

# REVEALING THE CSB'S EVOLUTION AND FUTURE

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High-profile incidents such as the 2008 dust explosion at the Imperial Sugar refinery in Savannah, Ga., killing 14 people and injuring 38, and the 2005 explosion at the BP Texas City refinery claiming 15 lives and injuring 170, continue to drive a new focus on industrial safety.

In the United States, the Occupational Safety and Health Administration, the U.S. Environmental Protection Agency and the U.S. Chemical Safety and Hazard Investigation Board (commonly referred to as the Chemical Safety Board or the "CSB") all have roles related to the investigation and prevention of chemical accidents.

Although dwarfed in size by its sister federal agencies, the CSB has become a leading voice on process safety matters and the prevention of industrial accidents. For this reason, it is imperative for companies who may experience chemical accidents to be familiar with the agency and its investigative process.

The challenges that the CSB overcame during its development make its evolution all the more remarkable. In the aftermath of the Bhopal, India, disaster, the U.S. Congress quickly passed the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § §

11001-11050, in an effort to address concerns about the prevention of catastrophic industrial accidents.

Believing that EPCRA's focus on emergency planning and response gave insufficient emphasis to accident prevention, Congress included a section in the 1990 Clean Air Act Amendments that specifically addresses the prevention of accidental releases and builds on the regulatory program developed by EPCRA. (42 U.S.C. § 7412(r)).

As part of this focus on prevention, Congress created "an independent Chemical Safety Board to investigate accidents and recommend measures to reduce the risk of catastrophic events" (S. Rep. No. 101-228, 101st Cong., 2nd Sess. 228, 1989).

Modeled after the National Transportation Safety Board ("NTSB"), the CSB ([www.csb.gov](http://www.csb.gov)) is an independent federal agency led by five board members appointed by the president and confirmed by the Senate.

Like NTSB, CSB has no enforcement authority and a limited regulatory role. The principal role of the CSB is to investigate accidental releases of regulated or extremely hazardous substances and to report on the probable causes of each incident.

The real power of the CSB stems from its authority to make recommendations to facility owners and operators, industry groups, unions, Congress, federal agencies and others on the ways to reduce the likelihood or consequences of chemical incidents, including recommending specific rules to be issued by EPA and OSHA (42 U.S.C. § 7412(r)(6)).

CSB's early history was marked with setbacks and controversy. For almost five years, CSB only existed on paper. No board members were nominated until 1994. Its first budget of merely \$500,000 in 1995 was later rescinded. The CSB ultimately received funding and began work in 1998. Infighting and allegations of mismanagement marred its first years.

Since fiscal year 2001, inspector generals from three separate federal agencies have made 32 recommendations to CSB to "address problems in management accountability and control, human capital management, compliance with its statutory requirements and other issues" (Chemical Safety Board: Improvements in Management and Oversight are Needed, United States Government Accountability Office, Aug. 22, 2008).

The roots of the agency's emergence as an authority on process safety began well before the BP Texas City disaster in 2005, but the fire and explosion that occurred that year on March 23 marked a turning point for the agency.

The sophisticated use of the "bully pulpit" by the then-chair and chief executive officer of the CSB, Carolyn W. Merritt, coupled with the agency's creative use of its authority to issue recommendations placed the agency

at the forefront of the government's and industry's response to Texas City.

For the first time in its history, CSB issued recommendations before its investigation was complete and termed several of them as "urgent."

Included among these was a recommendation to BP's Board of Directors to commission an independent panel to assess and report on the effectiveness of BP North America's corporate oversight of safety management systems at its refineries and its corporate safety culture, which led to the creation of the BP U.S. Refineries Independent Safety Review Panel, or "Baker Panel," chaired by former U.S. Secretary of State James A. Baker III.

Subsequent findings and recommendations from the CSB and the Baker Panel gave strong emphasis to the roles of boards of directors and executive management in overseeing process safety performance.

The CSB has been so active in seeking to publicize its message that some have questioned whether it oversteps. In fall 2006, Chairperson Merritt appeared on a 60 Minutes segment regarding the Texas City incident and made comments very critical of the company.

The segment, which ran a week before jury selection was set to begin in the first civil trial stemming from the accident, included interviews with the plaintiff in that lawsuit, whose parents had died in the incident, as well as her lawyer.

