U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

MINUTES OF COMMISSION MEETING
September 28, 2011

Chairman Inez M. Tenenbaum convened the September 28, 2011, meeting of the U. S. Consumer Product Safety Commission at 8:30 a.m. in open session. Commissioners Thomas H. Moore, Nancy A. Nord, Robert S. Adler and Anne M. Northup were also in attendance. Chairman Tenenbaum made welcoming remarks and summarized the agenda for the meeting.

Decisional Matter – Virginia Graeme Baker and Spa Safety Act; Interpretation of Unblockable Drain (Briefing packages dated September 7 and 26, 2011 OS No. 3381)

Chairman Tenenbaum summarized the issues for the decisional matter and recognized Commissioner Adler who explained his reconsideration of the interpretation of unblockable drain. Chairman called for a discussion. Commissioner Northup moved that the Commission waive the General Counsel legal privilege communications and open the General Counsel's advice to the Commission. Commissioner Nord seconded the motion. Commissioner Northup explained her motion. The Commission discussed the motion. Chairman Tenenbaum called for a vote on the motion. The Commission voted (3-2) to not approve the motion. Chairman Tenenbaum and Commissioners Moore and Adler voted to not approve. Commissioners Nord and Northup voted to approve the motion.

Commissioner Northup made a statement about the matter. The Commissioners further discussed the issue of the unblockable drains and the legal privilege issue.

Commissioner Northup moved that the Commission in lieu of the document under consideration that instead the Commission move to a proposal and comment period to determine what should be considered to make any change in the interpretation and to collect more information on costs and safety consequences. Commissioner Northup explained her motion. Commissioner Nord seconded the motion. After Commission discussion on the issue, Commissioner Northup amended her motion to keep in the same effective fixed date of compliance for the changes but include a notice and comment period to collect more information. Chairman Tenenbaum called for a vote on the motion. The Commission voted (3-2) to not approve the motion. Chairman Tenenbaum and Commissioners Moore and Adler voted to not approve. Commissioners Nord and Northup voted to approve the motion.

Commissioner Adler moved to offer an amendment to the motion to revoke the previous interpretation of unblockable drain. Commissioner Adler explained the amendment and highlighted that it would solicit comments from those affected by the decision on the date of compliance of May 28, 2012. Before the motion was seconded, Commissioner Adler moved that the Commission adopt the staff draft of the *Federal Register* ("FR") notice for revoking the

previous interpretation of the definition of unblockable drain. Commissioner Moore seconded the motion. Chairman Tenenbaum called for discussion. Before the vote on this motion, Commissioner Nord moved to amend the interpretation to "grandfather in" or exempt pool operators who made modifications in reliance of the old or previous interpretation. Commissioner Northup seconded the motion. The Commission discussed the issue. Chairman Tenenbaum called for a vote. The Commission voted (3-2) to not approve the motion. Chairman Tenenbaum and Commissioners Moore and Adler voted to not approve. Commissioners Nord and Northup voted to approve the motion.

Commissioner Adler moved to offer an amendment to the briefing package that has been moved and seconded to amend the briefing package motion to revoke the previous interpretation of unblockable drain that will permit the Commission to solicit comments from those affected by the decision on the date of compliance of May 28, 2012. Chairman Tenenbaum seconded the motion. Commissioner Northup made a statement about the matter. The Chairman called for the vote. The Commission voted unanimously (5-0) to approve the motion on the amendments.

Chairman Tenenbaum moved that the Commission approve publication in the draft notice of revocation of the interpretative rule of the definition of unblockable drain in the *FR* with the approved changes. Commissioner Northup made a statement about the matter. Commissioner Adler seconded the motion. Chairman Tenenbaum called for the vote. The Commission voted (3-2) to approve the motion and the publication as amended. Chairman Tenenbaum and Commissioners Moore and Adler voted to approve. Commissioners Nord and Northup voted to approve the motion.

Chairman Tenenbaum made a statement about the issue and read a letter to the Commission from Nancy Baker. Commissioner Moore made a statement about the issue.

Chairman Tenenbaum concluded the open session on this matter and explained the meeting was going to move into executive session to discuss legal matters. The meeting moved to executive session at 10:15 a.m.

Chairman Tenenbaum and Commissioners Nord, Northup and Adler each issued separate written statements regarding the matter. The statements are attached.

Testing & Certification and Component Parts Final Rules; Representative Testing – Notice of Proposed Rule; and FR Notice on HR2715 Questions

At 10:45 a.m. Chairman Tenenbaum reconvened the open session of the meeting and summarized the purpose of this portion of the meeting. Commissioner Moore was not present for this portion of the meeting.

Robert J. Howell, Deputy Executive Director for Safety Operations and DeWayne Ray, Assistant Executive Director, Director of the Office of Hazard Identification and Reduction ("EXHR") briefed the Commission on the proposed final rules that would establish requirements for a reasonable testing program and for compliance and continuing testing for children's

products and conditions and requirements for relying on component part testing. The proposal would also address labeling of consumer products to show that the product complies with certification requirements under a reasonable testing program for non-children's products or under compliance and continuing testing for children's products. Staff further briefed on the proposed rule for testing and labeling pertaining to product certification regarding representative samples for periodic testing of children's products. The proposed rules would implement section 14 of the Consumer Product Safety Act ("CPSA"), as amended by section 102(b) of the Consumer Product Safety Improvement Act of 2008 and H.R. 2715. No decisions were made during this part of the meeting.

Chairman Tenenbaum adjourned this portion of the meeting at 11:30 a.m., and called for the Commission to return at 12:30 p.m. to ask questions of the staff.

