January 13, 2020

Chemical Safety and Hazard Investigation Board
1750 Pennsylvania Ave. NW, Suite 910
Washington, DC 20006
ATTN: Reporting Rule Comment
Filed via Federal eRulemaking Portal:
http://www.regulations.gov

Office of Management and Budget
Office of Information and Regulatory Affairs
Attention: Desk Officer for the CSB
Filed to: oira_submission@omb.eop.gov

Re: Docket No. CSB-2019-0004; Regulatory Information Number, 3301-AA00;
Notice of Proposed Rulemaking; Accidental Release Reporting

Dear Sir or Madam:

On behalf of the CSB Reporting Rule Industry Coalition ("CSB Coalition"), we are pleased to submit comments addressing the Chemical Safety and Hazard Investigation Board’s ("CSB" or “the agency”) December 12, 2019 proposed rule entitled, “Accidental Release Reporting” (Docket No. CSB-2019-0004).

The CSB Coalition is composed of a broad array of industries potentially impacted by CSB’s December 12th proposed rule. The Coalition represents over 600 companies directly or through their various industry trade associations with a presence in every state in the United States. Included among its members are companies representing the chemical manufacturing, iron and steel, airline, petrochemical manufacturing, liquid terminal, and pulp and paper industries. Our membership includes segments of the regulated community most significantly impacted by the CSB’s proposed rule. Given the number of members potentially impacted by the CSB’s proposal, the Coalition has a substantial interest in the outcome of this rulemaking.
GENERAL COMMENT

The CSB’s proposed rule is unwarranted and overly broad in scope. From a policy standpoint, it is ill-considered and may well work in direct contravention to the legitimate and important mission of the agency, which is to investigate catastrophic, high-consequence ambient air releases in order to help prevent future similar accidents from occurring, and to make positive contributions to our Nation’s safety and environmental protection efforts through thorough and thoughtful investigations, analysis, and recommendations.

If finalized as proposed, the rule will considerably “broaden the net” of chemical incidents reported to the CSB – beyond even those required to be identified as OSHA recordable incidents on a company OSHA 300 log. Reviewing and screening this additional release data will burden the short-staffed and low-budgeted agency, draining resources that otherwise could be devoted to investigations of more serious incidents. The impact of “broadening the net” of incident data collected under the proposed rule will have little, if any, benefit because any additional low-consequence incidents captured by the reporting rule will be screened out for no further action by the agency, and the high-consequence major events captured would have been identified by the CSB via existing data compilation tools anyway.

A review of the CSB’s historic deployment decisions demonstrates the lack of need for the rule the CSB has proposed. CSB’s incident database included in the Notice of Proposed Rulemaking (“NPRM”) docket identifies approximately 1,923 chemical accidents from January 1, 2009 to July 15, 2019, yet the agency has deployed to only approximately 40-60 incidents during the entire ten year time span, equaling four to six incidents per year on average. This means that it deploys to only approximately 3 percent of the chemical accidents that it identifies using its existing data compilation mechanisms. This data demonstrate that the CSB already receives much more chemical incident information than it can possibly address; increasing the amount of data will divert far too any of its limited resources to gathering and screening such information, rather than investigating and developing critical safety recommendations.

In fact, the CSB has explicitly recognized as much and has determined that a reporting rule is not necessary and will not be helpful to its mission. The CSB stated in 2018, “Although

1 While the Coalition understands that the CSB was ordered to promulgate a reporting rule by the District of Columbia District Court on February 4, 2019, see Air Alliance of Houston, et al. v. U.S. Chemical Safety and Hazard Investigation Board, 365 F. Supp. 3d 118 (D.D.C. Feb. 4, 2019), as set forth herein, neither the District Court order nor the Clean Air Act Amendments enabling legislation mandate a rule of the breadth and scope of this proposed rule.

