



U.S. CONSUMER PRODUCT SAFETY COMMISSION
BETHESDA, MD 20814

OFFICE OF THE GENERAL COUNSEL

Cheryl A. Falvey
General Counsel
Tel: 301-504-7642
E-Mail: cfalvey@cpsc.gov

May 6, 2008

Lucy Schneider
Assistant General Counsel
Florida Department of Health
Office of the General Counsel
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1703

Re: Virginia Graeme Baker Pool and Spa Safety Act

Dear Ms. Schneider,

Thank you for your letter of March 28, 2008, in which you inquired about the preemptive effect of the Virginia Graeme Baker Pool and Spa Safety Act ("Act") and whether the use of a gravity drainage system in a public pool negates the need for compliance with the provisions of section 1404(c)(1)(A)(i) of the Act. Our reading of the Act suggests that Florida can continue to mandate the exclusive use of gravity drainage pools with collector tanks. However, under the Act, those pools would still need to have a drain cover or other anti-entrapment device that complies with ASME/ANSI A112.19.8.

You also inquired about enforcement of the Act once it becomes effective in December. Enforcement is a matter for the Commissioners and the Office of Compliance; however, I provide below the legal framework for enforcement under the Act.

I. PREEMPTION

According to your letter, for thirty one years Florida has required certain pools to be equipped with gravity drainage systems with collector tanks. Additionally, as of fifteen years ago, Florida required all new spas to be equipped with gravity drainage collector tank systems. You have asked whether the Act preempts Florida's requirement that pools and spas be equipped with gravity drainage systems, to the exclusion of any other of the alternatives enumerated in Section 1404(c)(1)(A)(ii) of the Act.¹ While this office will provide its legal analysis of your question

¹ Section 1404(c)(1)(A)(ii) provides that, beginning one year after the date of enactment of the Act, each public pool and spa in the United States with a single main drain other than an unblockable drain shall be equipped, at a minimum,

regarding preemption, as you know, the courts, not this agency, are the ultimate arbiters of whether the Act preempts a state law in a particular instance.

A. Express Preemption

The Act contains no provision on its preemptive effect and, therefore, does not by its terms expressly preempt state law. However, even though the Act does not contain a preemption provision, our preemption analysis must consider whether the requirements under the Act fall within the preemption provision of one of our statutes, the Consumer Product Safety Act (“CPSA”), 15 U.S.C. 2051 et seq. We look to the CPSA because the Act specifically refers to the CPSA in establishing a federal swimming pool and spa drain cover standard in Section 1404. The CPSA has a preemption provision which provides that the state and local governments may not establish or continue in effect any standards or regulations designed to deal with the same risk of injury as a federal consumer product safety standard, unless the state or local requirements are identical to the federal standard. 15 U.S.C. 2075(a). Thus, the inquiry here is whether the requirements of section 1404 of the Act are considered consumer product safety standards such that Section 26(a) of the CPSA would govern the preemption analysis.

While Section 1404(b) of the Act is expressly characterized as a “consumer product safety rule” under the CPSA,² Congress made no similar pronouncement with respect to section 1404(c). Instead, section 1404(c)(3) provides that violation of section 1404(c)(1) shall be considered a violation of section 19(a)(1) of the Consumer Product Safety Act and may also be enforced under section 17 of the CPSA. Since Congress deliberately chose not to make Section 1404 (c) a “consumer product safety rule” – in sharp contrast with the immediately preceding subsection – the language of the Act weighs against a finding of CPSA section 26 preemption for this part of the Act.

B. Implied Preemption

While the language of the Federal Act neither expressly preempts state law nor characterizes section 1404(c)(1) as a rule under the CPSA, the Act could nonetheless impliedly preempt Florida's law if the Act's scope and structure indicates that Congress intended to occupy the field exclusively or if Florida's law conflicts with the Act. *See, e.g., Bic Pen Corp. v. Carter*, 2008 WL 1765550

with one or more of the following devices or systems designed to prevent entrapment by pool or spa drains: (I) safety vacuum release system; (II) suction-limiting vent system; (III) gravity drainage system; (IV) automatic pump shut-off system; (V) drain disablement; (VI) any other system determined by the Commission to be equally effective as, or better than, or other systems at preventing or eliminating the risk of injury or death associated with pool drainage systems.

² In our view, the consumer product safety rule established by the Act in Section 1404(b), that all swimming pool or spa drain covers manufactured, distributed or entered into commerce in the United States conform to ASME/ANSI A112.19.8, falls squarely within the scope of Section 26 of the CPSA. Section 1404(a) of the Act provides that the requirements described in subsection 1404(b) shall be treated as a consumer product safety rule issued by the Consumer Product Safety Commission under the CPSA. Thus, it is our view that the preemptive provisions of Section 26 of the Act apply directly to the Section 1404(b) requirement.