At 12:30 p.m. Chairman Tenenbaum reconvened the open session of the meeting and explained that this portion of the meeting was for the Commission to ask questions of the staff about these proposed rules. Commissioner Moore was not present for this portion of the meeting. The staff present for the questioning was Robert J. Howell, Deputy Executive Director for Safety Operations, DeWayne Ray, Assistant Executive Director, EXHR, Kathleen Stralka, Associate Executive Director, Directorate for Epidemiology, Deborah Aiken, Supervisory Economist, Directorate for Economics, Jacqueline Campbell, Textile Technologist, Directorate for Engineering Sciences, and John Boja, Lead Compliance Officer, Office of Compliance, Regulatory Enforcement. The Commission asked questions and commented on the issues of the testing related proposed rules.

There being no further business on the agenda, Chairman Tenenbaum adjourned the meeting at 3:40 p.m.

For the Commission:

Todd A. Stevenson
Secretary

Attachments: Statement of Chairman Tenenbaum
Statement of Commissioner Nord
Statement of Commissioner Northup
Statement of Commissioner Adler

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CHAIRMAN INEZ M. TENENBAUM

September 28, 2011

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE COMMISSION DECISION TO REVOKE THE VIRIGINIA GRAEME BAKER POOL & SPA SAFETY ACT INTERPRETIVE RULE ON UNBLOCKABLE DRAINS

Today, the U.S. Consumer Product Safety Commission voted to revoke the Commission's rule on the interpretation of "unblockable drain," as set forth in the Virginia Graeme Baker Pool and Spa Safety Act ("VGB Act" or "the Act"). In taking this action, the Commission has now implemented the law as I believe Congress and the advocates who have lost their young children intended.

The VGB Act was passed into law by Congress in 2007. The VGB Act is intended to create layers of protection and barriers to prevent the drowning, drain entrapment, and evisceration of victims like Virginia Graeme Baker, Abigail Taylor, and Zachary Cohn, three children who died in tragic, yet entirely preventable ways.

The VGB Act requires each public pool and spa in the United States to be equipped with an anti-entrapment drain cover. In addition, each public pool and spa in the United States with a single main drain, *other than an unblockable drain*, must be equipped with one or more of the following secondary devices or backup systems: an automatic shut-off system, a gravity drainage system, a Safety Vacuum Release System, or a suction-limiting vent system. Section 1403(7) of the Act defines an unblockable drain as "a drain of any size or shape that a human body cannot sufficiently block to create a suction entrapment hazard." The presence of an unblockable drain removes the requirement for a secondary backup system.

On April 6, 2010, a majority of my colleagues voted to interpret the VGB Act's definition of "unblockable drain" to include the installation of an "unblockable drain cover" over a small, blockable, drain suction outlet; thus eliminating the requirement of a secondary backup system. As a result, when an unblockable drain cover is missing or broken, public pools and spas likely would be without a secondary backup system to prevent entrapment hazards.

This interpretive rule was published as a final rule in the *Federal Register* on April 27, 2010. I was in the minority at the time of this vote because I believed that this interpretation failed to follow clear congressional intent in the passage of the VGB Act. In my view, this approach did not follow the intent of the Act, which was to establish the layers of protection that have been long advocated by families of victims and the pool safety community as necessary to prevent deaths and injuries from pool and spa drownings and entrapments.

Based upon further reflection, discussion and analysis, and after having received many letters from the public, families of victims, and members of Congress, my colleague, Commissioner Robert Adler, concluded that he misinterpreted the legal requirements of the VGB Act. His change in position, he advised us, was not based upon a new set of facts, but rather, strictly on a change in his view of the meaning and intent of the law. Accordingly, the Commission held a public meeting and voted today to revoke this interpretive rule.

Indeed, revocation of the interpretation of an "unblockable drain" has been a contentious issue. I would like to set the record straight on a few issues. Some of my colleagues have sought to delay action on revoking the interpretive rule and requested that we seek comment from affected industry before any such revocation is issued. I concur with my colleague, Commissioner Adler, who observed at today's meeting that such action would be seeking the "wrong answers from the wrong people." Because this decision is driven by a change in Commissioner Adler's view of the law's requirements, I do not believe it is necessary to gather additional information unrelated to the legal requirements of the VGB Act

Furthermore, my vote today is consistent with my long held belief that, in light of the intent of the law, it is easily discernable that Congress intended to provide layers of protection, especially when a drain cover is missing or broken. Under these circumstances, it is entirely appropriate for the Commission to revoke the interpretive rule and proceed with implementation of the VGB Act in accordance with the revised legal interpretation.

I share the concerns about the expense to local pools and spas from compliance with the requirements of the VGB Act. Importantly, I want to commend operators of public pools and spas that came into compliance with the Act when it went into effect in December of 2008. The CPSC will continue to work with state and local health departments, as well as the pool industry, to ensure compliance with today's interpretation.

Based on this concern, I am interested in gathering additional information on the ability of the public pools and spas that have already modified their facilities and installed VGB Act-compliant unblockable drain covers based on the Commission's previous interpretation of the Act to come into compliance by May 28, 2012. For this reason, I supported the inclusion of a request for public comment on this issue in the Commission's Notice of Revocation. I encourage interested stakeholders to submit comments during the 60-day comment period to let us know of the successes, as well as challenges, facing those who have installed VGB Act-compliant unblockable drain covers to come into compliance with the requirements of the VGB Act by May 28, 2012.

Although the number of fatalities associated with these hazards is not extensive, the risks of tragic deaths and gruesome injuries involved with noncompliant pools and spas are real. Congress fully understood this when drafting the VGB Act and intended to put an end to these entirely preventable deaths and injuries. I am very pleased to report that there have been no deaths involving the entrapment of children on pool or spa drains since 2009.

