. At the Commission meeting of May 11, 1994, the staff briefed the Commission on issues related to the safety of these products (Ref: staff briefing package dated April 18, 1994). In response to questions raised at the briefing, the staff also provided the Commission with additional information, by memorandum dated May 17, 1994.

Following introductory comments by the Chairman and Commissioners, the Commission voted unanimously (3-0) on separate motions of Chairman Brown to take the following actions:

(1) Issue an Advance Notice of Proposed Rulemaking (ANPR) to address the drowning hazard presented by what is generically referred to as 5-gallon plastic buckets. The General Counsel's office will submit a revised ANPR to the Commission for its approval;

(2) Participate with ASTM to attempt to develop voluntary performance requirements for what is generically referred to as 5-gallon plastic buckets; and

(3) Participate in an industry-funded information and education campaign, with particular emphasis toward minorities, non-English speaking persons, and persons at the lower end of the socioeconomic scale, to warn about the danger of toddlers drowning in 5-gallon buckets. Commission participation is subject to the campaign being approved by and found acceptable by the Commission.

Minutes of Commission Meeting
May 19, 1994

5-Gallon Buckets, continued

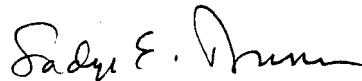
Separate statements on the 5-gallon buckets matter were filed by Chairman Brown, Commissioner Gall, and Commissioner Jones-Smith, copies attached.

2. Mid-Year Review

The Commission was briefed by the Executive Director and staff on the status of 1994 funds, programs, and projects and on proposed operating plan changes and new funding proposals. (Ref: briefing package dated May 5, 1994.) No decisions were made. Attached is a copy of opening comments delivered at the briefing and filed by Commissioner Jones-Smith on the matter of the 1994 mid-year review.

There being no further business on the agenda, Chairman Brown adjourned the meeting.

For the Commission:



Sadye E. Dunn
Secretary

Attachments

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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The Chairman

Statement of Chairman Ann Brown
on 5-gallon buckets
May 19, 1994

Good Morning. The Commission is meeting this morning to decide what action to take regarding the hazard of drowning in 5-gallon buckets. Various options are included in the briefing package. As we learned last week at the Commission briefing, an estimated 40 toddlers drown each year in 5-gallon buckets. Based on this estimate, approximately 200 toddlers have drowned since the Commission became involved with this issue in 1989.

I am concerned that the bucket industry has not aggressively taken steps to label its buckets voluntarily with a warning of the drowning hazard, implemented an aggressive information and education program to warn consumers of the risk of drowning, or moved aggressively to develop a performance standard to address the drowning hazard. I must agree with the staff's conclusion that the industry's progress toward a voluntary performance standard is unsatisfactory. Having said this, I am gratified at some actions the industry is now taking albeit late in the game.

As John Preston has advised us, five bucket manufacturers reportedly representing 70-75% of the industry intend to begin labeling their buckets voluntarily beginning with those buckets produced on or after January 1, 1995. The representative of those five manufacturers has indicated that they hope and expect to have 90% of the industry labeling their buckets by that date. I commend the plastic bucket industry for moving forward on bucket labeling and I want them to know that I want to work with them to increase the number of buckets that are labeled. It is my understanding that the label will be in both Spanish and English with a pictogram. I encourage these manufacturers to move even faster and to expedite the date by which labeling will begin.

These five manufacturers have also represented that they will initiate by July 1, 1994, an information and education program to alert consumers to the drowning hazard presented by 5-gallon buckets. I applaud this long overdue effort and believe this Commission should work with the industry on this program. I believe the I&E program's focus, however, must be on drowning in 5-gallon buckets and must be designed to reach the population at risk from the bucket drownings.

At the same time, I am not convinced that warning labels and an I&E program alone will significantly reduce the drowning hazard. Thus, while we should work with the industry on its

labeling and I&E program, it is also essential for the Commission to begin a rulemaking proceeding through the publication of an Advance Notice of Proposed Rulemaking. This is particularly true since the bucket industry has not moved forward on a voluntary performance standard and in fact takes the position that a label is a performance standard. A label is not a performance standard. Nonetheless, I also believe that the staff should continue working with the industry to attempt to develop a voluntary performance standard for buckets. If they are successful, the Commission can terminate its rulemaking proceeding.

CLOSING STATEMENT

I am gratified that the Commission voted to start a rulemaking proceeding on 5-gallon plastic buckets. I believe this is an important decision for the Commission and it demonstrates our commitment toward product safety and a reasonable approach to the problem of toddler drownings in 5-gallon buckets. I want to make clear, however, and I believe I can speak for my fellow Commissioners, that it is not our intent to put plastic bucket manufacturers out of business or to ban plastic buckets. Rather, we need to work together to solve the problem of toddlers drowning in 5-gallon buckets. I have no doubt that we will succeed.



