U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chairman Inez M. Tenenbaum
Commissioner Thomas H. Moore
Commissioner Nancy A. Nord
Commissioner Anne M. Northup
Commissioner Robert S. Adler

ITEM:

Virginia Graeme Baker Pool and Spa Safety Act Briefing Package
(Briefing package dated February 4, 2010 with ballot vote document dated February 22, 2010)

DECISION:

The Commission voted as follows for each item regarding the administration and enforcement of the Virginia Graeme Baker Pool and Safety Act.

A. (3-2) Instruct staff to draft a proposed interpretive rule on unblockable drain covers consistent with the definition in the staff memorandum. Commissioners Nord, Adler and Northup voted to take this action. Chairman Tenenbaum and Commissioner Moore voted to not instruct staff to draft an interpretive rule interpreting unblockable drain covers.
B. (4-1) Approve the publication of a proposed interpretive rule in the FR interpreting "public accommodations facility," as drafted. Chairman Tenenbaum and Commissioners Moore, Nord and Northup voted to approve as drafted. Commissioner Adler voted to approve the publication with changes.
C. (5-0) Approve the issuance of the Technical Guidance with changes.
D. (5-0) Approve the issuance of the Model Legislation with changes.
E. (5-0) Approve the issuance of the Funding Opportunity Announcement as drafted.

Chairman Tenenbaum and Commissioners Moore, Adler and Northup issued the attached statements with their votes.

For the Commission:

Todd A. Stevenson
Secretary

* Ballot vote due March 1, 2010

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

CHAIRMAN INEZ M. TENENBAUM

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE COMMISSION DECISION REGARDING THE USE OF UNBLOCKABLE DRAIN COVERS AND COMPLIANCE WITH THE VIRGINIA GRAEME BAKER POOL & SPA SAFETY ACT

Each year too many families face senseless tragedy in the drowning of a child. The Virginia Graeme Baker Pool and Spa Safety Act (VGB Act) is intended to create layers of protection and barriers to prevent drowning, drain entrapments and evisceration like those suffered by Virginia Graeme Baker, Zachery Cohn and Abigail Taylor. Today I voted on the issue of unblockable drain covers in a manner that I believe embodies the true spirit and purpose of the VGB Act. I believe that children should be afforded the maximum level of protection envisioned by this Act at all times, especially when a drain cover is missing or broken.

The VGB Act requires that each public pool and spa in the United States be equipped with an anti-entrapment drain cover.[i] 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 at least one or more of the following devices or systems: an automatic shut-off system, a gravity drainage system, a Safety Vacuum Release System or a suction-limiting vent system.[ii] 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."[iii] The issue presented to the Commission is whether the placement of an unblockable drain cover on a blockable sump creates an "unblockable drain" such that the safety systems listed above are not required.

While I recognize that unblockable anti-entrapment drain covers are an advancement in pool technology and have the potential to provide protection from all five common pool entrapment hazards, I must also recognize that this degree of protection is only afforded if the unblockable drain cover remains properly in place. At our public hearing on this issue, I was surprised to learn how many pool and spa drain covers often are removed for seasonal maintenance or may break due to age or deterioration. I have spoken out publicly about public pools and spas being out of compliance if the drain cover is missing or broken and stated that the facility should be closed until the drain cover is replaced because of the entrapment risks missing or broken drain covers pose to swimmers.

The use of an unblockable drain cover by itself does not address the entrapment risks posed by a missing or broken drain cover to the same degree as the installation of the safety systems expressly provided for in the VGB Act. Indeed, some states such as Washington have expressly stated that: "[n]ational experience with entrapment events all too frequently identify drain cover or fastener fatigue resulting in a broken or missing cover as the major contributor to entrapment-related injury and death. Relying on a cover to provide the sole measure of entrapment prevention, even one of 'unblockable' design meeting the *ASME A112.19.8*-2007 standard, *presents a level of risk that Washington State finds unacceptable*."[iv]

Despite this concern, today the Commission voted to interpret the VGB Act in a manner that allows an "unblockable drain" to be created solely by the installation of a compliant, unblockable sized drain cover. I dissent from this position because I believe that this approach fails to create the layers of protection intended

by the VGB Act, and necessary to prevent deaths and injuries from pool and spa drownings and entrapments. Under today's decision, when an unblockable drain cover is missing or broken, public pools and spas may be without a secondary backup system to prevent body, limb or mechanical entrapment hazards.

