



January 13, 2020

Mr. Thomas Goonan
General Counsel
Chemical Safety and Hazard Investigation Board
1750 Pennsylvania Ave. NW
Suite 910
Washington, DC 20006

Re: Chemical Safety and Hazard Investigation Board (CSB)
Proposed Accidental Release Reporting Rule
84 Fed. Reg. 67899 (Dec. 12, 2019)
Docket Number CSB-2019-004
RIN 3301-AA00

Dear Mr. Goonan,

The Plastics Industry Association (PLASTICS) appreciates the opportunity to provide the CSB with its perspective and recommendations in response to the above-referenced Notice of Proposed Rulemaking.

The Plastics Industry Association (PLASTICS), formerly SPI, is the only organization that supports the entire plastics supply chain, representing nearly one million workers in the \$451 billion U.S. industry. Since 1937, PLASTICS has been working to make its members and the industry more globally competitive while advancing recycling and sustainability. Plastics innovations continuously improve products ranging from healthcare and medical devices to building and construction, automotive and packaging.

I. Introduction

PLASTICS supports the CSB's mission and recognizes the importance of providing prompt notice of a chemical release with significant offsite consequences. Section 112(r) of the Clean Air Act (CAA) directs the CSB to "establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigative jurisdiction." 42 U.S.C. 7412(r)(6)(C)(iii). CSB states that the proposed rule is intended to satisfy this statutory requirement. After careful review, we respectfully submit that the scope of the proposed rule substantially exceeds both the authority provided by Section 112(r) of the CAA and the apparent intent of CSB as evidenced by its estimate that the proposed rule would result in the submission of approximately 200 reports per year. The proposed rule needs to be redrafted to comply with the Congressional mandate of the CAA and reflect the Board's stated intent. The bases for these conclusions are explained below.

Some of PLASTICS' member companies will be subject to the CSB reporting rule and could be significantly (and adversely) affected if it requires duplicative reporting or overreporting, or is

ambiguous; these companies would be exposed to the risk of inappropriate enforcement actions brought by EPA/DOJ on behalf of the CSB and the associated adverse publicity. Given the plastics' industry's keen awareness and commitment to safeguarding workers and protecting the public, we offer constructive comments that we hope will help the CSB more effectively meet its legitimate investigatory responsibilities in the manner directed by Congress under the CAA.

II. Congressional Authority

Congress provided CSB with the authority to compel the reporting of certain chemical releases; however, it put in place specific statutory protections to avoid both duplicative reporting and over-reporting.

To avoid duplicative reporting, Subparagraph 112(r)(6)(C)(iii) of the Clean Air Act (CAA) provides that "reporting [accidental] releases to the National Response Center [NRC], in lieu of the Board directly, shall satisfy [the CSB's accidental release reporting] regulations," and that "[t]he National Response Center shall promptly notify the Board of any releases which are within the Board's jurisdiction." In other words, Congress determined that the information that is required to be reported to the NRC under existing environmental reporting rules (e.g., CERCLA) is sufficient for CSB to make an initial determination for further action and CSB should work directly with the NRC to automatically receive contemporaneous reports of incidents falling within the CSB's investigatory jurisdiction, rather than creating a new and duplicative reporting obligation on owners and operators of chemical facilities. The proposed rule apparently would require a direct report to the CSB in situations where a report to the NRC is not required by other laws. We explain below why we believe such a requirement exceeds the CSB's investigatory authority under the CAA.

To avoid overreporting, Congress limited the scope of the CSB's investigatory jurisdiction to "accidental release[s] resulting in a fatality, serious injury or substantial property damages," and defined the term "accidental release" to mean "an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source."

III. Preferred Approach

CSB should rely on the existing mechanisms, particularly receiving information from the National Response Center (NRC), to meet the reporting obligations cited above, and not create any new requirements or obligations for covered stationary source reporting. PLASTICS membership observed that CSB has not demonstrated the need to collect any additional information due to any inadequacy of current mechanisms.

CSB should not use this as an opportunity to establish data collection beyond what is necessary for triggering statutory investigations. Further, CSB proposes reporting requirements that would contradict required coordination with other agencies having greater authority such as EPA (e.g., which has not identified a threshold for substantial property damage, and instead relies on federal, state and local release quantities) and OSHA (which does not require all recordable injuries to be submitted), as will be further discussed below.