(Tex., April 18, 2008) (most recent discussion of implied preemption under the CPSA)(citations omitted).

With regard to the first implied preemption issue, whether Congress intended to occupy the field exclusively, there is no indication that Congress intended to preempt the entire field of pool and spa regulation. As for the second implied preemption issue, whether there is a conflict between the Federal act and the state law, courts generally look to whether "compliance with both federal and state regulation is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or whether state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1940).

To the extent Florida requires gravity drainage systems on its public pools and spas, compliance with both Florida's statute and the Federal Act is not a physical impossibility. A public pool with a gravity drainage system utilizing a collector tank complies with Section 1404(c)(1)(A)(ii) of the Act. Legislative history does not provide great detail regarding the full purposes and objectives of Congress in enacting the Act, but it is clear that the overall purpose of the Act is to protect children from drowning and entrapment in swimming pools and spas. In order to address drain entrapment, Congress required that each public pool and spa in the United States with a particular configuration be equipped "at a minimum" with one or more enumerated devices or systems designed to prevent entrapment associated with pool and spa drains. There is no indication Congress favored one device or system over another or intended that a certain mix of devices or systems be present in public pools and spas across the United States. Additionally, the fact that the Federal Act lays out "minimum" requirements suggests Congress contemplated a minimum floor of protection, above which States could regulate.³ Florida's requirement to use a gravity drainage system with a collector tank in public pools and spas does not appear to frustrate the Act's purpose of protection from drowning and entrapment in pools and spas.

Public pools in Florida predating Florida's gravity drain requirement (*i.e.*, pools that may have been grandfathered under the Florida legislation), appear to need to come into compliance with the Act, as pools with no system at all are not in compliance with section 1404(c)(1)(A)(ii) of the Act. Moreover, to the extent that the definitions of public pool differ between the state and federal statutes, pools that are considered public pools under the Act would need to come into compliance with the Act even if they are not covered by Florida's state statute.

II. THE SECTION 1404(c)(1)(A)(i) REQUIREMENT

In your second question you ask whether "use of the gravity drainage system utilizing a collector tank negates the need for compliance with the provisions of section 1404(c)(1)(A)(i) of the Act." Section 1404(c)(1)(A)(i) of the Act provides that beginning one year after the date of enactment of the Act, "each public pool and spa in the United States shall be equipped with anti-entrapment devices or systems that comply with the ASME/ANSI A112.19.8 performance standard,

³ Indeed, the Act's grant provisions contemplate that the States would develop their own state laws consistent with a federal minimum standard.

May 6, 2008

Page 4

or any successor standard." This requirement applies to all public pools and spas in the United States. Congress did not provide an exception for any public pool or spa equipped with any one particular system enumerated in section 1404(c)(1)(A)(ii). As the requirement is clear on its face and provides for no exception, all public pools and spas in Florida must comply with section 1404(c)(1)(A)(i) of the Act. While you have advanced certain factual arguments as to why a drain cover may not be necessary on a gravity drainage pool with a collector tank, the Act leaves no room for us to weigh those facts and reach a different legal conclusion as to the applicability of the requirement.

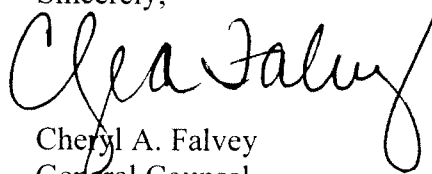
III. ENFORCEMENT

You also asked about our enforcement of the Act given the December 2008 effective date. As I mentioned above, the Commission and its Office of Compliance deal with enforcement. However, I can provide you with the legal framework within which such decisions are made. Violation of the drain cover standard in section 1404(b) of the Act would be a violation of a rule issued under the CPSA and, therefore, a prohibited act under Section 19 of the CPSA. Any person who knowingly violates section 19 is subject to civil penalties under section 20 of the CPSA. Such a violation also triggers the reporting requirement of section 15(b) of the CPSA. Failure to report to the Commission as required by section 15(b) may result in civil penalties. While not characterizing them as "consumer product safety rules," the Act directs that the additional requirements in section 1404(c)(1) of the Act are to be enforced under section 19(a)(1) of the CPSA. Thus, a violation of section 19(a)(1) may result in the imposition of civil penalties.

To conclude, gravity drainage pools in Florida subject to the Act would need to have a drain cover or other anti-entrapment device or system that complies with ASME/ANSI A112.19.8. Our analysis also leads to the conclusion that pools in Florida that may have been grandfathered under Florida state law or are otherwise not within the scope of coverage of that law, would need to come into compliance with the Act.

