



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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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.