



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

This document has been electronically approved and signed.

BALLOT VOTE SHEET

DATE: March 30, 2012

TO: The Commission
 Todd A. Stevenson, Secretary

THROUGH: Kenneth R. Hinson, Executive Director
 Cheryl A. Falvey, General Counsel

FROM: Hyun S. Kim, Acting Assistant General Counsel, RAD
 Barbara E. Little, Regulatory Affairs Attorney

SUBJECT: Virginia Graeme Baker Pool and Spa Safety Act (“VGB Act” or “VGBA”):
 Summary of public comments received regarding revocation of the definition of unblockable drain covers.

Ballot Vote Due: April 5, 2012

In September 2011, the U.S. Consumer Product Safety Commission voted to publish in the *Federal Register* a final rule revoking its prior definition of unblockable drain. The rule, published on October 11, 2011, provided a compliance date of May 28, 2012, for public pools or spas that required modifications as a result of the revocation. The Commission sought comments regarding the ability of those who had installed VGBA-compliant unblockable drain covers prior to October 11, 2011, as described at 16 C.F.R. § 1450.2(b), to come into compliance with the revocation by May 28, 2012. The attached memorandum provides a summary of the public comments received in response to this request and contains CPSC staff’s recommendation based on the comments.

Please indicate your vote on the following options:

- I. Direct staff to issue a notice in the *Federal Register* announcing a new, later compliance date of May 23, 2013.

 (Signature)

 (Date)

II. Do not direct staff to issue a *Federal Register* notice announcing a new, later compliance date of May 23, 2013.

(Signature)

(Date)

III. Direct staff to issue a *Federal Register* notice announcing a different compliance date. (Please specify compliance date.)

(Signature)

(Date)

IV. Take other action. (Please specify.)

(Signature)

(Date)

Attachment:
Summary of public comments received regarding revocation of the definition of unblockable drain covers.



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
BETHESDA, MD 20814

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Memorandum

Date: March 30, 2012

TO : The Commission
Todd A. Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel
Kenneth R. Hinson, Executive Director
Robert J. Howell, Deputy Executive Director for Safety Operations

FROM : DeWane Ray, Assistant Executive Director, Office of Hazard Identification and
Reduction
Perry Sharpless, Project Manager -- Pools and Spas, Directorate for Laboratory
Sciences
Troy Whitfield, Lead Compliance Officer, Office of Compliance
Barbara E. Little, Regulatory Affairs Attorney

SUBJECT : Summary of public comments received regarding revocation of the definition of
unblockable drain covers.

1. Introduction

In September 2011, the U.S. Consumer Product Safety Commission (CPSC; the Commission) voted to publish in the *Federal Register* (FR) a final rule¹ regarding the revocation of the prior definition of an unblockable drain. The rule, published on October 11, 2011, disallowed the installation of a large cover over a smaller sump in order to meet the requirements of the Virginia Graeme Baker Pool and Spa Safety Act P.L. 110-140, Title XIV ("the VGBA") for unblockable single drains.

The Federal Register notice invited comments regarding the ability of those who had installed VGBA-compliant unblockable drain covers, as described at 16 CFR § 1450.2(b), to come into compliance with the revocation by May 28, 2012. This memorandum provides: (1) a summary of the comments submitted in response to the final rule, and (2) CPSC staff's conclusions and recommendation based on the comments.

2. Background

The VGBA was signed into law on December 19, 2007, and it became effective on December 19, 2008. The VGBA's purpose is to prevent suction entrapment by swimming pool and spa drains and child drowning in swimming pools and spas.

¹ The complete Federal Register notice may be found at:
<http://www.cpsc.gov/businfo/frnotices/fr12/vgbunblockable.pdf>.

Section 1404(c)(1)(A)(i) of the VGBA requires that each public pool and spa in the United States be equipped with drain covers that comply with the ASME/ANSI A112.19.8 performance standard or any successor standard. (In the *Federal Register* of August 5, 2011 (76 FR 47436), the Commission published a final rule to incorporate into its regulations ANSI/APSP-16 2011 as the successor standard to ANSI/ASME A112.19.8. The effective date of this incorporation is September 6, 2011, so that drain covers manufactured, distributed, or entered into commerce in the United States must conform to ANSI/APSP-16 2011 as of that date.) Section 1404(c)(1)(A)(ii) of the VGBA also requires that each public pool and spa in the United States with a *single* main drain, other than an unblockable drain, be equipped, at a minimum, with one or more of the following:

- safety vacuum release system;
- suction-limiting vent system;
- gravity drainage system;
- automatic pump shut-off system;
- drain disablement; and/or
- any other system determined by the Commission to be equally effective as, or better than, the enumerated systems at preventing or eliminating the risk of injury or death associated with pool drainage systems.