This letter presents the views of the Office of General Counsel based on the information you have provided. It has not been reviewed or approved by the Commission and may be changed or superseded by the Commission.

Sincerely,



Cheryl A. Falvey
General Counsel



Charlie Crist
Governor

Ana M. Viamonte Ros, M.D., M.P.H.
State Surgeon General

March 28, 2008

Cheryl A. Falvey, General Counsel
Consumer Product Safety Commission
Washington, D.C.

Re: Virginia Graeme Baker Pool and Spa Safety Act

Dear Ms. Falvey:

As discussed in our telephone conversation of March 18, 2008, the State of Florida has concerns regarding the interaction between the requirements of the recently enacted Virginia Graeme Baker Pool and Spa Safety Act ("Act"), with Florida's current state rules governing public swimming pools and spas. Specifically, we are concerned with the following:

- 1) does the Act's requirements preempt Florida's existing regulations, or can a state continue to maintain its more stringent standards;
- 2) whether use of the gravity drainage system utilizing a collector tank negates the need for compliance with the provisions of section 1404 (c)(1)(A)(i), of the Act, as the gravity drainage/collector tank system is not a suction fitting system; and finally
- 3) how does the Consumer Product Safety Commission contemplate compliance with the Act's requirements, when there remains little time available to practically accommodate the number of modifications to public pools necessary to meet the December, 2008 deadline.

Section 1404 (c)(1)(A), of the Act mandates the following:

- (i) each public pool and spa in the United States shall be equipped with anti-entrapment devices or systems that comply with the ASME/ANSI A112.19.8 performance standard, or any successor standard; and

(ii) each public pool and spa in the United States with a single main drain other than an unblockable drain shall be equipped, at a minimum, with 1 or more of the following devices or systems designed to prevent entrapment by pool or spa drains that meets the requirements of subparagraph (B):

The remainder of (c)(1)(ii) lists a total of six alternatives that comply with this section's requirements, including the gravity drainage system utilizing a collector tank.

The Division of Environmental Health of the Florida Department of Health is responsible for ensuring health and safety standards for nearly 37,000 licensed public swimming pools, spas, and other treated water venues. For 31 years Florida has required gravity drainage with collector tanks for all new pools built in this state. For public spas, Florida required suction-limiting vent systems 29 years ago, and then updated our rules 15 years ago to require the gravity drainage / collector tank system for all new spas.

Due to Florida's regulatory history, we estimate that approximately 31,000 public pools and spas have already been fitted with the gravity drainage/collector tank requirement, thus meeting the requirements of section 1404 (c)(1)(A)(ii), of the Act. Our concern, however, is with the additional approximate 6,000 public pools and spas built before the gravity drainage system was required that would need retrofitting, and with all future public pool and spa construction. Thus, our first question is whether the Act's requirements preempt Florida's existing regulations, or can we continue to maintain our more stringent state standard?

The issue of potential federal preemption of Florida's state code is particularly important to us as our experience, mirrored by the many engineers and contractors we have spoken with, is that the gravity drainage system utilizing collector tanks is the safest of the many systems allowed in the Act. Should the Act preempt our state requirements we are concerned that it would allow the other systems listed in section 1404 (c)(1)(A)(ii), to be utilized in the 6000 public pools requiring retrofitting, and with all new public pool construction. We are of the opinion, that as Florida's requirements incorporate one of the allowable systems under section 1404 (c)(1)(A)(ii), of the Act, we meet the Federal requirements, and should be able in our state to solely mandate use of the gravity drainage system.

Our concern is slightly different with regard to the requirements of section 1404 (c)(1)(A)(i), of the Act. That section requires each public pool and spa in the United States to be equipped with anti-entrapment devices or systems that comply with the ASME/ANSI A112.19.8-2007 performance standard ("Standard"). However, review of the Standard and other related material leads us to believe that the provisions of section 1404 (c)(1)(A)(i), do not apply to the 31,000 Florida public pools and spas utilizing the gravity drainage/collector tank system.

The title of the Standard clearly indicates that it relates to "suction fittings for use in swimming pools, wading pools, spas, and hot tubs." Review of the Standard indicates that it is replete with definitions of and references to, different types of suction fittings and components. For example, note the "definition" in section 1.1.2 on page 1 of the Standard regarding suction

fittings; section 1.1.6 and parts thereunder outlining types of suction fittings; and the language in section 1.2 entitled "Related Standards" stating that the scope of this standard is "directly related to suction fittings." Thus, based on the plain language, it is clear that the ASME/ANSI Standard only applies to suction fittings.

The gravity drainage/collector tank system, however, is not a suction fitting system. Note the Consumer Product Safety Commission's (CPSC) own entrapment guidelines in publication # 363, appendix B, which states several times that this system is not a suction system. Note as well, page 3, of the recent CPSC Staff Interpretation of Section 1404, dated March 14, 2008, where, in discussing the gravity drainage system it states: "[T]he pool circulation pump draws water from this tank, thus removing direct suction from the pool."