In my role as Chairman, I am not willing to gamble the safety of our children in the hope that drain covers throughout the nation that are commonly removed for maintenance always will be reinstalled correctly or that a missing or broken drain cover will be immediately noticed by an observant pool operator who will then shut down the pool before any children are at risk. While I understand that my colleagues have interpreted the VGB Act in a manner that they believe provides an equivalent level of safety, I can only hope that the use of unblockable drain covers without secondary backup systems will exceed all expectations such that the Commission's decision today provides an equivalent degree of protection for our children.

Separate from today's vote, I urge all operators and owners of public pools and spas to ensure that they have properly installed ASME/ANSI A112.19.8-2007 compliant drain covers, no matter the size of the drains, before opening up their facility to the public. As I stated last year, the law is clear and so are the obligations of the industry to comply with the VGB Act. By working together to adhere to the requirements of this child safety law, we can reduce the number of drowning and entrapment tragedies that occur each year.

---

[i] 15 U.S.C. § 8003(c)(1)(A)(i).
[ii] 15 U.S.C. § 8003(c)(1)(A)(ii).
[iii] 15 U.S.C. § 8002(7).
[iv] Wash. State Dept. of Health, Div. of Envtl. Health, "Pool and Main Drain Safety, Guidance for Complying with the New Federal Law," at 9 (Feb. 2009), http://www.doh.wa.gov/ehp/wr/guidance-maindrainlaw.pdf.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF THE HONORABLE THOMAS H. MOORE ON A PROPOSED INTERPRETIVE RULE ON UNBLOCKABLE DRAIN COVERS

March 2, 2010

A major impetus for the Virginia Graeme Baker Pool and Spa Safety Act ("Pool and Spa Act") was, of course, the tragic entrapment death of the young girl for whom the Act was named. The framework for that bill was laid out by this agency in a March 2005 report on entrapment hazards in pools and spas.

The report acknowledged that layers of protection are just as necessary to prevent entrapment situations as they are in preventing drowning deaths: "The approach taken in the guidelines is to present various options to attain 'layers of protection' against entrapment in pools and spas."[1]

Our agency recognized then that pools or spas with single main drains are potentially the most dangerous water environments for children and that even the best drain cover has its limitations. To quote from our report again:

> "Due to the 'human element' involved in the care and maintenance of pools and spas, it is strongly recommended that consideration be given to including an additional and final layer of protection in all pools and spas that use submerged suction outlets, to relieve an entrapping suction force should outlets become blocked or if covers are broken or removed. Options for new construction include, but are not limited to, a properly designed atmospheric vent system, SVRS or other technology. For existing facilities, options include the installation of an SVRS or other technology. This is especially important in wading pools and older pools with single main drains."[2]

I was particularly struck by the role of the 'human element' in pool and spa maintenance as I read the Minnesota Department of Health's report on the disembowelment of 6-year old Abigail Taylor, which occurred in a wading pool at a golf club in 2007.[3] The report found the following poor operational practices:

---

[1] *Guidelines for Entrapment Hazards: Making Pools and Spas Safer*, U.S. Consumer Product Safety Commission, March 2005, page 6.
[2] *Id.*
[3] "Evisceration Incident at a Wading Pool—Executive Summary, Minneapolis Golf Club, St. Louis Park, Minnesota," June 29, 2007.

- The drain cover had been attached using improper fasteners and screws in a worn mounting ring. The screws used to secure the drain cover were not stainless steel, were not the original screws supplied with the drain cover and did not adequately secure the cover to the frame. This allowed the cover to become detached.
- The pool water was cloudy so that the bottom of the pool, including the drain, was not clearly visible. This was evidence of poor maintenance.
- The staff was not adequately trained to respond to unsafe conditions at the pool.

Abigail subsequently died following a triple organ transplant, which would have restored her ability to eat and digest food normally.

While eviscerations are rare (two were reported during 1999-2008), suction or circulation entrapments are more frequent, with 78 reported during the same ten-year period, resulting in 11 deaths. CPSC's count of deaths due to entrapment is most likely an undercount as some deaths that are reported as drowning may have been the result of entrapments that were not reported as such. Most entrapment protection devices are geared toward preventing the more frequent suction or entanglement entrapments.