2 The Coalition used information from CSB’s Performance Accountability Reports as well as published investigation reports to determine the approximate number of deployments since 2009.
the Board published the ANPRM in 2009,\(^3\) it has since prioritized its investigatory activities over a rulemaking that may not produce much additional information useful to the Board in accomplishing its mission.” See CSB Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and In Support of Cross-Motion for Summary Judgment, Air Alliance of Houston, et al. v. U.S. Chemical Safety and Hazard Investigation Board, 365 F. Supp. 3d 118 (D.D.C. Feb. 4, 2019) (No. 17-2608 APM) (citing Klejst Decl. ¶¶ 27-28) (emphasis added). It has further stated that since 2009, the internet and other newsgathering and information sources have developed such that the Board can learn of serious chemical accidents without a reporting regulation. See id. (citing Klejst Decl. at 21) (“Since 2009, however, due to the continued rapid development of the Internet and other sophisticated newsgathering and information sources, the CSB has been able to learn of the most serious chemical accidents from these sources along with reports of chemical releases required to be filed with the National Response Center (“NRC”) for purposes of fulfilling reporting requirements to other federal agencies under different statutory provisions.”). Indeed, “[t]he CSB has been able to reliably use media reports to obtain timely information about the majority (approximately two-thirds) of incidents the agency has screened until 2018.” Id. (citing Klejst Decl. at 17).

Notwithstanding its expressed views on the lack of necessity for a reporting rule, pursuant to court mandate, the CSB has proposed a reporting regulation. If finalized as proposed, the rule will shift finite agency resources in the wrong direction, resulting in less accident investigation, analysis, recommendations and communication of these findings to the regulated community and other affected agencies, which has been the hallmark of the CSB over these past 20 years. Put simply, the CSB’s proposal as currently drafted will waste government resources and unnecessarily burden the regulated community in the very moments when the full attention of industry personnel should be focused on ensuring the safety of employees and neighboring communities.\(^4\)

This proposal’s sole driver is the original mandate of the 1990 Clean Air Act Amendments (and the attendant court decision last year affirming that statutory requirement). However, years of experience using existing regulatory and media data reporting mechanisms, this driver has been proved to be unnecessary to fulfill CSB’s mission. Accordingly, rather than the agency’s current approach to this rulemaking, the CSB should reconsider an approach outlined in the agency’s 2009 ANPRM. In the ANPRM, the CSB asked for comment on four separate approaches for crafting a reporting regulation. Nearly

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\(^3\) In 2009, the CSB issued an Advanced Notice of Proposed Rulemaking (ANPRM) entitled “Chemical Release Reporting.” 74 Fed. Reg. 30259 (June 25, 2009). The ANPRM requested information regarding the development of a reporting rule and outlined four potential approaches to accidental release reporting. In response to the ANPRM, the CSB received 27 comments from a variety of interested parties.

\(^4\) In fact, Executive Order 13771, Reducing Regulations and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (Feb. 3, 2017), is contraindicative of this rulemaking because the proposed rule imposes incremental costs on covered entities with no quantified benefit and without a simultaneous deregulatory action to balance the additional costs associated with compliance.
all commenters, including commenters representing not just industry but environmental
groups as well, expressed support for an approach to rulemaking that would require
owners and operators to report to the CSB more extensive information on chemical
incidents in their workplaces only when contacted following an accidental release and
affirmatively requested to provide information by CSB. Under this approach, the agency
would continue to rely primarily on existing sources of data (NRC reports required by the
Environmental Protection Agency under the Comprehensive Environmental Response,
Compensation, and Liability Act (CERCLA) and media/internet information) to initially
identify and screen chemical incidents. Through these screening processes, CSB would
identify a subset of incidents (e.g., those with the most serious consequences, based on
initial reports) for which it would gather additional information through a questionnaire or
on-line form that the reporting party would be required by the rule to complete and submit
to the CSB.