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STATEMENT OF COMMISSIONER MARY SHEILA GALL
ON
OPTIONS ON MANDATORY FEDERAL REGULATION
OF
FIVE GALLON BUCKETS

Today the Commission has voted to adopt a broad-based approach to addressing the drowning hazard presented by five gallon plastic buckets. In addition to directing the staff to issue an Advanced Notice of Proposed Rulemaking (ANPR) under the Consumer Product Safety Act (CPSA) limited to these products, the Commission will continue to participate with ASTM in its efforts to develop voluntary performance requirements for buckets, and will conduct an information and education campaign with particular emphasis on reaching segments of consumers who are disproportionately impacted by this hazard. Each of these actions has my full support.

Although I have voted to initiate rulemaking for plastic five gallon buckets, I have done so reluctantly. At first blush, the incident data seem to indicate that these products present a hazard to consumers. In order to satisfy myself that this was the case, I read the incident reports on file with the Commission for the last four years for which we have data. In almost 60% of the reports, those entrusted with the care of the children who were killed acted irresponsibly and without regard for the safety of the child. This leads me to conclude that the problem may well be less with the product and more with those responsible for the care and supervision of the child.

At the outset, I would note that an ANPR is more than simply an information gathering device. Section 27 of the CPSA provides the Commission staff with an array of tools with which to gather information. Further, section 9 of the CPSA, under which ANPR's are addressed, contemplates that the Commission has, at a minimum, considered its options and narrowed its focus to some number of mandatory requirements. This determination can only be made after assessing whether or not the record before us supports the existence of an unreasonable risk and suggests remedies which are reasonably necessary to address that risk.

The Commission staff had recommended that the Commission include five gallon metal buckets in its rulemaking proceeding. I am pleased that the Commission rejected this recommendation. The

incident data, specifically, the fact that there is only one reported drowning in a metal bucket, does not support government intervention in this segment of the industry. It is my belief that the characteristics of metal buckets and the materials typically shipped and stored in them greatly reduce the likelihood that they will be reused by consumers in and around the home making the risk of drowning negligible. In fact, unlike plastic buckets, metal buckets are not offered for sale empty and for home use. Further, the metal bucket industry has taken steps in the last year to discourage reuse of its product in the home by removing rust inhibitors from key parts of the bucket, and stamping these containers for single use only. At this time, I do not have a precise estimate of what part of the market is covered by these actions; however, an informal poll of some of the largest producers suggests that over half of the industry would take these steps voluntarily, while some have already implemented these product modifications.

However, industry has represented to the Commission that development and implementation of a performance standard, voluntary or mandatory, is not feasible, and would be tantamount to a ban of this product. While this may be the case, I am interested in having the staff address a number of questions through its work under the ANPR, including: (1) are there performance requirements that while not presenting a universal solution to the drowning hazard, would address some significant portion of the plastic five gallon bucket market; (2) is the fact that since California implemented its labelling law there has not been a drowning in a five gallon bucket reported in that state evidence that a labelling standard coupled with a targeted, aggressive information and education campaign would adequately address this hazard; and, (3) of what significance is the Canadian experience involving these products? It is essential that questions such as these be answered definitively before the Commission could consider moving to the next stage of rulemaking.

I am also compelled to note that a group of plastic bucket manufacturers have sent to the Commission a letter committing to a voluntary labelling and information and education campaign. The former would begin next year, with the latter beginning in July of this year. While I am pleased that this overture has been made, it is unfortunate that similar voluntary efforts were not fully embraced by the plastic bucket industry sooner. By its own estimate, only 35% of the plastic five gallon buckets being manufactured today are labelled and to date, I have not seen an estimate of resources expended by these manufacturers or their representatives on the information and education campaign promised at that time.

Many of these incidents with plastic five gallon buckets tragically illustrate the effects of ignoring or failing to address the responsibility of parents and others entrusted with the care of children when it comes to safety issues. This is consistent with the observations of Marion Wright Edelman in the

Parade Magazine of Sunday, May 8, 1994. Edelman writes that an American child is abused or neglected every 13 seconds, is born to an unmarried mother every 26 seconds, is born into poverty every 30 seconds, is born to a teen mother every 59 seconds, is arrested for a violent crime every five minutes, and is killed by guns every two hours. And 1,200,000 latchkey children go home every day to houses where there is a gun. These observations lead Ms. Edelman to conclude that "parents and adults must stop our hypocrisy and break the code of silence about the breakdown of spiritual values and parental and community responsibility to nurture and protect children." All of these problems are not within the CPSC's jurisdiction. We must stimulate broader based community action to ensure the health and safety of our children. The hazard of drowning associated with plastic five gallon buckets provides the Commission with this opportunity.

I look forward working with my colleagues and the Commission staff on developing this diverse approach to addressing the hazard associated with plastic five gallon buckets. I would urge industry to join this effort fully, both at the Commission and in the voluntary standards community so that their expertise and creativity may be utilized in the development of this plan.

**STATEMENT OF COMMISSIONER JACQUELINE JONES-SMITH
ON THE ISSUANCE OF AN ANPR FOR 5-GALLON PLASTIC CONTAINERS
May 19, 1994**

Today, the Commission voted to issue an Advance Notice of Proposed Rulemaking (ANPR) on 5-Gallon plastic containers. It also directed the Staff to participate with ASTM, both to develop voluntary performance standards for such containers and to cooperate in orchestrating a public information campaign. I supported each of these measures; and was in agreement that 5-gallon metal containers should be excluded from the scope of the ANPR. My reasons for these decisions are as follows.