CSB should not create new definitions of critical CAA terms that conflict with other agency definitions or do not appear within the original CAA. Deviations create confusion within the regulated community and create enforcement uncertainty should other regulatory authorities

attempt to use CSB definitions in their enforcement cases (which may then raise question over whether their enforcement actions are consistent with their own jurisdiction and rules).

The Purpose of the Rule

As noted above, the CAA requires the CSB to issue a legislative rule “for reporting of “*accidental releases* [italics added] into the *ambient air* [italics added] **subject to the Board’s investigatory jurisdiction** [emphasis added].” 42 U.S.C. 7412(r)(6)(C)(iii). In other words, the purpose of the rule is to require each facility that experiences an event subject to the CSB’s investigatory jurisdiction under Subparagraph 112(r)(6)(C)(iii) to inform the CSB of the event so the CSB can determine whether to initiate an investigation. Therefore, it is critical to clarify the meaning of the italicized terms and the scope of the CSB’s investigatory jurisdiction over *accidental releases*.

The Scope of the CSB’s Investigatory Jurisdiction Over *Accidental Releases*

Subsection 112(r)(C) of the CAA states:

- (C) The Board shall--
 - (i) investigate ... any *accidental release* resulting in a fatality, *serious injury* or *substantial property damages* [italics added].

Congress’s adoption of that provision established objective criteria for demarcating the scope of the CSB’s investigatory authority, such that no reporting obligation may be imposed by the subject rule in the absence of a fatality, *serious injury* or *substantial property damages*. But that provision will not serve its presumably intended purpose of appropriately constraining the scope of the CSB’s investigational authority if the terms *accidental release* and/or *serious injury* are given an overly broad definition or interpretation.

To determine the scope of the CSB’s investigatory jurisdiction over *accidental releases*, it is necessary to clarify the meaning of the terms “*accidental release*”, “*serious injury*”, and “*substantial property damages*.” We start with the recognition that the CSB does not have unlimited resources to conduct the *accidental release* investigations mandated by Congress. Therefore, the CSB must avoid adopting overly broad definitions or interpretations of the scope of § 112(r)(C) that would preclude it from complying with this Congressional mandate.

The Meaning of “Substantial Property Damages”

In the absence of a statutory definition of “*substantial property damages*,” CSB proposed to define the term to mean “property damage, at or outside the stationary source, estimated to be equal to or greater than \$1,000,000.”

PLASTICS membership noted that EPA has not defined “property damage” or “substantial property damage” under its “Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act” (“RMP Rule”)¹, and that in its proposal, CSB recognized the difficulty in distinguishing between substantial and non-substantial damages. We believe that CSB should not establish a threshold dollar amount, and should not require reporting based

¹ 40 CFR Part 68

solely on *substantial property damages*, but should continue to rely on its established tracking mechanisms to identify where substantial property damages have occurred.

Furthermore, consistent with EPA's interpretation of the reporting requirement under 40 CFR 68.42, which requires reporting only of "[k]nown offsite impacts", it would be impractical to require the owner/operator of a stationary source to conduct investigations to determine offsite impacts.

The Meaning of "Serious Injury"

PLASTICS member views include that exposures to chemicals without actual or potential catastrophic effects were not intended to be considered "serious injuries" under the CAA. Clearly, OSHA recordability should not be used to define "serious injury" for purposes of the CSB reporting rule. The overwhelming portion of OSHA-recordable injuries and illnesses are not required to be reported to OSHA. For example, OSHA does not require an incident report for a chemical burn for which an ointment is prescribed. Furthermore, triggering a reporting requirement based on these types of less significant events is likely to introduce unnecessary complications that undermine their use. In a case immediately requiring multiple in-patient hospitalizations, the severity of the incident is clear. In a case involving a less significant chemical burn, the skin initially may be treated with an OTC ointment and other first aid and a prescription-only medication may be issued days later. Creating new reporting requirements for such injuries that would fall within CSB's proposed "serious injury" definition, with timing obligations, can cause confusion, especially for injuries that may not become OSHA recordable for much longer than four hours following the injury-causing event.