This approach to a reporting rule would formalize the CSB information compilation and
screening processes currently in place, and would reflect the current process followed by
CSB whereby approximately 60 incidents a year are segregated for a deeper screening
consideration. See ANPRM, 74 Fed. Reg. 30259, 30262 (June 25, 2009). Currently, for
those incidents identified for deeper screening, CSB staff contact these companies and
associated responders to gather more detailed information on the chemicals and industrial
processes involved in the incident, and incident consequences. This follow-up process
provides CSB with information beyond what is contained in media or NRC reports, and
allows the agency to make better judgments about how to deploy its limited investigative
resources. Codifying this process in a reporting rule is consistent with the 1990 Clean Air
Act Amendments mandate that requires the CSB to promulgate a reporting rule, but does
not establish requirements for the scope of the rule or the type of information to be
collected.

The CSB offers no explanation or rationale in the NPRM for disregarding this limited
approach to a reporting rule, which garnered overwhelming support in the 2009 ANPRM in
lieu of the current, overly broad approach – an approach most closely aligned with an
alternative outlined in the 2009 ANPRM that received substantial negative feedback and
for which the CSB itself expressed concern. See id. (“A comprehensive approach would
require the reporting of information on all accidental releases subject to the CSB’s
investigatory jurisdiction. The CSB is concerned that this approach might be unnecessarily
broad in scope, duplicative of other federal efforts concerning chemical incident
surveillance, and may not be necessary for the CSB to learn of most significant incidents
that would justify an on-site investigation.”).

The Coalition requests the agency reconsider its approach, and finalize a reporting rule
consistent with the approach favorably commented on in 2009 whereby a select number of
owner/operators who have experienced a release are required to provide information to
the CSB, but only after the CSB has affirmatively requested the information based on a
review of screening data obtained by CSB relating to a chemical release. The information
required to be provided by owner/operators under this approach should be limited to the data requested under the current proposal.

To the extent that the CSB rejects our request for a narrow rulemaking approach as outlined above, the Coalition provides the specific comments and suggestions set forth below designed to improve the effectiveness of the rule and lessen the regulated community’s concerns with the proposal, without sacrificing what we assume is CSB’s intent in promulgating this rule, which should be to ensure that it has an effective mechanism in place to identify high consequence catastrophic ambient air releases for possible investigation.

**SPECIFIC COMMENTS**

I. **The Proposed Rule as Applied to Owners/Operators Who Have Reported to the National Response Center (NRC) is Statutorily Impermissible, Unwarranted, and Counterproductive From a Policy Standpoint.**

As currently proposed, owners/operators who have reported a release to the NRC pursuant to 40 C.F.R. § 302.6 nevertheless must make a second report to the CSB, albeit limited to the NRC identification number, immediately following submission of the report to the NRC. This requirement is not only wholly unnecessary, it is not permitted under the CSB’s enabling statute. Additionally, from a policy standpoint, it makes little sense in that it adds an unnecessary task that provides no real benefit to the myriad of items that must be dealt with in the first few hours following an accidental release, when the focus should be on emergency response.

The CSB's enabling statute, the 1990 Clean Air Act Amendments, expressly states that the Board must "establish by regulation requirements binding on persons 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." 42 U.S.C. § 7412(r)(6)(c)(3) (emphasis added). Thus, if an owner/operator has reported its release to the NRC, any CSB reporting regulation is satisfied.

Had Congress intended to permit CSB to require a report even for those who had already reported to NRC, it would not have explicitly stated that reports to NRC satisfy any reporting obligation CSB might establish. Rather, Congress made a deliberate choice that NRC reporting eliminates further obligation to the CSB. Accordingly, the provision in the proposed rule requiring owners and operators who have reported to the NRC to then report to the CSB by submitting their NRC identification numbers is not allowed under the CSB’s enabling statute. The proposed rule should be revised to eliminate the requirement to make a second report to the CSB with the NRC report identifier number.