Unfortunately, the Commission continues to receive reports of drain entrapment incidents. As recently as three months ago, a four-year-old boy in a wading pool was severely bruised in his rectal area after becoming entrapped on a drain that lacked a cover. This incident and past incidents like it show that drain covers come off, creating exactly the types of serious entrapment hazards that Congress intended for secondary backup systems to prevent.

Seven-year-old Virginia Graeme Baker became entrapped by a hot tub drain. She was unable to free herself, efforts by her mother to pull her from the drain were futile and tragically, she died from drowning. Six-year-old Zachary Cohn lost his life when a drain cover came loose, while seven-year-old Abigail Taylor lost her life after suffering a severe evisceration injury on a drain with a missing cover.[1] I have attached to my statement, letters recently sent to the Commission by Nancy Baker, Karen and Brian Cohn, and Scott and Katey Taylor, to allow their voices to be heard on the importance of the decision we have made today to revoke the previous interpretive rule. Above all, we must not forget Virginia Graeme Baker, for whom this law has been named, nor can we overlook the circumstances of her death, and the deaths of other children, such as Zachary Cohn and Abigail Taylor, whose lives were senselessly cut short. I extend my heartfelt thanks to the families of the victims of entrapment and evisceration incidents and commend them for their tireless advocacy to ensure that no family experiences the pain they have suffered.

I strongly believe in the importance of the agency's efforts to prevent these types of tragedies and under my direction, the Commission will continue to promote its "Pool Safely" education campaign and will work to effectively implement the VGB Act with the goal of preventing any future deaths and eliminating pool and spa entrapment hazards.

[1] http://www.youtube.com/watch?v=Je293ebR5Bg

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STATEMENT OF COMMISSIONER NANCY NORD ON THE REVOCATION OF THE INTERPRETATION OF THE TERM "UNBLOCKABLE DRAIN" UNDER THE VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT

September 28, 2011

In April 2010, by a vote of three to two and after much public input, the Consumer Product Safety Commission (Commission) decided that a single main drain, with a properly-installed unblockable drain cover, was "unblockable" within the meaning of the Virginia Graeme Baker Pool and Spa Safety Act, Pub. L. 110-140 § 1403(7). *See* Virginia Graeme Baker Pool and Spa Safety Act: Interpretation of Unblockable Drain, 75 Fed. Reg. 21,985 (Apr. 27, 2010). The Commission has now revoked its interpretation of the term "unblockable drain." In revoking this interpretation, the Commission goes beyond mere revocation: it directs enforcement staff to deem as noncompliant any pool that complied with the former interpretation but lacks a second device or system to prevent entrapment. Because this reinterpretation violates basic principles of rulemaking procedures, imposes large costs on pool operators, and—most importantly—detracts from the safety of swimmers, I voted against it.

Procedural defects

Though the Commission styles its action as a revocation, it goes beyond mere revocation by (1) announcing that the former interpretation was wrong, (2) directing enforcement against those who complied with the old interpretation if they do not add the secondary system, and (3) functionally acknowledging the substantive effect of its action by staying enforcement until May 28, 2012. These aspects convert the revocation from an agency's interpretive posture—lacking any substantive import—into a substantive rule that triggers the notice and comment provisions of the Administrative Procedure Act, Pub. L. 79-404. Contrary to the assertions of some of my colleagues, we were required to provide the public with notice and an opportunity to comment on this action before taking it.

In going beyond revocation to establish a new interpretation and direct enforcement of it, we have in effect taken away an exemption without providing affected parties the opportunity to explain how the change will affect them. We have not given an adequate opportunity to states, cities, non-profit organizations (like universities), or private pool operators to explain the safety trade-off that necessarily follows from this change.

It is particularly troubling that when asked to seek information from states about their reliance on our earlier interpretation, the Commission's management delayed responding to the request and then rejected it, because there was not time to get sufficient information and that

information would not affect the vote. We have received a large volume of letters, emails, and other communications triggered, in part, by my subsequent contact with various state officials. Most of these communications are critical of both the timing and the substance of the reinterpretation. This strongly suggests that a full round of notice-and-comment rulemaking would have been productive.

The defects in this process, should it be challenged in court, deprive the Commission of any deference that it might otherwise have received before this interpretation was revoked. It is troubling that the Commission is risking its reputation and legal deference by acting so precipitously.

Costs

More than our own reputation, the Commission should be concerned about the heavy costs this revocation will inflict on the states, cities, and other public and private pool operators who relied on our interpretation. We have heard from numerous officials and professionals about the costs they have already incurred in installing unblockable pool drains. For example, 1,000 of Minnesota's 4,000 pools have installed unblockable drain covers. Nebraska and Illinois's pool regulators have likewise implemented the unblockable–drain- cover requirement. Other states are in the same situation. By changing its mind now, the Commission is inflicting greater burdens on the very parties it should be rewarding—those who have acted to augment pool safety in line with our guidance.

By imposing this now, the Commission is burdening already tight (and often already spent) budgets at the time that pool operators can least afford it. Indeed, by imposing these heavy costs, one can foresee more pool closings, and indeed we may drive swimming from safe pools (with lifeguards and properly-trained personnel) to less safe pools (those that ignore safety requirements and continue operating) and un-guarded bodies of water.