The 2005 CPSC report goes on to say:

> **"Regardless of the number of outlet drains provided**, because of the shallow depths of wading pools, spas, and hot tubs, and the easy access to their suction outlets, the installation of a safety back-up system that monitors the function of drain outlet/circulation systems and relieves suction forces in the event of entrapment should be **seriously considered**.
>
> For existing pools and spas where water depths are over four feet, a back-up system should be installed where a single drain currently exists, or a drain can become single upon activation of valves or as result of poor maintenance, and rework is not possible. While access to the suction outlets in deeper pools is less likely, the potential for a broken or missing cover(s) and subsequent entrapment still exists."[4]

No matter how good a drain cover is, it only works when it is properly attached. That was the message from our own 2005 report and it is the underlying rationale for the second layer of entrapment device requirements, which are **in addition to** the ASME/ANSI drain cover mandate, in the Pool and Spa Act. Our most recent report on circulation/suction entrapments found that in 37 percent of the incidents where the hazard scenarios could be classified, a broken, missing, removed or disengaged outlet cover was cited as the hazard associated with the death or injury.[5]

---

[4] *Guidelines for Entrapment Hazards*, page 11.

[5] *1999-2008 Reported Circulation/Suction Entrapments Associated with Pools, Spas, and Whirlpool Tubs, 2009 Memorandum*, May 14, 2009.

While I appreciate that installing an unblockable drain **cover** over a single main drain that can be blocked by the human body may be the most cost effective short term "solution" to bring a noncomplying pool into compliance, I do not believe it comports with the intent of the law or with our own public guidance on the subject. There is no cost/benefit analysis requirement in the Pool and Spa Act. As in so many other laws where the primary thrust is to save children's lives, Congress was loath to engage in a weighing of children's lives saved versus the cost of compliance. State and local jurisdictions have been putting additional safety requirements on, or prohibiting the construction of, pools with single main drains for some time. The Pool and Spa Act's grant program also provides incentives for States to eliminate pools with single main drains. Equating an unblockable cover with an unblockable drain strikes me as a step backward as it relies on a drain cover as the sole protection from a single blockable main drain. It is an interpretation that I cannot support.[6]

[6] The Washington State Department of Health has stated in its Guidelines for Regulated Pool Owners, Designers, and Builders dated December 2008: "An unblockable drain consists of an entire unblockable drain outlet, including the cover, sump, frame and fasteners. Placing an unblockable drain cover over a blockable drain sump does not constitute an unblockable drain."

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Separate Statement of Commissioner Robert Adler on the Virginia Graeme Baker Pool and Spa Safety Act

On December 19, 2007, Congress passed 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 anti-entrapment devices on public pools and spas. Today the Commission cast a series of votes on implementing the Act. I wish to discuss my votes on two issues under the Act before the Commission.

May a Complying Drain Cover be Considered an "Unblockable Drain?"

Under the VGBA, each public pool and spa must be equipped with drain covers that comply with ASME/ANSI A112.19.8, which essentially requires that the drain covers be installed in such a manner that they are tightly and permanently affixed. The Act further requires that each public pool or spa in the United States with a single main drain, other than an unblockable drain, shall be equipped, at a minimum, with one or more secondary anti-entrapment devices or systems.[2] Thus, the key issue is whether a compliant drain cover of sufficient dimensions over a single main drain renders it an unblockable drain.

An unblockable drain, as defined in the Act is a "drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard." I think it indisputable that a drain cover of sufficient size that fully complies with the voluntary standard would render any drain unblockable – and is clearly the best approach of any of the anti-entrapment devices or systems in the VGBA.

Some may argue, however, that the fact that the Act sets requirements for drain covers in section 1404(b) and then sets additional requirements in section 1404(c) for secondary anti-entrapment systems means that every public pool or spa must be equipped with a secondary anti-entrapment system. I would certainly read the statute as requiring the secondary anti-entrapment systems if it contained language with such a mandate, but it

[1] P.L. 110-140, Title XIV, 15 U.S.C. § 8001, et. seq.
[2] Section 1404(c)(1)(A)(ii) of VGBA.

does not. What section 1404(c)1(A)(ii) calls for, as I read it, is such systems if a pool or spa does not contain an unblockable drain.

In order to determine whether a drain cover can constitute an unblockable drain, one must look to the definition of the term "main drain." If the definition of "main drain" precludes the Commission from considering a drain cover to constitute an unblockable drain then I would agree that secondary anti-entrapment systems must be installed on all public pools and spas. I therefore turn to the definition of "main drain," which is a "submerged suction outlet typically located at the bottom of a pool or spa to conduct water to a recirculating pump."[3] Thus, the issue, succinctly stated, is whether the drain is only the suction outlet, but not the suction outlet with a drain cover. I believe that the latter, broader interpretation is more logical and sensible.