Beyond the legality of this requirement, mandating a second call or email report to CSB after contacting NRC is wholly unnecessary. As set forth in the CSB’s enabling statute, “[t]he
National Response Center shall promptly notify the Board of any releases which are within the Board’s jurisdiction.” 42 U.S.C. § 7412(r)(6)(c)(3) (emphasis added). The inclusion of the mandatory word “shall” makes clear that the NRC must notify the CSB promptly of any reports of releases which are within the CSB’s jurisdiction. Thus, even if it were legally permissible to require a second report to the CSB after reporting to the NRC (which it is not), it would be wholly unnecessary to require such a report.5

From a policy standpoint, requiring owners and operators to report to the CSB after making a report to the NRC (which is going to turn around and immediately provide the CSB with the reported information) is nonsensical at best, but actually imprudent and unnecessarily burdensome.6 Establishing yet another regulatory obligation on an owner/operator in the midst of addressing an accidental chemical release – especially one that provides no benefit whatsoever to the CSB and in no way assists in advancing the agency’s mission – distracts management personnel from focusing their efforts on ensuring the safety of their workers and the nearby community in the immediate aftermath of an incident.

II. The Proposed Rule is Overly Broad in its Definition of “Serious Injury” and Should be Revised to Eliminate or Substantially Modify the “Serious Injury” Criteria.

The proposed rule requires owners/operators to report any accidental chemical releases resulting in “a fatality, serious injury or substantial property damage.” See NPRM, 84 Fed. Reg. 67899, 67909 (December 12, 2019). As CSB defines “serious injury” under the rule, its inclusion as a trigger for reporting renders the rule immensely broad and establishes an extremely low consequence threshold for reportable events. In fact, under the proposed rule’s definitions, events that would not even be deemed recordable on an OSHA 300 log, let alone reportable to OSHA, would be required to be reported to CSB.

A “serious injury” is defined under the proposed rule as “any injury if it results in any of the following: (1) [d]eath; one or more days away from work; restricted work or transfer to another job; medical treatment beyond first aid; loss of consciousness; or (2) [a]ny 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.” Id. (emphasis added). The CSB explains in the preamble that this definition is based on OSHA’s general recording criteria found at 29 C.F.R. § 1904.7 and that it adopted this definition in part because it “concluded

5 To the extent that the CSB believes it should be receiving NRC reports more promptly than it already is, the solution is not to require employers to serve as “middlemen,” but to enter into an agreement with the EPA requiring more immediate provision of NRC reports to CSB.

6 Additionally, requiring the employer to provide the NRC identification number to the CSB opens up the possibility of the CSB being provided an erroneous identification number inadvertently, which would only complicate the situation and possibly interfere with an immediate deployment by the CSB.
that use of an existing OSHA definition would contribute to greater understanding among
the regulated community and help ensure faster and more effective compliance with the
new regulation.” See id. at 67906.

Such a definition, however: (1) is actually not aligned with OSHA’s injury and illness
recordable criteria; (2) is unnecessary even if it were aligned with OSHA recordability
criteria as it would still pull in many reportable events to which the CSB would not deploy;
and (3) would potentially so exponentially increase the number of CSB reports as to bog
down CSB’s entire screening system.

First, the proposed definition does not track the OSHA regulations. The portion of the
definition that includes “injuries and illnesses diagnosed by physicians or other licensed
health care professionals, even if they do not result in death, days away from work,
restricted work or job transfer, medical treatment beyond first aid, or loss of
consciousness” is not included in OSHA's recordability criteria unless those
injuries/illnesses are considered “significant.” See 29 C.F.R. §1904.7(a). The regulation
limits "significant" diagnosed injuries or illnesses to only those cases involving “cancer,
chronic irreversible disease, a fractured or cracked bone, or a punctured eardrum.” See 29
C.F.R. § 1904.7(b)(7).

CSB’s “serious injury” criteria, however, entirely omits any reference to “significant
injury.”7 Thus, for example, under CSB’s current proposed definition of “serious injury,”
arguably a report would be required where an employee spills an open test tube of a
chemical, visits the doctor because the chemical poses a respirable hazard, and is
diagnosed as having a sore throat for which the employee is recommended to use over-the-
counter throat spray. Surely, this is not the type of incident to which the CSB would ever
consider deploying, nor the type that an employee would typically report to his employer.
Nonetheless, under a strict reading of the proposed rule’s definition of “serious injury,” this
would be considered an injury diagnosed by a physician, and thus trigger reporting
requirements.