Safety

Finally—and mostly importantly—it is troubling that the Commission is taking what appears to be the less safe course. Even if the procedural defects and heavy costs of this action are not enough to convince the Commission to take a more deliberate course, the safety ramifications should be. Unblockable drains are a safe option. There are no incidents of anyone becoming entrapped at pools that complied with our former interpretation. Moreover, unblockable drains are simple, and unlike any other system, they protect against all five forms of entrapment (body entrapment, limb entrapment, evisceration from sitting on a drain, hair entrapment, and mechanical-related entrapment). This is the message that the Commission received from staff the first time we considered this issue, and the Commission has heard much more of the same in this round.

But under the new interpretation, pool operators may have to turn to the suction vacuum release system (SVRS). Though staff has not had the opportunity to conduct a thorough safety review of SVRS, we have heard substantial concerns about the system. For example, even if the system is working, there are reports that it can be troublesome and prompt pool operators to shut the system off rather than interrupt pool usage. The Commission's staff acknowledges that there are industry concerns about SVRS, and state officials have expressed doubt that SVRS

installations will be operational long term. After all, the main device in the system is often located in a mechanical room subject to substantial corrosion.

Even determining the effectiveness of SVRS is open to question. One state specifically rejected requiring SVRS installations because it could not identify a method for determining whether the system was operational or effective. Compare to the unblockable drain, whose presence is easy to identify and which—when properly installed—cannot be removed without tools. In short, an electro-mechanical system that has to be reset often is much less reliable than a properly-installed unblockable drain cover.

Conclusion

The Commission's about-face is inexplicable in light of these procedural defects, unnecessary costs, and safety concerns. One can only hope that the dangers we have heard about are not borne out. Having failed to ask the appropriate questions beforehand, we have to rely on hope, not facts.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
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COMMISSIONER ANNE M. NORTHUP

STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE REVOCATION OF THE INTERPRETATION OF THE TERM "UNBLOCKABLE DRAIN" UNDER THE VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT

October 4, 2011

The Commission's September 28, 2011, revocation of its prior interpretation of the Virginia Graeme Baker Pool and Spa Safety Act ("VGB Act" or "Act") § 1404(c)(1)(A)(ii) term "unblockable drain" was procedurally flawed and substantively indefensible. By eliminating an exemption and providing the Commission with power to enforce a new rule without providing notice and an opportunity for public comment, it likely violates the Administrative Procedure Act. It also replaces a rule that CPSC technical experts concluded would provide the best protection against drain entrapment with one that will leave children at greater risk of drowning.

The Original Interpretation Was Issued After Public Comment and Based on the Recommendation of Commission Technical Experts.

VGB Act § 1404(c)(1)(A)(ii) requires public pools and spas with a single main drain of a size small enough to create a life-threatening suction by being completely covered by a human body (known as a "blockable drain"), to be equipped with a device or system to prevent entrapment. These systems are often referred to as "backup systems". "Unblockable drains" were exempt from the requirement to have one of these back-up systems because their size and/or configuration prevented a deadly suction from ever occurring. Although five systems/devices are enumerated in the Act as permissible backup systems, the Commission has long recognized the safety vacuum release system (SVRS) to be the most commercially viable and therefore most likely to be used by pool owners.

In April 2010, following extensive input from the public, the Commission issued a final interpretive rule that defined "unblockable drain" as a suction outlet **and all of its components**, including the cover/grate, that cannot be shadowed by a "Body Blocking Element" intended as a proxy for a human body. As a result, pools and spas with a single main drain equipped with an appropriately sized "unblockable drain cover" were not required also to be equipped with an SVRS or other back-up system.

The Commission adopted this definition based on the recommendation of its staff of career technical experts. In their opinion, an unblockable drain cover is superior to an SVRS because it *prevents* entrapment. An SVRS, in contrast, *stops* an entrapment

incident after it has already occurred, and does so only after a delay of up to 4 seconds. As a consequence, once an incident resulting in hair entrapment, mechanical (i.e., necklace) entrapment, or evisceration takes place, it is already too late for an SVRS to save a child.

SVRS also have a well deserved reputation for unreliability. Despite the majority's rush to make this change without public input, the Commission received unsolicited letters from pool maintenance companies, who stood to benefit financially by this change, attesting to problems with SVRS and predicting that most of these systems would soon be disabled by pool owners because of the problems they create. Directors of parks and recreation departments from all over the country also wrote advising us that unblockable drain covers are superior to SVRS, from a safety perspective. As these letters explain and Commission staff has confirmed, SVRS are electro-mechanical devices prone to malfunction by stopping pool pumps without cause or simply shutting down completely. The former problem interferes with the essential mixing of sanitation chemicals in pool water, leading to potentially life threatening bacterial outbreaks. When an SVRS ceases operating completely, a blockable drain becomes an inescapable death trap.

In April 2010, the Commission followed the expert advice of its technical staff. This was done only after also considering the contrary views presented by SVRS and other back-up system manufacturers who wanted the Commission to mandate the use of their product, pool safety advocates, many of whom were influenced and mobilized by SVRS manufacturers, and a few members of Congress who had been lobbied by the back-up system industry. In particular, the Pool Safety Council (PSC), made up largely of the vacuum release industry, spent $100,000 on lobbying expenses in 2009. PSC is led by Paul Pennington, President and primary owner of Vac-Alert, one of the least expensive and, according to letters to the Commission, least reliable backup systems. In fact, Paul Pennington testified before the Commission on April 5, 2011, that he helped Representative Debbie Wasserman Schultz to draft the original legislation that became the VGB Act. These parties argued that an unblockable drain cover provides unreliable protection due to the risk of dislodgment and does not provide the "layers of protection" required by the VGB Act. Nonetheless, a majority of Commissioners recognized that the VGB Act's overriding intent to prevent child drowning was best served by reasonably and lawfully interpreting "unblockable drain" to include these newly invented systems that cover a blockable drain and convert it to an unblockable drain. The wisdom of their judgment is confirmed by the fact that, since that time, there has not been a single entrapment incident in a pool equipped with a compliant unblockable drain cover.