The above systems are collectively referred to as “secondary anti-entrapment systems” when a *single* main “blockable” drain is in use. Thus, under the VGBA, each public pool or spa with a *single* main drain, other than an unblockable drain, must be equipped with a secondary anti-entrapment system. Section 1403(7) of the VGBA defines an “unblockable drain” as “a drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard.”

On April 27, 2010, the Commission issued a final interpretive rule in the *Federal Register* (75 FR 21985), interpreting “unblockable drain” as follows:

A suction outlet defined as all components, including the sump and/or body, cover/grate, and hardware such that its perforated (open) area cannot be shadowed by the area of the 18 × 23” Body Blocking Element of ASME/ANSI A112.19.8 - 2007 and that the rated flow through 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. All suction outlet covers, manufactured or field-fabricated, shall be certified as meeting the applicable requirements of the ASME/ANSI A112.19.8 standard.

In September 2011, the Commission voted to issue a final rule to revoke the April 27, 2010 definition. This rule was published in the *Federal Register* on October 11, 2011. As of October 11, 2011, the “unblockable drain” definition reverted back to the original VGBA definition, which defines an “unblockable drain” as “a drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard.” The revocation, in effect, means that a drain cover can no longer be used to

convert a blockable drain (one that can be shadowed by the area of the 18 × 23" body-blocking element (BBE)) into an unblockable drain by the addition of a large "unblockable" cover. The revocation did not alter the requirement that public pools and spas be in compliance with the VGBA, which became effective on December 19, 2008. For public pools or spas that required *modifications* as a result of the revocation, the compliance date was set at May 28, 2012.

3. Response to Comments Received on May 28, 2012 Compliance Date

The Commission's final rule asked for "... written comments regarding the ability of those who have installed VGBA-compliant unblockable drain covers, as described in 16 CFR § 1450.2 (b), to come into compliance with our revocation by May 28, 2012." Most comments received were, in fact, unrelated to the ability of the respondents to comply with the proposed effective date. The comments received on the May 28, 2012 compliance date fell into four basic categories. Each category is listed below, with a staff summary addressing the significant issues raised. Categories are listed in the order of decreasing number of comments received.

Issue 1: Cost of Compliance (142 comments) and Dire Financial Circumstances (131 comments)

Members of the American Hotel & Lodging Association, the Illinois Department of Health, and others assert that the cost of retrofitting pools again would put an undue burden on them. Commenters cited the following as reasons that they are against the revocation: the impact of the poor economy on their operating revenues, and the loss of revenue that will be incurred while the pools are closed for the modifications that will be required to bring them into compliance.

Commenters in this category mention the respondents' "dire financial circumstances" as a reason against the revocation of the Commission's April 27, 2010 definition of "unblockable drain." Each of these letters was nearly identical and appeared to have followed a form generated by the Association of Pool and Spa Professionals (APSP).

Staff agrees that there may be financial hardship, but only to those who relied upon the Commission's interpretative rule and installed an unblockable drain cover over a smaller sump in lieu of installing a secondary system. Thus, it would seem reasonable to provide those firms who relied on the Commission's prior interpretation the time to budget and plan for the expenditure needed to install a secondary system. Staff has not probed the accuracy of the claims of financial hardship made in these form letters.

Issue 2: Apply Prospectively (4 comments)

Commenters in this category cited the lack of injuries as a reason to apply the revocation only to facilities that are newly constructed or renovated in the future.

Staff does not agree with prospective application to new construction or renovation. The law has required pools to be compliant with the VGBA for almost four years. Only firms that relied on the unblockable drain interpretative rule of April 27, 2010, and installed VGBA compliant unblockable drain covers, on or before October 11, 2011, are even affected by the revocation

decision. Thus, prospective application is much too broad, and applying it to firms that did not install VGBA compliant unblockable drain covers, on or before October 11, 2011 would not follow the statutorily mandated effective date, create confusion and unduly complicate enforcement.