If a cover renders a pool or spa's main drain unblockable, I can see no safety reason for interpreting the words "main drain" narrowly. If Congress truly intended to bar drain covers that address the entrapment issues presented by pool and spa drains from being considered unblockable drains, one imagines that they would have said so in much clearer fashion.[4] I see no such language in the statute. Moreover, I see no convincing policy reason for adopting such an approach. If I thought that the secondary anti-entrapment systems provided substantially more safety than unblockable drains, I might be tempted to push the definition, but I note that these systems, which can be quite expensive, do not address hazards such as organ evisceration from sitting on a drain or hair entanglement in drains. In fact, the only protection that seems to address virtually all hazards is the drain cover which, if fully compliant with the voluntary standard (and of sufficient dimension), is the most cost-effective approach to safety.

In making this point, I am well aware of the concern about a drain cover coming off or not being well maintained. I have two thoughts about this. First, if the voluntary standard's requirements for ensuring that a cover stay affixed over a drain are inadequate, the voluntary standard certainly should be upgraded. I have, however, seen no evidence that the standard will fail to provide the necessary protection. Second, I fear the moral hazard implications of relying on the current secondary anti-entrapment systems to any substantial degree. If a drain cover were to come off, a pool or spa owner might choose not to worry because he or she had a secondary anti-entrapment system. But, as I just mentioned, these systems fail to protect against some of the most serious hazards to children, such as organ evisceration or hair entrapment. Thus, one might be lulled into thinking that protections exist that really do not.[5] Accordingly, I return to my conclusion that the most important safety step one could take to meet the spirit of VGBA is to install a well-made drain cover.

---

[3] Section 1403(4) of VGBA.

[4] By analogy, when I think of a "cage" in the zoo, I do not imagine the fence as something separate from what I consider the cage. They are one and the same system.

[5] This is particularly the case for one who installs a small "compliant" drain cover that does not protect against evisceration or hair entrapment. While such a drain cover may meet the specifications of the voluntary standard, it provides much less protection than a large size, well-designed drain cover. In other words, the main focus of the Commissions's efforts should be on well-designed drain covers.

How Should the Commission Interpret the Term "Public Accommodation" in the Act?

Under VGBA, a public pool or spa includes one that is "open exclusively to patrons of a hotel or other public accommodations facility."[6] Because the term "public accommodations" is not defined in the Act, many parties have sought guidance from the Commission regarding its interpretation of these words. Notwithstanding that nothing in the statute limits the scope of the term, the Commission today voted to interpret this term narrowly, as follows:

> *Public accommodations facility* means an inn, hotel, motel, or other place of lodging *except for an establishment located within a building that contains not more than five rooms for rent or hire* and that is actually occupied by the proprietor of such establishment as the residence of such proprietor. (Emphasis added).

Upon consideration, I respectfully dissent from the Commission's exclusion of establishments with five rooms or fewer for rent. I believe that any establishment with a pool, hot tub, or spa that rents rooms to the public should be subject to the Act and that a plain language reading of the statute justifies that result.[7]

The Term "Public Accommodations" in Previous Acts: Dubious and Irrelevant Precedents: As far as I can tell, the primary reason the Commission has adopted the exclusion in the term "public accommodation" is because several other federal statutes explicitly limit it in this manner. In other words, the substantive reason for this decision has nothing to do with safety or with the legislative history of the VGBA. It has only to do with some sense that the Commission should interpret the Act in a fashion similar to other acts.

The three acts with the exclusion language before VGBA was passed that the Commission seems to have relied on are the Civil Rights Act of 1964 (CRA), the Americans with Disabilities Act (ADA), and the Danny Keysar Child Product Safety Notification Act,[8] enacted as part of the Consumer Product Safety Improvement Act (CPSIA). While these are all important laws, I think their precedential value for the VGBA is zero.

---

[6] Section 1404 (c)(2)(B)(iii) of the VGBA.

[7] In fact, the Commission's approach clearly assumes that all such lodging falls within the definition of the term "public accommodation," so what they have done is to exempt some places of public accommodation – something that the statute does not call for.