The Commission's Revocation of Its Prior Interpretation Is Procedurally and Substantively Indefensible.

I was therefore shocked and surprised when late last month, Commissioner Bob Adler, who had previously voted with the majority, placed on the agenda a vote to revoke our original interpretation of "unblockable drain" to no longer permit consideration of these new covers. My surprise turned to dismay when I learned that Commissioner Adler and his two Democrat colleagues intended to do so without notice to the public or any

opportunity for public comment, and without a public briefing before the vote. They even refused my colleague Nancy Nord's request to at least notify, prior to the vote, the state agencies responsible for pool administration and safety and obtain their input. And now that the majority has rushed through this significant change, the Chair has taken the virtually unprecedented step of choosing not to issue a press release even informing the public of the Commission's decision.

Without Public Comment, the Revocation May Not Withstand Judicial Review.

The Commission's failure to provide an opportunity for notice and public comment before revoking its prior interpretation of "unblockable drain" almost certainly violates the APA, and without doubt will entitle the Commission's new construction to no deference in court. Under the APA, a legislative rule must proceed through notice and comment rulemaking; an interpretive rule need not. Although the majority styles its action as the mere revocation of an interpretive rule, much more is at stake for the pool and spa owners impacted by its decision. The revocation eliminates the exemption from the back-up system requirement granted to single unblockable drains equipped with an unblockable drain cover. Moreover, the Commission's *Federal Register* notice announcing the change clearly signals its intent to enforce the new rule against pool and spa owners who have installed unblockable drain covers but do not also have an additional entrapment prevention device/system enumerated in the Act. Under these circumstances, a court could well deem the revocation a legislative rule and find that the failure to undertake notice and comment violated the APA. *See Jerri's Ceramic Arts, Inc. v. CPSC*, 874 F.2d 205, 208 (1989).[1] At the very least, the revocation is a reinterpretation of statutory language without a rational justification that would be entitled to little, if any, deference. *See Watt v. Alaska*, 451 U.S. 259, 273 (1981) (holding that an agency interpretation that conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view).

There Is No Rational Reason for the Majority's Action.

I can only speculate as to why the new majority on this issue wished to cloak their decision in secrecy. One reason may be that there is no reasonable rationale to support it. Commissioner Adler claims that his mind was changed by letters from interested citizens and members of Congress, and by private meetings he held with Representative Debbie

[1] In *Jerri's Ceramic Arts*, the court held that a "Statement of Interpretation" expanding the small parts prohibition to cover fabrics in addition to hard components was actually a substantive rule change that required notice and comment rulemaking. The court explained that interpretive rules simply state what the administrative agency thinks a statute means, and only "reminds" affected parties of existing duties, whereas substantive rules impose new rights or duties. It concluded that adding fabric to the small parts prohibition was substantive because it had "the clear intent of eliminating a former exemption and providing the Commission with the power to enforce violations of a new rule.' 874 F.2d at 208. Similarly, removal of the option to use a drain cover to create an unblockable drain eliminates an exemption from the back-up system requirement, and the *Federal Register* notice announcing the change informs pool owners that pools with only an unblockable drain cover and no back-up system will henceforth be considered to be in violation of the VGB Act.

Wasserman Schultz. But in none of these letters or meetings was any *new* evidence or argument presented that was not already considered and rejected by Commission staff as outweighed by paramount safety considerations. And while I am heartbroken for parents who lost their children to drain entrapment incidents, this Commission should not make decisions based on the *ex parte* views of a single interest group or the self-serving *post hoc* rationales of a handful of the hundreds of members of Congress whose votes pass a bill. Our job is to consider all of the relevant evidence in light of the expert advice of the career professionals who have dedicated their lives to consumer safety, not to swing haphazardly in the strongest blowing emotional breeze of the moment.

Specifically, Representative Debbie Wasserman Schultz's view of what the legislation means is irrelevant after its passage. No court would give weight to her preferred interpretation of a bill that was passed by 435 Members of the House and 100 Members of the Senate and signed by the President. No small group, even the authors, can unilaterally decide that the legislation means only what they intended when they voted for it. Once it is in the hands of the Executive agency, Members of Congress can again influence it only by further refinements of the law passed by all the Members of Congress. Representative Wasserman Schultz's effort to protect children in swimming pools is admirable, but it is the CPSC's responsibility to interpret and administer the law based on our technical expertise and experience in safety. It is doubtful the Rep. Wasserman Shultz heard from the wide array of safety experts that contacted the Commission, or has the technical expertise of our staff.

Mr. Adler also argues that no public input is necessary because his reversal is neither policy nor evidence based, but merely a change in his interpretation of the legislation. There is a word for statutory language that is so susceptible to alternate construction that even a single lawyer cannot make-up his mind about its meaning. And when statutory language is ambiguous, it should be informed by the underlying intent of the law. The VGB Act was passed in order to reduce the risk of children drowning due to entrapment in pool drains. The Commission's reconstruction of "unblockable drain" makes that tragic outcome more likely.

Moreover, Mr. Adler's claimed disavowal of the need for public input or consideration of factors beyond his personal legal views is belied by his own statement on the revocation. After recounting the unsolicited letters, almost all of which are identical form letters, and private meetings that lead him to reconsider his views, Mr. Adler sanctimoniously proclaims that "as a policy maker sworn to uphold the law, I believe it is my duty to listen to all points of view and when a persuasive case is made to reconsider my position. So in response to these requests, I took it upon myself to reexamine both the safety considerations associated with `unblockable drain covers' and the legislative history of the VGBA."