In light of the upcoming trial, the participation of CSB and the tenor of the agency's comments were somewhat surprising, especially considering that the agency is not supposed to

apportion blame or fix liability (Senate Report, at 233, reprinted in 1990 U.S.C.C.A.N. at 3617).

As illustrated, the powerful scrutiny that the agency can bring to bear on an incident or an organization is impressive, especially considering its relatively limited budget of approximately \$9.2 million in fiscal year 2009 and staff of about 40 people. Its recent accomplishments are significant.

CSB continues to drive consideration of key safety issues, including a recent emphasis on the hazards associated with reactive chemicals and combustible dust.

The agency also is at the forefront of the debate on the impact of Homeland Security regulations on "sensitive security information" issued under the Maritime Transportation Security Act of 2002 and limits on the public accessibility of information after accidents at certain facilities.

The agency remains adept at the adage of "doing more with less." By way of comparison, the NTSB's annual budget and staff is almost 10 times larger than that of the CSB.

While still conducting reviews that result in final investigation reports and very specific recommendations, the agency is conducting an increasing number of reviews that result in case studies and more general recommendations.

The agency also continues to conduct evaluations and publicize more general chemical accident hazards. Both of these efforts allow the agency to husband its resources while still being very active.

The GAO and CSB continue to disagree on whether the agency's Clean Air Act mandate requires it to investigate every chemical accident involving a fatality, serious injury or substantial property damage.

Although no one disputes that the agency's current budget would not allow it to conduct all of these investigations, CSB has stated that it will work with Congress to clarify its mandate.

Meanwhile, CSB continues to be both resourceful and on the cutting edge when it comes to publicity. CSB chemical safety video messages are now available on YouTube and the agency even uses Twitter ([twitter.com/chemsafetyboard](https://twitter.com/chemsafetyboard)) and Facebook as well as more conventional outlets for disseminating news releases.

The CSB recently announced an action with broad future implications for many different industries.

In a recent Advance Notice of Public Rulemaking ("ANPR"), CSB announced its intention to move forward with a plan to develop an accidental chemical release reporting rule required under the agency's implementing legislation (74 Fed. Reg. 30259, June 25, 2009).

Until recently, the CSB maintained that such a rule was not needed and that it could learn of most serious chemical accidents from the media and reports filed with the National Response Center.

In response to criticism from the GAO and others for not developing a rule, CSB now has concluded that an accidental chemical release reporting rule would (1) improve the timeliness,

completeness, and accuracy of information regarding chemical incidents; (2) help develop better information on chemical accidents; and (3) help identify issues and trends that could be used to prevent chemical accidents.

In the ANPR, CSB asked the public to consider several issues, including incident notification and collection of incident data (e.g., what information should be reported, how soon after an incident should reporting occur); coordination with other chemical incident reporting requirements; thresholds for reporting; and various statutory definitions (e.g., ambient air, extremely hazardous substance, serious injury, substantial property damage).

The agency also sought public comment on the following four approaches for implementing the rule:

#### **Option 1**

Comprehensive approach requiring the reporting of information on all accidental releases subject to CSB investigatory jurisdiction;

#### **Option 2**

Targeted approach requiring the reporting of basic information for incidents that met significant consequence thresholds;

#### **Option 3**

Upon request approach requiring the reporting of more extensive information on chemical accidents when notified by CSB; and

#### **Option 4**

Approach based upon presence or release of specified chemicals and specified threshold amounts.

Comments were due on Aug. 4, 2009, and many industry groups and trade associations submitted comments in response to CSB's request. The majority of the comments supported Option 3 or another more limited approach.

Most commentators expressed concern over the potential for confusion and burden associated with multiple, redundant reporting requirements. A proposed release reporting rule is expected by late 2009 or early 2010. A second opportunity for public comment then will follow before the agency issues a final rule.

In the absence of fundamental missteps, it is likely that CSB's role on chemical accident prevention, and prominent visibility, will continue to increase. CSB's announcement of a new regional office in Denver demonstrates the agency's commitment to expanding its footprint.

For all of these reasons, it is important for companies and the environmental, health and safety lawyers who counsel them to have a strong understanding of the CSB and its investigatory methods.

If a major industrial accident occurs at a stationary facility in the U.S., it is almost assured that CSB investigators will be among the first federal agents seeking prompt information and access.

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