Second, even if the agency addresses this issue and limits reports to “significant injuries” as
defined by OSHA, this does not sufficiently narrow the scope of the reports required. This
revision would simply align CSB reporting to those events that must be recorded on an
OSHA injury and illness log. But the CSB has never been, nor will it or should it be, in the
business of investigating chemical releases resulting in OSHA recordables. These are
simply not the types of incidents to which CSB deploys. The CSB’s scare resources are
devoted to investigating “high-consequence” catastrophic incidents. Any reporting
obligations should be so aligned.

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7 Although the CSB explains in its NPRM that it finds the word “significant” to be generally synonymous with the
word “serious,” the omission of the critical qualifier “significant” in CSB’s definition of serious injury, even if
inadvertent, expands CSB’s reporting trigger well beyond injury/illness recordability triggers.
Moreover, the CSB’s “serious injury” reporting criteria is unworkable. It requires an immediate determination of reportability based on factors that will not be realized for days or in some cases months. How could an owner/operator know within the reporting timeframe whether an injury meets the “serious injury” definition where the definition is based on consequences that occur days, weeks or at times months after the release event causing the injury?

For the reasons outlined above, the Coalition strongly urges the CSB to eliminate the “serious injury” trigger from any final reporting rule promulgated.

To the extent the final rule retains the “serious injury” trigger, a number of important modifications should be made to this criterion. First, the timeframe for reporting should not commence until an employer learns of the serious injury.^(8^) (In fact, this revision establishing knowledge of the reporting trigger should apply to all three reporting triggers in the rule – fatalities, serious injuries and substantial property damage.) OSHA explicitly incorporated an employer’s knowledge of the triggering event into its fatality and injury reporting regulation for the precise reason that there are often delays between either the workplace incident and the reporting trigger (i.e., in-patient hospitalization), or between the event and the employer’s knowledge of the event. Alignment of CSB’s reporting triggers with the OSHA fatality and injury reporting rule would render the rule more reasonable and tenable from a compliance standpoint.^(9^)

Second, the Coalition recommends that the final rule impose a time limitation on the serious injury and fatality criteria after which reporting is no longer required. As written, the proposed rule could require an owner/operator to report an incident resulting in a case of asbestosis or other long latency illness, or musculoskeletal or repetitive stress injury, months or years after the actual release causing the illness or injury. This would not only impose a substantial burden on the regulated community in terms of real-time tracking and continuous monitoring of these incidents,^(10^) but it also would add to the load of useless reports submitted to the CSB. The CSB could not possibly be interested in such events that have delayed consequences. In these situations, evidence would be stale, witnesses may be gone, sampling would be irrelevant, and documents would not necessarily have been...

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^(8^) This revision establishing knowledge of the triggering event should apply to all three reporting triggers in the rule – fatalities, serious injuries and substantial property damage.

^(9^) Finally, an unintended consequence of the rule’s broad definition of “serious injury” could be that it creates a disincentive for robust internal investigation into minor incidents. Coalition members often conduct in-depth root causes analyses in order to develop lessons learned or after-action reports designed to prevent the same type of event from occurring in the future. If a company believes that its root cause analysis or robust investigation will uncover facts indicating that the CSB’s reporting rule criteria for “serious injury” has been met, this might pose a disincentive to conduct the type of robust analysis currently common among sophisticated companies.

^(10^) Real-time tracking and continuous monitoring of these incidents would be virtually impossible for members of the general public (e.g., neighbors) who might be impacted by the incident. It is not practical to require monitoring of non-employees to determine whether these individuals are diagnosed by a physician.
preserved. Yet without a revision to the rule, consequence-based reporting will trigger delayed reporting of events upon realization of the consequence. The Coalition therefore recommends that fatalities or serious injuries occurring more than 30 days after the release be excluded from coverage under the final rule.

III. CSB’s Reporting Rule Should be Realigned with OSHA’s Fatality and Injury Reporting Requirements and Should Exempt from Reporting Any Entities Who Have Submitted a Report to OSHA.