Issue 3: Comments Requesting Delay of Enforcement (2 comments)

Two comments requested that the Commission delay the implementation of enforcement. One requested that the CPSC delay implementation of the enforcement of the change for one year because they had relied upon the original regulations and installed unblockable drain covers and now would have to go back and “re-do” their work, which they characterized as unfairly penalizing them for their compliance with the prior interpretation. The commenter also noted that the unblockable drain covers were far more expensive than typical smaller fittings, and also asserted that they represented a major investment, which was based on the fact that once the covers were installed, additional equipment would not be required. The other commenter requested that the Commission delay the implementation date to January 1, 2013, or prior to 2013 operation dates for seasonal pools and spas. The commenter also stated that regulated pools and spas that had already invested to comply with the requirements of the VGBA would be required to add secondary anti-entrapment systems or make other modifications at considerable expense, in addition to expenditures necessary to comply with state law and U.S. Department of Justice pool and spa accessibility requirements.

Staff agrees that those who relied upon the Commission’s interpretative rule and installed an unblockable drain cover in lieu of installing a secondary system will now face additional expenditures to bring their pools into compliance with the VGBA. Thus, it would seem reasonable to provide those who installed VGBA compliant unblockable drain covers, on or before October 11, 2011 time to budget and plan for the expenditure needed to install a secondary system. Staff has not probed the accuracy of the claims of financial hardship, nor does staff have specific information regarding how many firms represented by these commenters actually relied on the prior interpretative rule and installed unblockable drains.

Issue 4: Compliance Date Is Acceptable (1 comment)

One comment in support of the May 28, 2012 compliance date cited in the Federal Register notice was received. The commenter, the National Multi Housing Council/National Apartment Association (NMHC/NAA), expressed the belief that if the Commission offered additional guidance to the regulated community to assist with compliance, the majority of their members could comply by the deadline; but NMHC/NAA urged the CPSC to reevaluate the progress being made by pool owners and adjust the deadline, if necessary.

Staff has a concern about the number of requests for assistance with compliance that may be received and whether the pool operator is seeking a plan review and not just limited advice about how to handle the revocation decision. Again, the only circumstance in which staff believes there could be any need for compliance assistance due to the revocation of the unblockable drain interpretative rule is with respect to pool operators who relied on the Commission’s April 27, 2010 decision and installed VGBA compliant unblockable drain covers, on or before October 11, 2011. The guidance to those firms is that your unblockable drain cover is VGBA compliant and

does not need to be removed; but pool operators need to install a secondary anti-entrapment system to come into compliance, unless the pool uses a gravity drain system. Accordingly, if a pool operator installed an unblockable drain system, staff believes it is reasonable to allow them time to budget and plan for the expenditure required to install a secondary anti-entrapment system.

4. Summary of Other Comments Received

As discussed above, most of the comments received were, in fact, unrelated to the ability of the respondents to comply with the proposed effective date. These comments fell into seven basic categories. These issues fall outside the scope of the requested comments on the compliance date, and the Commission has not directed work on these issues. For that reason, staff has summarized the comments but has not responded to them. Categories are listed in the order of decreasing number of comments received.

Issue 1: Entrapment Injuries/Fatalities (143 comments)

Numerous commenters mentioned the lack of reported entrapment injuries as an issue to contemplate when the Commission considered the revocation of the April 27, 2010 unblockable drain definition. Specifically, the commenters state that there have been no entrapment fatalities or serious injuries since the public pool provisions of the VGBA went into effect and further state that there have been no incidents where compliant covers are installed. One commenter cited a website blog that he claimed had information indicating suction entrapment incidents continue to occur.

Issue 2: Jeopardizes Safety (140 comments)

Quite a few commenters said they believe that revoking the April 27, 2010 interpretation will jeopardize safety. The general tone of the comments was that too much reliance would be placed on Safety Vacuum Release Systems (SVRS) to provide bather safety, and the devices have limited value. The comments state that the devices do not prevent all forms of entrapment, are prone to false activation, require frequent maintenance and calibration, and activate only after an incident has occurred. The commenters claim that a compliant unblockable cover is a passive system that addresses all entrapment concerns all of the time.

Another issue mentioned regarding safety included an increased risk of drowning due to facility closures as a result of the increased cost of compliance. Commenters stated that closures of facilities will deprive nonswimmers of the opportunity to learn how to swim and could increase the risk of drowning, contrary to the intent of the VGBA.

Issue 3: Reliance on Previous Guidance from CPSC (137 comments)

Numerous commenters stated that “many unblockable drain covers were installed in public facilities based in good faith reliance upon the [VGBA] and the Commission’s original interpretive rule.” These commenters stated that the unblockable drain covers were more expensive than the typical smaller fittings and that the investment associated with these

unblockable drain covers was based in large part on the understanding that, once the covers were installed, additional equipment would not be required. The commenters stated that “once a ruling is made by the Commission, and relied upon by the public, as well as private entities, it should not be reversed except where there is clear and compelling safety data to support such a reversal.”