Based on our review of the above-referenced material, we do not believe that the provisions of section 1404 (c)(1)(A)(i), apply to Florida public pools and spas utilizing the gravity drainage/collector tank system. If you agree with our analysis, then Florida's approximate 31,000 public pools and spas already fitted with the gravity drainage system will not have to make any modifications, and the only impact will be on the remaining 6000 pools and spas predating current regulation. Should you disagree, however, and determine that Florida's public pools and spas utilizing the gravity drainage/collector tank system fall within the scope of the Act despite the fact that these pools do not use a suction fitting system, then all 37,000 public pools and spas in this state will require modification. Thus, our second question is whether the use of the gravity drainage/collector tank system negates the need for compliance with the provisions of section 1404 (c)(1)(A)(i), of the Act.

In either case, regardless of whether it is 6,000 or 37,000 public pools and spas, we then come back again to our first question of whether the Act preempts state regulations. Rules currently under development by the Department contemplate a five year phase-in period whereby all of the 6,000 older pools and spas are required to be updated to meet the gravity drainage/collector tank requirement. It is clearly our preference to have all public pools and spas utilizing this system rather than having to lessen our standards to include the other systems allowed under the Act. If preemption applies, we remain concerned that we will no longer be able to mandate use solely, of the gravity drainage/collector tank system.

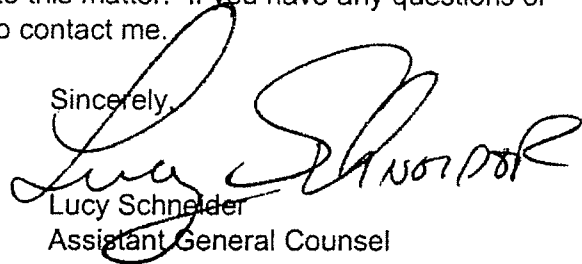
Our last concern, one that I am sure you understand, is that of time to comply with the Act's requirements. The large number of public pools and spas in this state suggest that compliance with the Act by the December 2008 deadline will be difficult. With regard to the requirements of section 1404 (c)(1)(A)(i), we are not yet aware of a drain cover product suitable for use in public pools meeting the ASME/ANSI standard. Additionally, all pool modifications require a sufficient number of available contractors to make the change, as well as engineering review and approval by Department engineers already tasked with running our statewide public pool program. Clearly this is an endeavor requiring a good-deal of person power before it can be finally implemented.

The State of Florida prides itself as having been at the forefront of health and safety regulation in the arena of public swimming pool regulation. With no suction fittings we long-ago solved the potential problem of entrapment in public swimming pools and spas. While we

applaud the Act's intent of raising public pool safety standards for those states still utilizing suction systems, we hope that the provisions of the Virginia Graeme Baker Pool and Spa Safety Act will not result in the implementation of lesser standards for Florida's citizens.

Thank you very much for your attention to this matter. If you have any questions or require any assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Lucy Schneider". The signature is fluid and cursive, with a large initial "L" and "S".

Lucy Schneider
Assistant General Counsel

LS/

cc: Bart Bibler

Stevenson, Todd

From: Falvey, Cheryl
Sent: Friday, March 28, 2008 4:04 PM
To: Horner, John; Elder, Jacqueline; Semple, Patricia; Mullan, John; Stevenson, Todd
Subject: FW: Virginia Graeme Baker Pool and Spa Safety Act
Attachments: Falvey ltr.pdf

Todd -- Can you log this in to GC as a request for a GC opinion? Everyone else this is the State of Florida's official request for our guidance on the pre-emptive effect of the Pool and Spa Safety Act. It requires technical help as well as input on enforcement issues. Our response will obviously impact our position vis-a-vis 49 other states. Cheri

From: Lucy_Schneider@doh.state.fl.us [mailto:Lucy_Schneider@doh.state.fl.us]
Sent: Friday, March 28, 2008 2:35 PM
To: Falvey, Cheryl
Cc: Bart_Bibler@doh.state.fl.us; Bob_Vincent@doh.state.fl.us; Terry_Davis@doh.state.fl.us
Subject: Virginia Graeme Baker Pool and Spa Safety Act

Dear Ms. Falvey:

As per our discussion last week, attached is a letter from the State of Florida outlining our questions with regard to the above-referenced federal legislation. I thank you in advance for your attention to this matter. Please do not hesitate to contact me if you have any questions or if I can offer you further assistance.

Lucy Schneider
Assistant General Counsel
850/ 245-4024

<<Falvey ltr.pdf>>