[8] Section 104(c)(2)(D) of the CPSIA. This section provides that section 104 applies to any person who "owns or operates a public accommodation affecting commerce (as defined in section 4 of the Federal Firec Prevention and Control Act of 1974. (FFPCA)." Section 4 of the FFPCA defines a place of public accommodation as "any inn, hotel, or other establishment ... that provides lodging to transient guests, except that such term does not include ... an establishment located within a building that contains more than 5 rooms for rent or hire and that is actually occupied as a residence by the proprietor of such establishment."

First, with respect to the Civil Rights Act, a brief review of its history demonstrates, if anything, how shameful and irrelevant it is as a precedent for interpreting the term "public accommodation." The language in the statute represents to me nothing more than a bitter reminder of the struggle for civil rights in the 1960s. Essentially, the definition of public accommodation represents an obstructionist, if not racist, intent on the part of its proponents for small businesses to continue to deny food and lodging to non-white Americans.[9] Nothing in its language or rationale bears any relevance to the VGBA.

With respect to the Americans With Disabilities Act (ADA), I can see a thoughtful rationale for excluding businesses with fewer than five units. Requiring a small business owner to retrofit his or her building to accommodate wheelchairs, for example, likely would have imposed exceptionally large costs, perhaps even to the point of bankrupting such a business. Accordingly, this is a rational reason for such an exclusion under the ADA, but, as I shall discuss, its cost rationale does not extend to the VGBA.

With respect to the Danny Keysar Act, I believe that the exclusion language in that Act demonstrates just how unfortunate an exercise it is to rely on tradition where there is no rationale attached to the tradition.[10] In essence, the Keysar Act's drafters used the language because it had been used before – not for any safety concern. If cost were the concern that led to excluding five or fewer units in a motel or small hotel, the drafters surely would have also excluded small day care centers or family child care centers – yet they did not. These enterprises fall squarely within the Keysar Act's jurisdiction[11] even though they likely face similar or even greater cost challenges than small motels or hotels. The only rationale for the exclusion language in the Danny Keysar Act is a mechanical reliance on a previous precedent.

Finally, for those who might argue that the public has developed a reasonable expectation that the term "public accommodation" automatically and universally excludes small business units, I question this claim. Were the term that sacrosanct, I doubt that states such as Maine,[12] Maryland,[13] and Massachusetts[14] would have rejected the narrow definition relied upon by the Commission. In fact, they have resisted this approach and have insisted upon a broader interpretation. And, of course, I reiterate that the VGBA carries no such limitation.

In short, there is no hallowed tradition or thoughtful public policy basis for excluding businesses with five or fewer units from the Commission's implementation of the VGBA.

---

[9] In addition, because the right of the Congress to regulate businesses that did not directly engage in commercial activities that crossed state lines was unsettled in 1964, Congress limited the Act's scope to companies whose activities clearly affected interstate commerce. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

[10] As Gibert Chesterton stated, "Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead."

[11] Section 104(c)(2)(B) of the CPSIA.

[12] 5 M.R.S § 4533 (2009).

[13] Md. Code Ann. § 20-301 (2009).

[14] ALM GL ch. 272, §92A (2009).

The Statutory Scheme of the VGBA: Interpreting the intent of Congress in legislation is a deadly game. Most maxims that guide statutory interpretation run into maxims that point directly in the opposite direction. That said, I note that, unlike the three acts that the Commission seems to have relied on to interpret the term "public accommodation," the VGBA does not contain language that excludes businesses with five units or less. To the contrary, the VGBA simply defines a "public pool or spa" as one that is open to "patrons of a hotel or other public accommodations facility."[15] In other words, without any hint or prodding from Congress, the Commission has taken it upon itself to narrow the scope of the law's protections simply because the VGBA uses a term that has been defined more narrowly in other statutes.

The fact that the Congress defined "public accommodation" in the three acts relied upon by the Commission with explicit language that narrowed their application yet did not do so in the VGBA strongly suggests that Congress intended a broad application of the term in the VGBA. To me, this suggests an appropriate invocation of the legal maxim, "*expressio unius est exclusio alterius.*" In other words, whatever is omitted is understood to be intentionally excluded. In the case of VGBA, Congress omitted the words of limitation included in the other statutes relied upon by the Commission, so one wonders why the Commission felt it necessary to issue such a narrow interpretation, especially since the Commission's interpretation will result in greater risks to the public health and safety.

