



Office of the Secretary  
Consumer Product Safety Commission  
Washington, D.C. 20207  
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Docket No. 02-2

**Comments of Consumers Union of the U.S. Inc., to the  
Consumer Product Safety Commission  
Urging the Commission to Reconsider the  
Provisionally-Accepted Settlement Agreement with Daisy Manufacturing Co., Inc.  
Under Federal Hazardous Substances Act and Consumer Product Safety Act  
(66 Fed. Reg. 68876)**

**Introduction**

These comments are submitted by Consumers Union<sup>1</sup> (CU), non-profit publisher of *Consumer Reports* magazine. They are in response to the Consumer Product Safety Commission's ("CPSC" or "Commission") request for comment on a provisionally-accepted Settlement Agreement with Daisy Manufacturing Co., Inc. ("Daisy Manufacturing"). CU urges the Commission to reconsider its provisional acceptance of the Settlement Agreement ("Settlement Agreement") because (i) the Commission failed

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<sup>1</sup> Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

to follow the procedural requirements governing the settlement of such cases by removing the case from review by the Administrative Law Judge ("ALJ" or "Presiding Officer"); and (ii) separate and apart from procedural requirements, the Settlement Agreement is not in the best interest of advancing consumer safety. If in fact Daisy Powerline Airguns contain a hazardous product defect, the Settlement Agreement lacks an adequate corrective action plan (incorporating repair or replacement measures) to ensure that consumers are protected from these dangerous products.

Of additional concern is the fact that, although it did not require a finding as to whether Powerline Airguns contain a defect that constitutes a substantial product hazard, the Commission limited the remedy in this case to a mere information and education ("I&E") campaign. I&E campaigns are notoriously ineffective in reducing injuries and deaths. There is no clearer demonstration of this in the record than the I&E campaign conducted to address the dangers associated with the use of All Terrain Vehicles ("ATVs").

The ATV industry assumed a voluntary approach to safety in 1998, relying almost exclusively on recommendations to dealers not to sell large ATVs for use by children, warning labels on the ATVs, tiny print in advertisements intended to communicate critical safety information, and optional safety training for purchasers of new ATVs. Earlier this year, CPSC issued the latest in a long line of studies documenting the dramatic increase in ATV injuries and deaths. In assessing trends since the voluntary approach began (1997 through 2001), the Commission provides compelling evidence that the I&E campaign for ATVs fails to protect consumers.

The CPSC's study concluded the following:

- ATV-related injuries requiring emergency room treatment increased 104 percent from 54,700 to 111,700;
- Injuries suffered by children under 16 increased 56 percent to more than 33,000 in 2001;
- Injuries caused by bigger and more powerful ATVs, defined by the Commission as machines with engines bigger than 400 cc, shot up 567 percent from 3,662 to 24,437; and
- The ATV industry's contention that rising injuries can be explained by the significant growth in the number of ATVs, hours driven, and drivers is not supported by the evidence.

While the above findings speak for themselves, the Consumer Federation and Natural Trails performed additional analysis of data from 2001 - not previously released by the Commission - which cements the conclusion that core elements of the industry's voluntary approach are ineffective. For example:

- Less than four percent of injured ATV drivers received formal safety training from a dealer, salesperson or organized training program. This proportion is unchanged since 1997;
- More than 40 percent of drivers injured in 2001 stated that their ATV did not have warning labels or they did not know if it did at the time of the accident; and
- Nearly 90 percent of children under 16 were injured while riding adult-size ATVs in spite of the industry's voluntary policy not to sell these machines for use by children. This proportion is also unchanged since 1997.

One major reason the Commission reportedly limited the remedy in the Settlement Agreement to an I&E campaign was Daisy Manufacturing's assertions of financial harm to itself. Because the Commission apparently did not allow full

participation by Complaint Counsel,<sup>2</sup> it is inappropriate for it to consider the unchallenged assertions of financial harm to Daisy, without a full and rigorous examination of the potential harm to consumers posed by these products. In sum, the Commission has considered the asserted risks to this company without properly examining the risk of injury to consumers. This is particularly egregious in this case because those most likely to be at risk of injury are children.