In the absence of a statutory definition of the term "serious injury", CSB proposed to define the term to mean any incident that results in any of the following:

- (1) Death; one or more days away from work; restricted work or transfer to another job; medical treatment beyond first aid; loss of consciousness; or
- (2) Any injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

The CSB's sole reasoning for this definition appears to be that it was suggested in several industry comments responding to the ANPRM (84 Fed. Reg. 67906, col. 2). For the following reasons, we believe this definition is inapplicable, inappropriate and incompatible with Section 112(r) of the CAA and we believe the CSB may have misinterpreted the industry comments that addressed this issue.

The proposed definition of the term "serious injury" would go beyond² adopting the broad definition of a recordable, work-related injury or illness in § 1904.7 of the Recording and Reporting Occupational Injuries and Illnesses Rule (RROII Rule) adopted by the Occupational Safety and Health Administration (OSHA) and the Bureau of Labor Statistics (BLS).³ The RROII implements a Congressional mandate to collect and analyze data on all work-related injuries and illnesses in the United States other than those effectively addressed with a narrowly defined set of treatments classified as first aid.⁴ This definition is not oriented toward the catastrophic

² The CSB proposal deleted the word "significant" from the phrase "any significant injury or illness diagnosed by a physician," which would appear to broaden the category of "serious injury" to include any condition, however, minor, diagnosed by a physician, including first aid cases.

³ OSHA Recording and Reporting Occupational Injuries and Illnesses Rule, 29 CFR 1904.

⁴ See definition of first aid at Section 1904.7(b)(5)

events or potentially catastrophic events that led Congress to adopt Section 112(r) of the CAA. It is designed to provide both site-specific and national data that may be useful to employers, employees, OSHA, the National Institute for Occupational Safety and Health (NIOSH), BLS and other stakeholders in managing workplace safety and health, and prioritizing various types of interventions by OSHA, NIOSH, employers and other stakeholders (e.g., research, outreach, education, enforcement, rulemaking).

According to BLS, private sector establishments covered by the RROI Rule recorded a total of approximately 2.8 million OSHA-recordable cases in 2018.⁵ Neither OSHA nor BLS collected the detailed case data for those 2.8 million cases. There is no rule requiring the covered establishments to submit the detailed case-specific data, including causation, for those 2.8 million OSHA-recordable cases to OSHA or BLS.

OSHA requires the approximately 450,000 establishments in what OSHA has identified as high hazard industrial sectors to submit site-specific summary data extracted from the detailed annual log of recorded cases. The summary includes total number of: deaths, cases with days away from work, cases with job transfer or restriction, other recordable cases, days away from work, days of job transfer or restriction, injuries, skin disorders, respiratory conditions, poisonings, hearing loss, all other illnesses, average number of employees and hours worked by all employees. BLS conducts a statistically-based annual survey of approximately 275,000 establishments from which it collects case-specific workplace data on OSHA-recordable cases for the purpose of developing and publishing detailed national estimates of the number, rates, types, causes, and characteristics of those incidents, not for purposes of investigating particular events or facilities.

If a medical professional, whether because of an inclination to rely on a patient's desires or err on the side of caution, recommends a day away from work or a day of restricted duty, or prescribes a prescription drug (to be used if needed), the case becomes recordable. There is a great deal of subjectivity in the OSHA recordkeeping system that militates against its use to define the term "serious injury" as a reporting trigger for the CSB, even if it were limited to days away from work cases.

Furthermore, even narrowing the proposed definition of the term "serious injury" to the most serious category of OSHA-recordables – days away from work cases (also known as "lost workday cases") – would not be adequate to limit the reports filed with the CSB under the proposed rule to a manageable number deserving of the CSB's attention. According to the BLS estimates for 2018, there were 17,410 lost workday cases due to exposure to harmful substances:

- 3,890 lost workday cases due to inhalation of harmful substance--single episode;
- 10,500 lost workday cases due to exposure to harmful substance through skin, eyes, or other exposed tissue (excluding 250 due to medical injection), of which 3,790 lost workday cases were due to chemical burns and corrosions
- 3,020 lost workday cases due to other exposures to harmful substances (excluding multiple episode exposures)

This large number of potential reports would be unmanageable, far beyond the scope of the catastrophic or potentially catastrophic incidents envisioned by Congress, and far in excess of the number of incidents reported to OSHA, which is the agency to which Congress has entrusted the oversight of workplace safety. Furthermore, as indicated by the water and plastic

⁵ BLS news release, Nov. 7, 2019 at <https://www.bls.gov/news.release/pdf/osh.pdf> (last accessed Jan. 10, 2020)

resin scenarios described below, given the incredibly broad definition of the terms “accidental release,” “extremely hazardous substance” and “serious injury” proposed by the CSB, we can only guess, but would expect the number of reports required by the proposed rule to be significantly higher.