But of course, by refusing public comment, Mr. Adler ensures that "all points of view" will not be heard – only those of the activists whose form letters he reads and the well placed politicians that he deigns to meet in private. And as for "safety considerations", Mr. Adler's position is incomprehensible. He is not interested in data showing the safety

impact of the original interpretation or input from knowledgeable sources about the current safety features of unblockable drain covers. Instead, he appears to have relied on information obtained through public input solicited in 2009 and the one-sided viewpoints presented to him since. Mr. Adler is entitled to change his position for any reason he likes, but the closed procedure leading to this change dispels any pretense of open mindedness.

Particular emphasis has been placed on the possibility that unblockable drain covers can be removed or damaged. Commission experts were aware of this characteristic of unblockable drain covers and still judged them to provide greater protection than SVRS. Their view of the relative safety of the two alternatives has not changed. Moreover, as the Commission learned from the many unsolicited letters responding to the *Federal Register* notice announcing the revocation vote, advances in drain cover design, construction and installation have substantially reduced, and could completely eliminate, the risk of cover dislodgment. It is in order to consider such new and unknown evidence that notice and comment are required before the promulgation of regulations changing enforceable obligations.

Another red herring is the claim that requiring an SVRS or other entrapment prevention device will ensure the "layers of protection" required by the VGB Act. Revoking the interpretation of "unblockable drain" that permitted the use of an unblockable drain cover did not *add* any protection. Public pools are *not* now required to have an unblockable drain cover *and* a back-up system. With the new interpretation, they are instead likely to have a "blockable drain" with an SVRS or other back-up system. The sophisticated unblockable drain covers are expensive and their availability may disappear altogether. That means a superior form of protection has been exchanged for an inferior one, not that a new layer of protection has been added.

In contrast to the weak arguments supporting the new Majority's revocation, there are compelling reasons to retain the Commission's original interpretation of "unblockable drain." The fact that unblockable drain covers would save lives that may be lost due to an SVRS should alone have been enough to stop the Majority's action. But that is not where the adverse safety consequences end. We have learned from numerous municipal park and recreation departments, as well as nonprofit groups created to promote aquatic recreation safety, that many state, municipal and other public pool operators will be unable to afford this new and expensive mandate coming shortly on the heels of the expensive work required to come into compliance with the Commission's original interpretation. As a result, many public pools will open late or close, with the brunt of the losses suffered by economically-disadvantaged regions. There have been no injuries associated with compliant pool drains since 2008. But there were over 1500 drownings just between May 1 and August 26, 2011. Children cannot learn to swim in closed pools, and economically disadvantaged children are at the greatest risk of drowning.

The Majority Rejected My Reasonable Compromise

Recognizing that a majority of Commissioners intended to push through this change hastily and without reasoned consideration of all the relevant evidence, I offered an alternative. In lieu of voting to revoke the Commission's prior interpretation of "unblockable drain", I initially proposed that the Commission:

> Direct Commission staff to prepare a notice of proposed rulemaking to reinterpret the term "unblockable drain" to no longer permit the installation of an unblockable drain cover to satisfy the definition of "unblockable drain." The notice should invite public comment regarding (1) whether the proposed reinterpretation of "unblockable drain" is the correct statutory interpretation of the term; (2) costs incurred by stakeholders to comply with the original interpretation of the term (including the number of pools modified or constructed in compliance with the original interpretation), and the estimated costs of compliance with our proposed new interpretation of the term; (3) the safety consequences of reinterpreting the term as proposed, including a comparative analysis of the safety benefits of installing an unblockable drain cover as compared to a device or system as defined in VGB Act § 1404(c)(1)(A)(ii); (4) whether an unblockable drain cover meeting any specifications with regard to materials, the number of screws used to affix it to the drain, any other method of affixing it to the drain, or any other characteristic of the drain or its installation, should be deemed an "Other system" under VGB Act §1404(c)(1)(A)(ii)(VI); (5) whether spas and pools that have already complied with the VGB Act by installing an unblockable drain cover in reliance on the Commission's original interpretation should be exempted from any new compliance requirements flowing from our reinterpretation of the term; and (6) any other considerations relevant to our determination whether to reinterpret the term as proposed.

The Majority voted down my proposal to obtain public comment. In her statement on the Commission's decision, the Chair characterized my alternative as seeking "to delay action on revoking the interpretive rule and request[ing] that we seek comment from affected industry before any such revocation is issued." This distortion of my proposal and its intent fits a pattern that has become all too familiar in the Chair's public comments. Suggestions that the Commission should not act precipitously without considering public input is derided as "delay," and any views potentially contrary to hers must emanate from "industry." The talismanic recitation of clichéd political canards is no substitute for the truth, and the underlying claims are, in fact, demonstrably false. The change the Commission adopted takes affect in May 2012. I amended my proposal at the decisional meeting to permit the effective date to remain the same for whatever final determination the Commission made after a Notice and Comment period allowing for public input. This proposal, which entailed no delay to the Majority's rush to act, was also voted down. Moreover, as is clear from the proposal itself and the unsolicited public input we have already received, the position of "industry" was not my principal concern. I also sought input from the public entities who will bear the cost of this change and from aquatic safety experts. It is ironic that the Chair would accuse me of catering to industry,

when the uncritical adoption of one industry representative's self serving view point contributed to a new majority being formed around the Chair's position.