As currently proposed, the CSB proposal adds yet another layer of differing and inconsistent regulatory reporting requirements to the web or reporting requirements that already exist and which must be addressed by companies in the midst of an emergency. As discussed, EPA’s CERCLA reporting regulations require immediate reporting to the NRC. Also, for instance, MSHA’s reporting regulations require reporting within 15 minutes of knowledge of an accident; OSHA’s reporting regulations require reporting within eight hours of learning of a fatality and 24 hours of learning of an in-patient hospitalization; DOT’s spill reporting obligations require reporting select spills within 12 hours; and CSB’s proposal as currently drafted would require reporting within four hours of a release. Add to this the fact that each of the regulatory schemes establish differing threshold criteria for reporting (and require different information to be reported). While each agency may have a valid rationale for establishing its reporting criteria and time limitations, cumulatively, the regulations can easily cause confusion and lead to inadvertent non-compliance.

To facilitate compliance and lessen confusion caused by differing and inconsistent regulatory reporting requirements, the establishment of a simple, bright-line CSB reporting requirement would be beneficial. To this end, it would be prudent to align CSB’s reporting requirements with OSHA’s fatality and serious injury reporting obligations at 29 C.F.R. § 1904.39 (excepting reports already made to NRC as described above). Thus, the CSB reporting obligation would be limited to reporting fatalities, in-patient hospitalizations, amputations\(^{11}\), or losses of an eye resulting from an accidental release into the ambient air, unless a report was made to the NRC. Alignment of CSB’s reporting rule with OSHA’s reporting requirements makes sense from a policy perspective because OSHA’s reporting criteria more closely reflect the type of high-consequence incidents that the CSB would most likely consider for deployment purposes.

Moreover, as with NRC reports, the reporting rule should exempt those entities who submit a report to OSHA from having to make a second report to CSB. There is no valid rationale for burdening employers with an obligation to report the same event twice to two separate agencies, especially in that critical immediate post-incident timeframe. Rather, the CSB and OSHA should coordinate to ensure prompt and complete information sharing of employer

\(^{11}\) We do not foresee an accidental release into the ambient air resulting in an amputation, but find no issue leaving this criterion to maintain consistency with OSHA’s reporting rule.
reports, as is mandated under the 1990 Clean Air Act Amendments for NRC and CSB. Coordination between OSHA and CSB could be accomplished via the establishment of an interagency Memorandum of Understanding that requires OSHA to immediately provide CSB with the reports it receives that relate to accidental ambient air releases.12

IV. The Proposed Rule is Overly Broad in its Definition of “Substantial Property Damages.”

The proposed rule also establishes “substantial property damage” as a trigger for reporting a chemical release to the CSB. “Substantial property damage” is defined as “estimated property damage at or outside the stationary source equal to or greater than $1,000,000.” See NPRM, 84 Fed. Reg. 67899, 67909 (December 12, 2019). As with the “serious injury” reporting trigger, the property damage trigger would likewise likely result in significant over-reporting, causing CSB to receive reports about incidents to which it would never deploy.

Chemical, petroleum, steel, pulp and paper and many other industries operate multiple types of extremely expensive equipment. Damage to even a single piece of expensive equipment could result in a repair cost of over a million dollars. Moreover, under the CSB’s proposal, costs associated with “loss of use” are to be included in calculating property damage. The result of this is a property damage reporting trigger that could be met with some regularity in Coalition member industries, including many such incidents that do not represent the type of accidental releases that CSB is tasked with investigating, such as partial shutdowns.

The reason CSB’s jurisdictional requirement incorporates incidents resulting in significant property damage is to capture situations where there has been considerable physical impact to either the stationary source itself or neighboring communities – those incidents that will surely be captured by the media. Those are the incidents to which the CSB would deploy, not the types of more minor incidents also captured by this proposed definition.