Increased Risks to Children: I think it beyond dispute that a pool, hot tub, or spa at a small B&B with four rooms made to the exact specifications of a pool, hot tub, or spa at a B&B with six rooms presents precisely the same risk of injury or death to children at both facilities. With such strong safety concerns, one looks in vain for a rationale to explain why one facility should be covered by VGBA and the other not.

The only argument that I have heard to explain the distinction suggests that the proprietor of the smaller facility might be more likely to act as a lifeguard than one at the larger facility. This argument rests upon an extremely dubious set of assumptions and is not credible. Anyone who knows anything about small hotels and B&Bs surely knows that owner-proprietors are extremely unlikely to have the spare time to monitor children at play in their pools or hot tubs. Moreover, as almost any casual traveler would know, the trend in the country today is to hire fewer and fewer lifeguards at small lodging facilities. The lack of supervision means that any child caught in a deadly drain at an exempt facility likely faces life-threatening consequences.

Cost Issues: An Unpersuasive Concern: As previously mentioned, I can easily understand a sound policy basis for excluding small hotels and B&Bs from coverage under the ADA because of costs. That basis does not exist with the housing units excluded under the Commission's approach. Nothing in VGBA requires any lodging, large or small, to install a pool, hot tub, or spa. All that it says is that once the facility's owner has made the judgment to incur the cost of installation (or to continue to offer the use of a pool, hot tub, or spa to his or her guests), he or she should take the reasonable

[15] Section 1404(c)(2)(B)(iii) of the VGBA.

steps necessary to make the pool, hot tub, or spa safe. Any safety system required under VGBA will constitute a small percentage of the costs of the pool, hot tub, or spa. In other words, no one requires the owners or proprietors to play, but if they do play, they must do so safely. One might draw an analogy to automobile ownership. No one requires a citizen to purchase a car, but if he or she does so, society requires the citizen to drive a safe car in a safe manner, with everyone having to purchase insurance to enter the roads.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON IMPLEMENTATION OF THE VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT

March 3, 2010

Having spent more time than most people in and around swimming pools as a child and as a parent, I have always had a healthy concern for the risk from drowning. The majority of swimming pool drownings occur in homes where a fence is in place and the swimmer is legitimately at the pool. Kids can drown in an instant. Because drowning happens so quickly, it can happen even in the most watchful families. If parents or grandparents get distracted just for a moment, children can get out a door to the pool or get into trouble underwater. The impact of a drowning on lives and families is devastating, so it is all the more important that we give careful consideration to how we implement laws concerning pool safety.

The Virginia Graeme Baker Pool and Spa Safety Act primarily addresses the miniscule portion of drownings attributable to entrapments in the circulation system of public pools or hot tubs. Congress noted in its statutory findings that drowning is the second-leading cause of accidental, injury-related death among children 1-14, but that statistic is a bit misleading when it comes to the law—and now to this regulation. Of the roughly 3,400 drowning deaths that occur each year in the United States,[1] this regulation on average will affect less than 1 of them.[2] The larger number includes both drownings of toddlers in bathtubs and drownings in natural water settings, such as rivers and lakes, that are completely unaffected by this law. It also includes drownings in residential pools, which this rule does not cover.

To reduce the risk of entrapment in public pool and hot tub drains, the act requires all public pools and hot tubs to have multiple drains, an unblockable drain, or one or more secondary anti-entrapment devices or systems. Today's vote resolves the surprisingly controversial question of whether a drain fitted with an unblockable drain cover becomes an unblockable drain. I support the majority's decision that it does for three reasons: 1) I believe the statutory term "unblockable drain" includes drains made unblockable via an unblockable drain cover; 2) I believe an unblockable drain system is equally if not more effective than other "systems designed to prevent entrapment" and; 3) I am convinced that the staff's recommendation to accept unblockable drain covers will save the most lives and prevent the most injuries.

In the first place, it makes logical sense to treat drains fitted with unblockable drain covers as unblockable drains under the statute. Drains made unblockable through their design or through use of an unblockable drain cover function equally well to maintain the suction flow of water at a safe level when

---

[1] CDC data from 1999-2006 records 27, 514 drownings, or 3,439 per year. 6,685 of these drownings occurred to children 14 and under, or 836 per year. See Centers for Disease Control and Prevention, National Center for Injury Prevention and Control. Web-based Injury Statistics Query and Reporting System (WISQARS) (2010) [cited March 3, 2010]. www.cdc.gov/ncipc/wisqars.