But in any event, the views of industry are relevant and important, especially when the issue is whether the stated justification of dislodgment risk can be addressed in a way that causes less disruption and unnecessary expense than the Majority's decision. It is because too many regulatory agencies believe seeking input from the industries they regulate is a bothersome waste of time that this country's economy is strangled by over regulation. The Majority's decision to impose on regulated public entities a new enforceable burden that the Commission's technical experts have concluded will undermine pool safety, without first seeking public comment, sets a new standard of irresponsible governance.

I hope that all interested members of the public will respond to the Majority's request for narrowly tailored comments addressed to the effective date of the revocation, by instead responding to the issues raised in my proposed substitute action. While we are powerless to stop the Majority, we can at least create a record upon which a more rational future Commission may act.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER ROBERT S. ADLER ON THE REVOCATION OF THE INTERPRETATION OF THE TERM "UNBLOCKABLE DRAIN" UNDER THE VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT

September 28, 2011

On December 19, 2007, Congress enacted the Virginia Graeme Baker Pool and Spa Safety Act [1] ("VGBA" or "the Act"). The purpose of the Act is to prevent child drowning and entrapment in swimming pools and spas. Among other things, the Act imposes requirements for secondary anti-entrapment devices on most public pools and spas. In April 2010, I cast a vote interpreting the term "unblockable drain" as permitting public pools and spas with an "unblockable drain cover" to comply with the Act without the necessity of installing a secondary anti-entrapment device. Today, after long and painful consideration, I have decided to join with my colleagues in revoking the previous interpretation of the term "unblockable drain." As a result of our vote today, the Commission will not allow a removable "unblockable" drain cover, by itself, to render a small, single main drain unblockable in public pools covered by the Act.

Previous Vote Interpreting the Term "Unblockable Drain"

Under the VGBA, an "unblockable drain" is defined as a "drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard." In preparing for the vote in April 2010, I found no specific guidance either in the statutory language of the VGBA or its legislative history indicating whether Congress intended that drains with "unblockable drain covers" could be considered "unblockable drains." So, when I interpreted the term, I found myself drawn to the definition that made the most sense to me at the time – one that allowed the use of a large cover that I understood to prevent the most common types of pool entrapment.[2]

After the April 2010 vote, however, I received numerous letters from citizens and members of Congress, including those who were intimately involved in drafting the

[1] P.L. 110-140, Title XIV, 15 U.S.C. § 8001, et. seq.
[2] For a comprehensive explanation of my previous vote see my separate statement at http://www.cpsc.gov/pr/adler03032010.pdf.

statute, who strongly disagreed with my interpretation of the statute. To a person, the members of Congress that wrote insisted that they did not intend that small, single main drains with "unblockable drain covers" be considered "unblockable drains." In addition, I met twice with Representative Debbie Wassermann Schultz, who introduced the bill, and was unquestionably one of the members of Congress most involved in passing the VGBA, who reiterated this position. Further, every one of the citizens that wrote expressed serious objection to an interpretation of the VGBA that allowed for no backup system for a single main drain that could be obstructed.

I understand that consumers and industry alike need stability in the marketplace. They look to the decisions of regulators and rely on those decisions when purchasing, using, and manufacturing consumer products. In fact, I hesitated at first to reexamine my previous vote for this very reason. However, as a policy maker sworn to uphold the law, I believe it is my duty to listen to all points of view and when a persuasive case is made to reconsider my previous decisions. So, in response to these requests, I took it upon myself to reexamine both the safety considerations associated with "unblockable drain covers" and the legislative history of the VGBA.

Competing Policy Considerations

I have spent many hours comparing the safety of large "unblockable drain covers" used on small, single main drains to the safety of smaller drain covers with a secondary anti-entrapment device. When I cast my vote in April 2010, I believed that large "unblockable drain covers" seemed to provide a greater measure of safety than smaller drain covers with secondary anti-entrapment systems. I reached that conclusion based on my understanding that a properly installed "unblockable drain cover" always protected swimmers from the five entrapment hazards identified by CPSC better than a VGBA compliant cover plus a back-up system. Because all drain covers come off, it is no longer my conclusion that in all circumstances this is the case.

Further, at that time, I concluded that if required to install a secondary system, despite the statute's allowance for five different back-up systems (Safety vacuum release system (SVRS), suction-limiting vent system, gravity drainage system, automatic pump shut-off system, or drain disablement) the vast majority of public pools were likely to opt for a small VGBA compliant cover and an anti-entrapment device known as an SVRS, which is among the least expensive of the back-up systems.[3] My concerns have not necessarily

[3] An SVRS operates by shutting down a pool's pump if the water flow through a drain drops significantly due to a blockage in the drain. Generally speaking, automatic pump shut-off systems appear to be similarly priced to an SVRS, but their use appears to be less wide spread.

changed because the usefulness of an SVRS is essentially limited to those instances in which a swimmer's body or limb fully blocks a drain.[4]

What makes the policy call so difficult, however, is the fact that an "unblockable drain cover" can operate only if it stays on the drain. In other words, if a drain cover is improperly installed or removed and there is no secondary system then swimmers would be at risk of entrapment in the drain below.[5]

Of course, as critics of my previous vote have stated, all drain covers come off, at a minimum, for seasonal pool maintenance and repairs or to be replaced – a point I freely concede.[6] On the other hand, some backup systems offer protection only against three of the five entrapment hazards. So the question remains as to which is the safer approach. The best I can say is that one can hypothesize various accident scenarios in which one approach is safer than the other depending on the circumstances one assumes to be in play. But neither approach is so clearly superior that all reasonable minds would agree that one is always safer than the other.