We next review the ANPRM comments that apparently led the CSB to propose a definition of “serious injury” based on the definition of an OSHA-recordable injury or illness.

The American Chemistry Council (ACC) made the following ANPRM comment on the definition of “serious injury”:

ACC recommends that CSB define serious injury on the basis of the definition used by OSHA for catastrophe... This definition is already widely understood and used and eliminates the problem of “precautionary” hospital visits being counted. [See p. 93 of the compiled comments on the ANPRM.]

OSHA defines “catastrophe” to mean “the [in-patient] hospitalization of three or more employees resulting from a work-related incident or exposure; in general, from an injury or an illness caused by a workplace hazard.”⁶ While less specific, the ANPRM comment made by the American Petroleum Institute (API) on this issue referred to “existing reporting regulations” rather than “recordkeeping regulations.”

The American Forest & Paper Association made the following ANPRM comment on the proposed definition of “serious injury”: “CSB could model a reporting requirement after the [EPA] SPCC⁷ rule or OSHA.” [See p. 10 of the compiled comments on the ANPRM.] This appears to have been referencing the narrow OSHA **reporting** requirement for catastrophic events in effect in the 2009 version of § 1904.39, not the broad definition of OSHA-recordable in § 1904.7 or the expanded OSHA reporting requirement adopted in the 2014 version of § 1904.39.⁸ The 2009 version of § 1904.39 required the reporting of a work-related incident resulting in a fatality or the in-patient hospitalization of 3 or more employees. The version of § 1904.39 in effect since 2014 requires the employer to report a work-related fatality to OSHA within 8 hours of the employer becoming aware of it and a work-related hospitalization, amputation or loss of an eye within 24 hours of the employer becoming aware of it.

Given that the proposed rule is intended to assist CSB in making “informed decisions about its jurisdiction, interagency coordination, and deployment decision-making” for what would hopefully be a relatively small number of events with actual or potentially catastrophic consequences, we believe a definition of “serious injury” based on an incident resulting in 3 or more in-patient hospitalizations is consistent with the phrase “any accidental release resulting in a fatality, serious injury or substantial property damages.” The word “a” appears before the word “fatality” but not the term “serious injury”; and it would not be proper to place the word “a” (referencing something in the singular) before the term “substantial damages.” Therefore, it appears that Congress provided the CSB with discretion to determine what number and types of conditions would constitute “serious injury.” Furthermore, a purely work-related definition of “serious injury” would not be appropriate because the Congressional mandate to the CSB in Paragraph 112(r)(6)(E) states:

⁶ OSHA field Operations Manual September 13, 2019. Directive Number CPL 02-00-163. Available at: https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-163.pdf (last accessed Jan. 7, 2020)

⁷ Spill Prevention, Control and Countermeasure (SPCC) Rule.

⁸ In 2014, OSHA expanded the scope of its incident reporting requirement to include incidents

The Board shall enter into a memorandum of understanding with the Occupational Safety and Health Administration so as to limit duplication of activities. In no event shall the Board forego an investigation where an accidental release causes a fatality or serious injury among the general public, or had the potential to cause substantial property damage or a number of deaths or injuries among the general public.

The Meaning of “Accidental Release”

Paragraph 112(r)(2)(A) of the CAA defines the term “accidental release” as follows:

(A) The term “accidental release” means an unanticipated emission of a *regulated substance* or other *extremely hazardous substance* into the *ambient air* from a stationary source [italics added].

To determine the meaning and scope of the term “accidental release,” it is necessary to clarify the meaning of the terms “regulated substance”, “extremely hazardous substances” and “ambient air.”

The Meaning of “Ambient Air”

The meaning of the term “ambient air” for purposes of the proposed rule is best determined by a review of its historical meaning and the context in which it is used. Subparagraph 112(r)(6)(C) provides:

- (C) The Board shall--
- (i) investigate ... any **accidental release** resulting in a fatality, serious injury or substantial property damages;
 - ...
 - (iii) establish by regulation requirements ... for reporting **accidental releases** into the ambient air subject to the Board's investigatory jurisdiction. Reporting releases to the National Response Center, in lieu of the Board directly, shall satisfy such regulations. The National Response Center shall promptly notify the Board of any releases which are within the Board's jurisdiction.