Between January 1984 and March 1994, there have been reported 228 drowning and 30 non-fatal incidents, involving infants between the ages of 7 to 24 months. All but one of these incidents involved a plastic container with capacities ranging from 3 1/2 to 6 1/2 gallons. The measures adopted today have the potential to effectively address this tragic situation -- both in the short term and long term.

As I have noted on prior occasions, the promulgation of a rule under the Consumer Product Safety Act requires, among other things, that the Commission make certain mandatory findings. To initiate an ANPR, members of the Commission must make at least a preliminary determination that these requirements, ultimately, can be met. In brief, the statutes, as interpreted by the courts, necessitate that the Commission resolve two fundamental issues:

1. Does the hazard in question present an "unreasonable risk of personal injury or illness"?
2. And, if so, is the proposed remedy "reasonably necessary" to justify the promulgation of the specific regulations under consideration?

As interpreted by the courts, each of these basic questions, while somewhat overlapping, contains a number of criteria which the Commission must weigh in order to reach a final decision. Thus, for it to find that there is an "unreasonable risk of injury", the Commission first must balance three factors:

1. The "severity" of the injury that may result from the product's use;
2. The "likelihood" that such injuries will occur; that is, its relative frequency of occurrence, and
3. The impact, or the "harm" such a regulation will exact upon manufacturers and consumers; that is, a risk/utility analysis.

Once the Commission determines that a product constitutes an unreasonable risk, it must still determine whether the particular rule under consideration is "reasonably necessary" to reduce or eliminate this unreasonable risk. Again, this requires a three-step analysis in which the Commission must weigh:

- 1) The "nature and severity" of the risk;
- 2) The "potential the [rule] has for reducing the severity or frequency of the injury", and
- 3) The effect the rule would have on the "utility, cost or availability of the product"; a cost/benefits analysis.

With regard to adoption of mandatory standards for plastic containers, I am convinced that the data currently available supports the initiation of such a proceeding. The incident data cited above, and the Staff's estimate that about 40 drowning deaths are occurring annually, speaks adequately to both the "severity" of the risk and the "likelihood" that such occurrences unfortunately shall continue without affirmative action. In addition, the identification of a range of what appears to be technically feasible performance standards is at least suggestive that design modifications can be undertaken by industry that could minimize this risk.

Thus, it is my preliminary finding that 5-gallon plastic containers currently available to the consuming public present an unreasonable risk. Similarly, I am reasonably satisfied that a performance standard may have the "potential" to reduce at least the frequency of these incidents. However, I remain somewhat more cautious in drawing any more definite conclusions about either this element or the impact such a rule may have upon the "utility, cost or availability" of this product to the public. In particular, Staff needs to provide additional information about the ability of industry to adopt, functionally, any of the performance options currently or potentially under consideration, as well as the interaction of such a standard with existing state and federal regulations. Thus, the question as to whether any particular standard may be "reasonably necessary" provides a greater challenge. I anticipate that these questions shall be addressed by Staff pursuant to this ANPR.

The question of Commission jurisdiction also has been raised with regard to this product. I am reasonably satisfied that 5-gallon plastic containers are consumer products within our jurisdiction. This product is made available to the public in three forms. As a primary product, it is sold directly to the public both empty and filled with such products as soap detergent, pet food and various coatings. It is also made available, as a secondary bi-product of commercial use.

On the other hand, current information fails to satisfy an unreasonable risk finding -- even a preliminary one -- with regard to 5-gallon metal containers. Of the 250 plus reported incidents, over the course of ten years, only one involves a metal container. Thus, the likelihood of occurrence is extremely questionable. Also, unlike plastic containers, the metal containers under review, do not lend themselves to secondary consumer use. The nature of both the containers and the fillers make their utility to consumers both unappealing and impractical. This is suggestive in the incident data. It would, however, be appropriate for Staff to report on how the adoption of any performance standards for plastic containers might affect the substitutability of metal containers.

Finally, I was most pleased by ASTM's expeditious development of an emergency labeling standard. Although, in general, labeling is normally the least effective means of addressing a hazard, it represented the most practical and immediate option at that particular point in time. Indeed, the Commission staff was itself uncertain, at that time, as to the technical feasibility of a performance standard.

I am also pleased with industry's expressed interest in cooperating with the Commission in funding and actively participating in a comprehensive public information campaign concerning the dangers inherent in these products. I do recognize that there exists a fundamental problem concerning proper adult supervision of small children and hope that such cooperative efforts can alleviate this problem.

I have been disappointed, however, with industry's lack of cooperation -- indeed its obstruction -- with regard to the development of reasonable performance standards. Both Staff and the Commission recognize that the adoption of a single performance standard may not be feasible or practical for all plastic containers, given their multiple commercial and consumer uses. Nonetheless, I remain optimistic that a range of utilitarian options can be developed and I invite industry to work closely with Staff in furthering this objective in a timely manner.