Congressional Intent

I turn now to what is the touchstone for a policy maker like me, namely, what did Congress – the folks who wrote the law – intend with respect to the implementation of the VGBA. And although neither the statutory language nor the legislative history provide clear guidance, my discussions with congressional staff and members directly involved in drafting the statute have clearly persuaded me that my previous interpretation was not what they intended. Therefore, the question arises whether I can or should reinterpret the law based on the post-enactment declarations by members of Congress. Based on my understanding of the law, I believe that I can do so. I am certainly aware that post-enactment congressional declarations are not necessarily good guides to legislative intent. To say that they are not necessarily good guides is not to say that they are never helpful. In this case, given the consistency and intensity of the views expressed, I find them to be extremely relevant.

As a matter of law, I see no impediment to my relying on such statements where they have persuaded me that my interpretation, reasonable to me at the time, was in fact inconsistent with what many members of Congress intended at the time of passage.

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[4] CPSC staff have identified five types of entrapment risks: (i) full body entrapment, (ii) hair entrapment, (iii) evisceration from sitting on a drain, (iv) limb entrapment, and (v) mechanical entrapment (e.g., jewelry or necklaces caught in a drain).

[5] The ASME/ANSI standard requires drain covers to be firmly and strongly attached using corrosion resistant screws that are securely inserted and designed to avoid threading, greatly reducing the chance of a cover coming off inadvertently or accidently.

[6] Another area where data is lacking is how many reported incidents of entrapment were related to covers being removed for pool maintenance or repair as opposed to drain cover failure. Relatedly,I would like to see VGBA compliant drain covers that do not need to be removed for pool maintenance or repair.

Again, based on the communications I received[7] and the discussions I had with Representative Wasserman Schultz and others[8], I have been persuaded that my interpretation is not what was intended when the law was written.[9]

Revoking the Previous Commission Interpretation of the Term "Unblockable Drain"

Given the close call between the safety implications and/or benefits of the two interpretations and my belief that my previous interpretation is contrary to congressional intent, I have cast my vote today to revoke the Commission's previous definition of the term "unblockable drain." As a result of today's vote, it is my understanding that the Commission's Staff Technical Guidance, dated June 2008, will be updated to note that "placing a removable unblockable drain cover over a blockable drain shall not constitute an unblockable drain." The revised Guidance will state that a drain is "unblockable" if a suction outlet, including the sump, has a perforated (open) area that cannot be shadowed by the area of the 18" x 23" Body Blocking Element of ASME/ANSI A112.19.8-2007 and that the rated flow through any portion of the remaining open area (beyond the shadowed portion) cannot create a suction force in excess of the removal force values in Table 1 of that Standard.

I am aware that some owners of public pools may have purchased and installed "unblockable drain covers."[10] It would be a fine thing if I, as a policy maker, could require both "unblockable drain covers" and secondary anti-entrapment systems. In that way, safety would be clearly be enhanced. Alas, I cannot do that. But for those who did install "unblockable drain covers," it is my hope that they will continue to use their

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[7] See e.g., September 27, 2011 Letter from Representatives Waxman, Butterfield, Larson, Wasserman-Schultz, and Himes and Senators Rockefeller, Pryor, Durbin, Nelson, and Blumenthal. See also September 27, 2011 Letter to Chairman Tenenbaum from Representative Wolf. All related letters are on file with the Commission Secretary.

[8] To review the various meetings that I have held on this issue see my meeting logs at
http://www.cpsc.gov/library/foia/meetings/mtg10/poolSafetyAdler.pdf;
http://www.cpsc.gov/library/foia/meetings/mtg10/apspAdler.pdf;
http://www.cpsc.gov/library/foia/meetings/mtg10/apspAdlerPhone.pdf;
http://www.cpsc.gov/library/foia/meetings/mtg10/ZACAdler.pdf;
http://www.cpsc.gov/library/foia/meetings/mtg10/nsfAdler.pdf;
http://www.cpsc.gov/library/foia/meetings/mtg10/adler09232010a.pdf; and
http://www.cpsc.gov/library/foia/meetings/mtg11/adler10142010.pdf.

[9] I have also been told that secondary systems are called for because of the Act's focus on "layers of protection" to prevent drownings and pool entrapments. As a public health official, I find this concept to be appealing, but find it extremely puzzling that the only mention of it is in section 1402(4) of the Act, which on its face seems to apply only to residential swimming pools, not public pools. Why the Act seems to adopt such a narrow scope is unclear.

[10] My understanding of the anecdotal data is that the number is relatively small and certainly smaller than I had anticipated. This may be because as it turns out, the large "unblockable drain covers" typically exceed the cost of installing an SVRS system, so financial considerations probably weigh against the installation of many unblockable drain covers as a way of complying with VGBA.

"unblockable drain covers" in conjunction with the back-up systems that they will need to install.[11]

I hope to see the day when technology moves us even further forward in terms of safety. The VGBA explicitly allows for the Commission to determine that other secondary systems are equally effective as, or better than the five systems outlined. For example, I would like to see someone market a drain cover with a "dead-man switch" that shuts off the pool pump immediately upon the removal of the drain cover. Until that time, however, in order to give public pool owners sufficient time to make any necessary changes to their pools, I voted for a compliance date of May 28, 2012. For those public pool owners affected by our vote today, the Commission will not begin enforcing this change in our interpretation until the start of the pool season next year. In addition, I offered an amendment that was adopted unanimously by my colleagues to solicit "written comments regarding the ability of those who have installed VGBA compliant unblockable drain covers as described at 16 CFR 1450.2(b) to come into compliance with our revocation by May 28, 2012." I look forward to receiving those comments on this important issue.

[11] To be clear, nothing in the Commission's action today should affect the use of a properly installed, properly rated VGBA compliant drain cover – large or small. The action only speaks to whether a back-up system is needed.