Paragraph 112(r)(2)(A) provides:

(A) The term “**accidental release**” means an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source. [Italics and emphasis added]

While the CAA does not define the term ambient air, EPA has a longstanding and well-recognized definition of the term (at 40 CFR 50.1(e)) in the rule implementing the National Primary and Secondary Ambient Air Quality Standards, which was re-codified in 1971⁹ and reads as follows:

Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access.

⁹ 36 Fed. Reg. 22368, 22384, col. 2 (Nov. 25, 1971).

The term “atmosphere” is generally recognized to mean the layer or envelope of gases surrounding the Earth.

A word search shows the phrase “ambient air” is used 230 times in the Clean Air Act. In adopting the 1990 Amendments to the CAA without providing a new definition of the term “ambient air,” Congress presumably was aware of and adopted EPA’s definition of that critical term rather than granting the CSB the authority to reject that definition in favor of one that was then in conflict with over 20 years of established environmental law and now would be in conflict with over 50 years of established environmental law. When Congress has determined an agency should exercise jurisdiction over indoor air (inside a stationary source), it has clearly expressed that intent (see, e.g., Radon Gas and Indoor Air Quality Research Act of 1986).

The CSB proposal declines to adopt that definition, and instead proposes to define the term “ambient air” to mean “any portion of the atmosphere inside or outside a stationary source,” which implies CSB is asserting that its investigatory jurisdiction includes the ambient air inside a stationary source. We respectfully submit that CSB does not have such authority. Where an *accidental release* occurs, the CAA provides the CSB with jurisdiction to investigate the incident and that includes an investigation of the indoor equipment and activities that caused or contributed to the accidental release. Where an incident does not result in an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air (as defined by EPA) from a stationary source there is no accidental release subject to the CSB’s investigatory jurisdiction. We are not aware of any accidental release incidents investigated by the CSB that did not involve a release of an extremely hazardous substance to the ambient air outside a stationary source to which the general public had access. That is consistent with the Congressional mandate in Paragraph 112(r)(6)(E), which provides:

(E) The Board shall coordinate its activities with investigations and studies conducted by other agencies of the United States having a responsibility to protect public health and safety. ... The Board shall enter into a memorandum of understanding with the Occupational Safety and Health Administration so as to limit duplication of activities.

The Meanings of “Regulated Substance” and “Extremely Hazardous Substance”

The CAA authorizes the CSB to investigate and, therefore, limits its investigatory authority to “any **accidental release** resulting in a fatality, serious injury or substantial property damages.” The term “**accidental release**” means “an unanticipated emission of a **regulated substance or other extremely hazardous substance** into the ambient air from a stationary source [emphasis added].” Therefore, combining those two principles, CSB’s investigatory authority under the CAA is limited by the CAA to:

any unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source ... resulting in a fatality, serious injury or substantial property damages.

The term “regulated substance” refers to set of “extremely hazardous chemicals” identified by EPA for coverage under its RMP Rule because they “pose the greatest risk of causing death, injury, or serious adverse effects to human health or the environment from accidental releases” (see Subsection 112(r)(3) of the CAA) “due to their toxicity, reactivity, flammability, volatility or

corrosivity” (1990 U.S.C.C.A.N. 3385, 3596).¹⁰ While the term “extremely hazardous substance” was not explicitly defined in the CAA, Subsection 112(r)(3) states:

For purposes of promulgating such list, the Administrator shall use, but is not limited to, the list of extremely hazardous substances published under the Emergency Planning and Community Right-to-Know Act of 1986.

Furthermore, Paragraphs 112(r)(6)(H) and (I) provide:

(H) Not later than 18 months after November 15, 1990, the Board shall publish a report accompanied by recommendations to the Administrator [of EPA] on the use of hazard assessments in preventing the occurrence and minimizing the consequences of accidental releases of extremely hazardous substances. **The recommendations shall include a list of extremely hazardous substances which are not regulated substances** (including threshold quantities for such substances) and categories of stationary sources for which hazard assessments would be an appropriate measure to aid in the prevention of accidental releases and to minimize the consequences of those releases that do occur [emphasis added].

