



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**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 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

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.

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 effect 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.