Inclusion of the property damage trigger poses an additional concern to Coalition members. There will be many situations where the extent of property damage both onsite and offsite will remain uncertain well beyond the four-hour reporting window. Property damage estimates by claims assessors can take days, weeks, or even months to produce. Property damage costs for low to medium consequence events covered by the CSB proposal will with some regularity take time to ascertain. Accordingly, owners/operators will be put in the difficult position of being forced to make a good faith best guess as to whether the million-dollar threshold has been reached. This could result in both over- and under-reporting. Over-reporting will cause the diversion of CSB’s valuable, limited

12 If the Coalition’s comments are adopted, owners/operators would report employee fatalities and covered reportable hospitalizations, etc. to OSHA and releases resulting in those same consequences to non-employees to CSB.
resources away from more important investigations. Under-reporting will expose entities to potential enforcement actions and issuance of attendant penalties for non-compliance.

In light of the problems created by inclusion of a property damage trigger in the reporting rule, the Coalition recommends serious consideration be given to eliminating the property damage trigger altogether, or at least raising the dollar threshold to a level that would make it easier to immediately assess. To do so would reflect CSB’s historic focus on fatalities and injuries rather than property damage. See NPRM, 84 Fed. Reg. at 67907. A review of CSB’s investigations shows that virtually all of CSB’s published investigation reports involve a fatality or serious injury. As CSB acknowledged in the NPRM, the agency has not relied heavily on the “substantial property damage” factor in selecting accidental releases to investigate in-depth. Id. At minimum, CSB should allow more time to report incidents that are covered based solely on property damage (as explained more fully below).

V. The Proposed Rule Significantly Underestimates the Amount of Time and Cost Burden Associated with Reporting, and Unfairly Imposes Potential Liability on Companies Who Initially Underestimate the Consequences of an Accidental Release.

The CSB determined that it would cost approximately $37.20 in the first year of the rule for companies who submit a report. This estimate is based on an assumption that it will take companies approximately 15 minutes to submit a report to the CSB if a reportable event occurs.

CSB’s cost estimate, however, does not evaluate or consider any time associated with making determinations as to whether a reportable event has occurred. Because the rule establishes consequence-based reporting triggers, the bulk of time and effort associated with compliance with this rule relates not to the final call or website report made, but, rather, to the evaluation of the consequences of the event and determination of harm or damage caused by it.

Except for the subset of reportable events that are catastrophic and where tragic consequences are immediately known (fatalities and/or severe and certain building/neighborhood damage), there often is uncertainty as to the extent of resultant damage or harm in the immediate aftermath of an accidental release. For instance, events that do not cause harm to employees or the public, but result in some level of building or equipment damage (e.g., minor fires) may well become reportable under the rule as currently drafted. In these situations, owners/operators will need to spend hours, days or weeks assessing damage and calculating damage costs. Aside from the fact that it will be impossible to make these determinations in the first four hours after the incident, the time and effort associated with making these judgments about property damage will be considerable. CSB’s estimate of 15 minutes to comply with the rule does not take into account any of this time, and, therefore, underestimates compliance costs by orders of magnitude.
More important to the Coalition than the underestimate of costs is the potential legal exposure a company would face in situations where its management “guesses wrong” as to the scope of damage or harm resulting from the incident in the first four hours post-incident, and does not file a report. This entity would be subject to an enforcement action and potentially liable for fines simply because it could not accurately and immediately assess the scope of damage to its facility or neighboring properties and/or accurately estimate the cost of these damages.

While the proposal provides companies 30 days to revise their reports without legal consequences, in some cases even 30 days can be an insufficient amount of time to ascertain the actual scope and cost of property damage, especially damage beyond the facility’s property line. This is in part because sometimes these types of assessments are outside the employer’s direct control (e.g., performed by an insurer). Owners and operators should not be penalized for a third party’s timeline. Beyond this, the proposed rule provides only 30 days to revise a report if an initial report is filed. What about companies who in good faith do not know that the $1 million trigger has been met and, therefore, do not submit an initial report? Or companies who did not report and later learned that an employee had been diagnosed with an injury by his or her physician? The 30-day revision does not seem to apply to these situations. Thus, the current rule provides no safe harbor for these companies, putting them at risk of enforcement for violation of the reporting obligation.