(I) Whenever the Board submits a recommendation with respect to accidental releases to the Administrator, the Administrator shall respond to such recommendation formally and in writing not later than 180 days after receipt thereof. The response to the Board's recommendation by the Administrator shall indicate whether the Administrator will--
(i) initiate a rulemaking or issue such orders as are necessary to implement the recommendation in full or in part, pursuant to any timetable contained in the recommendation; or
(ii) decline to initiate a rulemaking or issue orders as recommended.

In other words, Congress directed the CSB to provide EPA with a recommended list of extremely hazardous substances for consideration by EPA. EPA could then determine whether to (1) accept the CSB recommendation and pursue rulemaking with the intent of adding the substance to the list of *regulated substances* covered by the RMP Rule; (2) accept the CSB recommendation and pursue rulemaking with the intent of adding the substance to a list of *extremely hazardous substances* subject to some lesser regulatory scheme, such as the General Duty Clause of the CAA or the CSB's reporting rule; or (3) reject the CSB recommendation.

Given the longstanding and widely-recognized meaning of the term “extremely hazardous substance” in Federal environmental statutes and regulations, and the legislative history of the 1990 Amendments to the CAA, we believe it is clear that the intent of Congress was to address unanticipated releases of chemicals with inherent and greatly elevated (“extreme”) toxicity, reactivity, flammability, volatility and/or corrosivity hazards that resulted or could have resulted in a catastrophic event.

¹⁰ Senate Report 101-228 at 211 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3596 states:

Extremely hazardous substances would also include other agents which may or may not be listed or otherwise identified by any Government agency currently which may as the result short-term exposures associated with releases to the air cause death, injury or property damage due to their toxicity, reactivity, flammability, volatility or corrosivity. The release of any substance which causes death or serious injury because of its acute toxic effect or as the result of explosion or fire or which causes substantial property damage by blast, fire, corrosion or other reaction would create a presumption that such substance is extremely hazardous.

Rather than adopting an approach consistent with the longstanding meaning of the term “extremely hazardous substance,” and the clear intent of Congress, the CSB proposal would, in effect, rewrite the CAA, as follows, by completely eliminating the requirement that the “accidental release” involve an “extremely hazardous substance.” As revised, its investigational authority would be greatly expanded to include:

any unanticipated emission of a ~~regulated substance or other extremely hazardous~~ substance into the ambient air from a stationary source ... resulting in a fatality, serious injury or substantial property damages.

Rather than characterizing a substance as extremely hazardous based on its inherent hazards, the CSB would base that characterization on the outcome of an event, which could be any injury that is simply recordable (as distinguished from reportable) under the RROII Rule (at 29 CFR 1904) enforced by OSHA. Under those criteria, and the CSB’s proposed definition of “ambient air,” an unanticipated release of any chemical, including inert chemicals that resulted in an OSHA-recordable injury or substantial property damage, would result in an ad hoc classification of those inert materials as “extremely hazardous substances.” For example, suppose there was a spill of water or resin pellets on a factory floor, an employee slipped and fell to the floor, and broke a bone in the fall (an OSHA-recordable event). To avoid any issue of a direct versus indirect effect, assume the force of the release of water or resin pellets knocks the employee to the floor and results in a broken bone. Suppose a bulk quantity of inert dust falls to the floor and creates a cloud of dust in the airspace of an employee with allergic rhinitis. The employee experiences an allergic reaction for which he takes a prescribed Rx medication (an OSHA-recordable event). Those substances arguably entered the ambient air/atmosphere above the factory floor, will fall to the factory floor and will remain there temporarily (until removed by evaporation and/or housekeeping). They arguably fall within the broad definition of an unanticipated emission into the atmosphere.¹¹ Clearly, the approach proposed by the CSB in defining the term “extremely hazardous substance” is not permitted by the CAA and we believe these are not the types of events the CSB has the inclination or resources to investigate, or that Congress would want the CSB to investigate. The assertion that CSB, in the exercise of its discretion, would not ask EPA to bring an enforcement action against a facility that failed to report events Congress never intended the CSB to investigate is not a satisfactory answer.

¹¹ Title 40 Section 49.123 of the CFR defines the terms “emission” and “air pollutant” as follows:

Emission means a direct or indirect release into the atmosphere of any air pollutant, or air pollutants released into the atmosphere.