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Issue 4: Comments in Support of Revocation (10 comments)

The majority of these comments addressed the issue of “layers of protection” that are provided by the addition of a second suction outlet or a vacuum release system. Commenters in this category expressed the belief that a second method of entrapment prevention was needed. Included in this category were 11 members of Congress.

Issue 5: Need for Definition Change Due to Unintended Consequences of Revocation (6 comments)

Three commenters are concerned that the revocation will imply that larger sumps (under large unblockable covers) are safe, which the commenters state is not the case. The VGBA exempts unblockable drains from secondary anti-entrapment device requirements. According to one commenter, the cover/grate itself should be the ONLY factor to be considered “unblockable.” In many cases, due to the high flow rates through the sump and the large piping, secondary anti-entrapment devices would be ineffective should large covers go missing from large sumps. The commenter offered additional wording to clarify conditions that need to exist within the sump to prevent entrapment. Another commenter stated that during the standards development process, “[t]here was never any contemplation by any of the related technical committees of such an outlet [unblockable] without a cover, unless the sump itself was safe.” The same commenter goes on to state: “Most unblockable sumps will admit a bather’s body to the unprotected suction piping . . .”

Issue 6: Due Process (5 comments)

Commenters, including the American Hotel & Lodging Association, International Association of Amusement Parks and Attractions (IAAPA), Association of Pool & Spa Professionals (APSP), and World Waterpark Association (WWA) expressed concern that the September 2011 vote was taken without the benefit of a public comment period or an opportunity for stakeholder input. One commenter, IAAPA, characterized this as a disregard for the Administrative Procedure Act. Another, APSP, noted that a public comment period would have allowed owners and operators of public pools, members of the industry, and others concerned about pool safety to “explain to the Commission why this vote will jeopardize, rather than advance pool and spa safety.”

Issue 7: Request for Additional Guidance (2 comments)

Two commenters requested additional guidance from the Commission on how to become compliant, what options are available for compliance, and what outlet size is considered unblockable. The discussion centered on modifications to the existing circulation system/drain openings and drain fittings that would be acceptable rather than installing a secondary anti-

entrapment device. It was suggested that the Commission identify what methods are acceptable and provide illustrations of compliant systems. It was also suggested that the Commission establish a system to respond to inquiries about proposed system designs/modifications. There was also a suggestion to develop a material/life span sheet for outlet covers to ensure the cover material properties are appropriate for the pool environment and product life. The same commenter suggested guidance for certain size covers (24" × 24" and 3" × 31") regarding the classification as "unblockable."

Issue 8: Marketplace Confusion (2 comments)

Two commenters (National Swimming Pool Foundation and Independent Pool and Spa Service Association) stated that the revocation will create confusion in the market with no net benefit. The National Swimming Pool Foundation stated that "[t]he CPSC has funded several millions of dollars with contractors to create and disseminate educational materials to consumers, industry and health officials. Changing the interpretation after all training contracts have ended will create confusion."

5. Staff Recommendation

Due primarily to the lack of reported injuries, as well as the potentially adverse financial effects for those who relied on the Commission's previous interpretation of "unblockable drain," staff believes that it would be reasonable to delay enforcement of the revocation until May 23, 2013, for pool owners who installed an unblockable drain cover in reliance on the Commission's original interpretative rule. Delaying enforcement would allow pool operators one budget cycle to propose funding or to raise the revenue that may be required to make any necessary changes. Should the Commission decide to extend the compliance date, staff still intends to continue with its enforcement activities with regard to pools that did not install an unblockable drain cover and should have been in full compliance with the VGBA by now.

This conclusion is based solely on staff's review of the comments received. Generally, staff did not perceive an overwhelming concern about the current May 2012 compliance date, and the comments did not provide specific data with regard to the number of pools affected and the amount of money already spent on unblockable drain cover installation. Furthermore, staff does not know whether all such pool operators have the financial concerns that the comments suggest. It is unclear whether a full one-year extension is necessary for everyone who relied on the original interpretative rule and whether it is necessary to offer the extension across all areas of the country. Nevertheless, the request for a one-year extension seems reasonable for those who installed VGBA compliant unblockable drain covers, on or before October 11, 2011, and May 23, 2013, falls on the Thursday just before the Memorial Day weekend, which traditionally, is the start of the pool season in many areas of the country.