## **Background**

On November 6, 2001, the Commission, then headed by Chairman Ann Brown, published in the *Federal Register* a Complaint, dated October 31, 2001, issued against Daisy Manufacturing Co., pursuant to section 15 of the FHSA, 15 U.S.C. § 1274, and section 15 of the CPSA, 15 U.S.C. § 2064. 66 Fed. Reg. 56062 (November 6, 2001). The Complaint alleged that the approximately 7,279,151 Daisy Powerline Airgun models 880 and 856 sold at the time the Complaint was filed contained defects that represent a substantial product hazard defect because BBs can become lodged in gun barrels, creating a "virtual magazine." Consequently, a BB may be in the gun, but may not be visible to users of the guns -- often children -- who may believe the gun to be empty and fire it, causing injury or death. (See *CPSC v. Daisy Manufacturing Co.*, CPSC Docket No. 02-02).

On October 14, 2003, with the CPSC under a new Chairman, Harold Stratton, Daisy Manufacturing made a request directly to the CPSC asking the Commission to

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<sup>2</sup> Under 16 C.F.R. § 1025.26(d), "any party may object to the transmittal to the Commission of a proposed consent agreement by filing a response opposing the motion." 16 C.F.R. § 1025.26(d) Therefore, the failure to allow Complaint Counsel the opportunity to review, and to object to the transmittal of a proposed consent agreement also is a violation of the regulations governing Commission actions.

reconsider Daisy Manufacturing's earlier settlement offer, "based primarily upon Daisy's financial condition and its inability to obtain liability insurance at a reasonable price."

(Id.) In response to Daisy Manufacturing's request, Commissioner Gall and Chairman Stratton voted to stay the proceeding, and removed the case from the Presiding Officer.

(See Statement of The Honorable Thomas H. Moore in the Matter of *Daisy*

*Manufacturing Company.*, CPSC Docket No. 02-02, November 14, 2003). The

Commission then proceeded to consider Daisy Manufacturing's request, and ultimately chose to provisionally accept the proposed settlement agreement addressed by these comments.

#### **Acceptance of the Provisionally-Accepted Agreement by the Commission Would Violate Commission Regulations**

Such a direct transmission of a settlement offer by Daisy Manufacturing to the Commission violated regulations requiring the settlement offer to be submitted directly to the ALJ accompanied by a motion for the offer to be transmitted to the Commission. Consideration of a Settlement Offer circumventing review by the Presiding Officer constitutes a clear violation of the Commission's regulations.

The regulations state that, "Any party shall have the opportunity to submit an offer of settlement to the Presiding Officer." 16 C.F.R. § 1025.26. The regulations further state that, "Each offer of settlement shall be accompanied by a motion to transmit the proposed agreement and order to the Commission."

Under these regulations, Presiding Officer has the authority to decide whether or not to transmit the offer of settlement to the Commission for its consideration. The regulations specify that:

The Presiding Officer may transmit to the Commission for decision all offers of settlement and accompanying memoranda that meet the requirements enumerated in paragraph (c) of this section. The Presiding Officer shall consider whether an offer of settlement is clearly frivolous, duplicative or offers previously made and rejected by the Commission or contrary to establish [sic] Commission policy. The Presiding Officer may, but need not recommend acceptance of offers. 16 C.F.R. § 1025.26(d).

Therefore, under the clear language of the regulations governing procedures for settlement of cases by the Commission, a settlement offer may not be considered by the Commission directly -- such an offer must be transmitted by the Presiding Officer -- and the transmission of such a settlement offer is within the sole discretion of the Presiding Officer. Because the Daisy Manufacturing provisionally-accepted Settlement Offer was not properly presented to the Commission by the Presiding Officer, the Commission cannot consider it. Such a departure not only violates the Commission's regulations, but it also sets a bad precedent for the effective and orderly process of Section 15 cases.

**No Determination Has Been Made as To Whether the Guns Present a Substantial Product Hazard**

Separate and apart from procedural reasons, we believe that the Commission should reject this provisionally-accepted Settlement Agreement. If in fact Daisy Powerline Airguns are potentially hazardous products under section 15 of the FHSA, 15 U.S.C. § 1274, and section 15 of the CPSA, 15 U.S.C. § 2064, the provisionally-accepted Agreement is woefully inadequate because it lacks measures for Daisy Manufacturing to recall or repair the Powerline Airguns.