Air pollutant means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and by-product material) substance or matter that is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term air pollutant is used.

IV. Alternative Considerations Based on CSB NPRM

Mandatory Content of Any Required Report Must be Limited to Information Required in Reports Submitted to the NRC Under Other Environmental Reporting Statutes

As previously explained, to avoid duplicative reporting, Subparagraph 112(r)(6)(C)(iii) of the Clean Air Act (CAA) provides that “reporting [accidental] releases to the National Response Center [NRC], in lieu of the Board directly, shall satisfy [the CSB’s accidental release reporting] regulations,” and that “[t]he National Response Center shall promptly notify the Board of any releases which are within the Board’s jurisdiction.” In other words, Congress determined:

- (1) That the required reporting to the NRC under other environmental statutes (e.g., CERCLA) would include all incidents required to be reported to the CSB under its investigational authority; and
- (2) that the information that is required to be reported to the NRC under existing environmental reporting rules (e.g., CERCLA) is sufficient for CSB to make an initial determination on whether it will pursue an investigation.

While it may be theoretically possible, the chances appear to be extremely remote that offsite exposure to an accidental release of less than the reportable quantity of a hazardous substance under CERCLA would cause a fatality or serious injury.

As CSB is not obligated to create requirements beyond the established current NRC reporting connection, CSB should focus only on receiving information (similar to the NRC information) from other agencies without placing additional burden upon regulated sources. As with EPA and its RMP Rule, it was also noted that caution must be taken to ensure confidential and security-sensitive information is protected, as information within a report becomes potentially publicly available through a FOIA request.

Factors to Consider if “Substantial Property Damages” is Defined

As CSB stated in the NPRM preamble:

In reviewing its own work, the CSB concluded that nearly all of its published investigation reports involved a fatality or serious injury. This is noteworthy only because the CSB has not relied heavily on this factor in selecting accidental releases to investigate in-depth.

We recognize the statutory use of the term, challenge with definition and practical application, and that other factors have played a more significant role in triggering CSB investigations. What if the dollar loss quantity only becomes known to exceed a set threshold days, weeks or months following an accidental release? Would such ambiguity open industry up to civil liabilities due to inconsistent interpretation? Should a definition be necessary, consistent with the limitation on the CSB’s investigatory authority imposed by the definition of the term “accidental release” in Paragraph 112(r)(2)(A) of the CAA (as further detailed above in the discussion of the meaning of “accidental release”), the words “at or” must be removed. The use of the definition would only be appropriate provided:

- (1) the CSB modifies the deadline for reporting an accidental release to one based on when the owner/operator becomes aware of the consequence triggering the notification requirement rather than the time of the release;
- (2) the owner/operator of the stationary source of the release would not be required to investigate off-site consequences; and

- (3) CSB recognizes that, except in extreme cases, it is anticipated to take significantly longer than four hours to estimate the dollar value of the damages caused by a release, especially when the initial response effort must focus on assisting those in need and controlling or eliminating any remaining hazardous conditions rather than developing estimates of property damage.

A Universal Requirement to Provide Notice to the CSB Within Four Hours of an Event Triggering a Reporting Obligation is Inappropriate

The appropriate timeframe for reporting should be based on the nature of the event. OSHA requires that a fatality be reported within 8 hours of an employer learning of the fatality and we believe that is appropriate for reporting a fatality case to the CSB. OSHA requires that the inpatient hospitalization of an employee be reported within 24 hours of an employer learning of that situation and we believe that time frame is also appropriate for reporting the inpatient hospitalization of three or more individuals (using OSHA's definition for catastrophe as previously cited) to CSB.

V. Conclusion

Based on the foregoing analysis, we respectfully submit that the scope of the proposed rule substantially exceeds both the authority provided by Section 112(r) of the CAA and the apparent intent of CSB as evidenced by its estimate that the proposed rule would result in the submission of approximately 200 reports per year. More specifically, we believe the CSB's investigational authority is limited to unanticipated releases of extremely hazardous substances into the ambient air outside the stationary source, in an area accessible to the general public, which results in a fatality, serious injury or significant property damages.

We hope that the information in these comments will assist the agency in determining how to proceed. Should you have any questions about our comments or wish to discuss any of these issues with us, please contact me.

Respectfully submitted,

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