[2] CPSC data shows that 4 of the 11 drain entrapment deaths from 1999-2008 occurred at public pools or spas, far less than 1 per year. <http://www.cpsc.gov/LIBRARY/entrap09.pdf>

blocked by a person's body, so we should treat them the same. In either case, if the drain cover is removed, the drain ceases to be unblockable—so the issue of an unblockable drain cover dislodging is really a red herring. If other unblockable drains do not require back-up systems, then neither should drains fitted with unblockable drain covers.

Even if I were not convinced that the term "unblockable drain" includes drains fitted with unblockable drain covers, § 104(c)(1)(A)(ii)(VI) of the statute explicitly authorizes the Commission to determine whether other systems are "equally effective as, or better than, the systems described … at preventing or eliminating the risk of injury or death associated with pool drainage systems." Based on the public hearing and briefing by staff—and for the reasons discussed below—I would determine that unblockable drain covers are at least equally as effective in preventing or eliminating injury or death from drain entrapments as the other systems described in the statute.

Finally, it appears to me that unblockable drain covers promise to save more lives and prevent more injuries than other anti-entrapment systems. The prevalence of drowning due to a circulation-related entrapment in a public pool or hot tub is quite low. Of the 11 entrapment drowning deaths from 1999-2008, only 4 of them occurred in public pools or hot tubs. The remaining 7 deaths, including Virginia Graeme Baker, occurred in residential settings. Four of the 11 deaths were limb entrapments, three were hair entrapments (involving hair getting sucked into a drain and/or entangled behind the drain cover grate), three were body entrapments, and one was an evisceration/ disembowelment.

Unblockable drain covers are the only solution that prevents all five types of entrapments identified by the staff (limb, hair, body, evisceration, and mechanical-related). An unblockable drain cover with the appropriate flow rating addresses all five entrapment scenarios so long as it remains in place. The back-up systems mentioned in the Act only address some of the potential scenarios. For example, some of the back-up systems deal with suction body entrapment and some limb entrapments but would not handle hair, mechanical, or evisceration entrapments. Given the prevalence of hair entrapments in the mortality data, that failing poses a real problem. Moreover, preventing entrapments in the first place is the best solution to the threat of entrapment drownings. Back-up systems require an entrapment incident to begin to occur before they respond, and they may not prevent the entrapment depending on what kind it is and what type of drain system is involved.

Unblockable drain covers also represent a cost-effective solution for dealing with a relatively remote risk. If we are going to require public pools to change their drain systems, it makes no sense to preclude the best solution—unblockable drain covers that prevent hair and evisceration entrapments—from the market. I am convinced that failing to recognize that unblockable drain covers create unblockable drains would have that effect. Few pool owners would invest in an unblockable drain cover if that owner would also have to purchase another back-up system. CPSC's requiring unblockable drain covers to be installed with additional back-up systems would thus create a strong financial disincentive to installing such covers and thereby prevent market penetration of what appears to be the safest solution. The expense of forcing pools to acquire more elaborate back-up systems might also encourage some public pools to close altogether, which would reduce the opportunities for learning to swim. This agency should not encourage the closing of swimming pools due to remote risks anymore than we should encourage the removal of playground equipment due to remote risks—at least where no statute compels it and we have a perfectly good alternative available.

Although I am pleased to vote in favor of having the staff draft an interpretive rule on unblockable drain covers as a solution to the problem of circulation-related entrapments in public pools and hot tubs, I do not believe that the risk of such drownings justifies a disproportionate share of the Commission's attention. To the contrary, I hope and expect that the agency will develop a plan for a public awareness campaign using the funds appropriated under the VGBA that addresses the greatest risks for drowning and stresses those messages that contain the greatest potential for saving lives. To that end, I do not believe the remote risk of drowning from drain entrapment should figure prominently in the agency's public awareness messaging.

I would like to add a few words about the risk that the agency will be sued over this policy decision. Certain purveyors of back-up systems have made it known that they will challenge in court any decision like the one made today approving unblockable drain covers. I do not believe that such a threat—or indeed any threatened lawsuit by a group with a vested interest in a Commission decision (financial or otherwise)—should ever influence the Commission's decision process one way or the other. Taking such threats into account would bias the Commission's thinking toward those special interests most willing to sue (such as self-styled consumer groups, or, as here, an industry group invested in promoting a particular technology). The Commissioners have a duty to implement those statutes Congress puts under our jurisdiction consistent with serving the wider public interest. I firmly believe that today's decision does that.