We believe that these issues must be returned to the ALJ for a determination of whether the Airguns are potentially hazardous products. The Commission's record in this case suggests that these are dangerous products.

In its Complaint, the agency noted: CPSC's staff has learned of at least 15 deaths and 171 serious injuries that have been attributed to alleged design and manufacturing defects in Daisy's Powerline Airguns. About eighty percent of those who have been killed or injured by the airguns were children under the age of 16. Children have been killed after being shot in the head or chest. Other children have been seriously injured after BBs punctured their heart, spinal cord, or skull, causing paralysis and brain damage.

One of the many tragic incidents that CPSC learned about involved John "Tucker" Mahoney, of New Hope, Pa. On May 24, 1999, Tucker and his friend were shooting a model 856 Powerline, two days after he had received the airgun as a gift for his 16th birthday. CPSC staff contends that as a result of a defect within the airgun, a BB remained lodged inside of the airgun's magazine, unbeknownst to Tucker or his friend. Believing the airgun was unloaded, Tucker's friend pointed and fired the airgun at close range. The hidden BB became dislodged, chambered, and struck Tucker in the head. Tucker was severely injured and is now in a near vegetative state. In February 2001, Daisy settled Tucker's product liability lawsuit for approximately \$18 million dollars. CPSC staff believes that it would cost \$2 per airgun to correct the defect that causes BBs to become lodged in the loading mechanism and to put an automatic safety device on the airgun.

We believe that, due to the serious nature of the injuries that can be inflicted by these products, the question of whether they contain a dangerous defect should be returned to the Presiding Officer for his or her examination. Such a proceeding should include a full exploration of the facts, as well as the full participation of Complaint

Counsel -- who is tasked with advocating for the protection of consumers from dangerous products. He or she can fully evaluate and counter any assertions made by Daisy Manufacturing that the product is safe, or any assertion that the financial state of the company should impact any corrective action plan. For the Commission to consider a Settlement Agreement, as it apparently did in this case, without the full and active participation of Complaint Counsel leaves the Commission inadequately informed to make any decision regarding the Agreement.

### **Conclusion**

For the reasons stated herein, we request that the Commission reconsider its provisional Settlement Agreement with Daisy Manufacturing Co., Inc., and return the case to the Presiding Officer who can make a determination of whether the Daisy Powerline Airguns present a substantial product hazard. It is only after such a determination that an assessment can be made of whether, and to what extent Daisy Manufacturing should implement a corrective action plan -- including a recall or repair program.

In addition, the Commission should require Daisy Manufacturing to submit any future offers of settlement to the Presiding Officer -- who can decide, as is properly within his or her discretion under 16 C.F.R. § 1025.26, on the sufficiency of any settlement offer, and whether or not to transmit such a settlement offer to the Commission for its consideration.

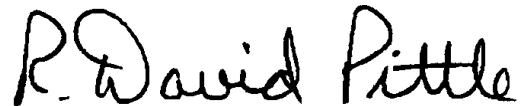
We urge the Commission to Reconsider the Settlement Agreement currently before it because the Settlement Agreement is 1) improperly presented; and 2)



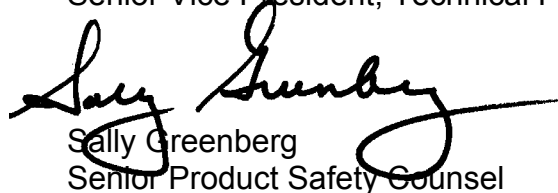
incomplete in its determination of the level of risk to consumers. Given the past history of deaths and injuries associated with these products, accepting such an agreement under these flawed conditions would be a disservice to consumers.

December 24, 2003

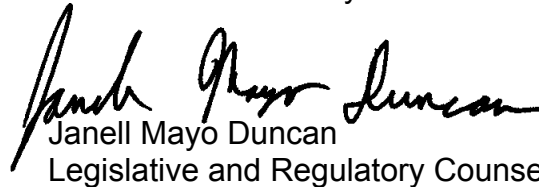
Respectfully submitted,



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