VI. The 4-Hour Window to Report is Significantly Too Short and Could Needlessly Interfere with First Response.

The proposed rule requires owners/operators to report covered releases within four hours of a covered release. This time period does not provide sufficient time for management personnel to determine whether an event is reportable under the criteria established in the proposal. More importantly, requiring a report to CSB in the first hours after an accidental release could distract from and interfere with a company’s focus on first response and/or addressing critical post-accident responsibilities such as: accounting for and ensuring the safety of the workforce; communicating to employees, the local community, internal management, and employees’ families; coordinating with first responders; following up and monitoring the status of any injured workers; and coordinating with any necessary remediation services to address releases.

It is confounding that the CSB established a 4-hour reporting timeframe when it had credible evidence in the administrative record that the first three hours post-incident at minimum are necessary to deal with emergency response itself and immediate post-accident circumstances. See Comments to ANPRM, 74 Fed. Reg. at 30259. In fact, in the preamble to the proposal, CSB cites to comments submitted in 2009 to the ANPRM from

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13 To reiterate an earlier point, the Clean Air Act Amendments provides that no report is necessary if the NRC has been notified.
the American Society of Safety Professionals stating that “a minimum of three hours is needed for a site’s emergency response priorities and any extenuating circumstances to be handled.” See NPRM, 84 Fed. Reg. at 67908. The agency itself states that, “[t]he CSB understands that the first several hours following an accidental release require a focus on emergency response actions.” Id.

To ensure that emergency response and immediate post-incident contingencies relating to the security and safety of personnel and the neighboring community are prioritized, the proposed rule should be revised to lengthen the amount of time an owner/operator has to report an event. Anecdotal accounts of CSB’s deployment timeframe suggests that the agency takes one to two days to mobilize and deploy to a site. Using that timeframe as a guide, it seems that a 24-hour reporting window would be sufficient.

Providing 24 hours to report also has the benefit of allowing companies at least a little additional time to gather information regarding the nature, scope and consequences of the event. This would increase the likelihood that a report would more accurately describe the reportable event. It also would likely serve to lessen (although not eliminate) the number of entities who ultimately would be unfairly subject to legal exposure for “guessing wrong” that the event was reportable because they underestimated the extent of property damage or injury/illness associated with the incident.

If a 4-hour window is retained in the final rule, two revisions should be made to minimize the difficulty of making such a quick report. First, a provision should be added preventing EPA from bringing an enforcement action against owners/operators who reported outside the 4-hour time period due to their ongoing emergency response responsibilities. Second, like OSHA’s reporting rule, the 4-hour window should not commence until an owner/operator has knowledge of the consequences of the release and determined that the release is reportable.

VII. Concerns with Data Security.

The Coalition is concerned about protecting the privacy of the information it would be required to submit under this rule. The fact that the CSB indicates in its NPRM that it does not plan to release this information provides no assurance that the information will not be released publicly. First, a future Board appointed by a different presidential administration may feel that public release of these records is warranted. Second, even if the CSB does not release the data, these reports generally may fall within the scope of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Accordingly, once obtained by the CSB, they will be subject to potential disclosure.

Concern over compelled disclosure is real. High-consequence, catastrophic releases will become public by their very nature. However, low-consequence incidents with no impacts beyond a facility fence line and which do not result in even an OSHA recordable may nevertheless be reportable under this rule. These injuries typically are not known to the public. The Coalition is primarily concerned with the optics of such a public release. To the extent the public is aware of the CSB and its jurisdiction and mission, it associates the agency with very serious explosions and catastrophic incidents. It is concerning that the
public may be informed – pursuant to a FOIA response from, for instance, a journalist, competitor, or public citizen group – of a CSB reportable incident at a facility. In light of the connotation and optics of such an event, the reputation of a company could be unnecessarily damaged.

VIII. The CSB Should Refrain From Referring Suspected Violations of the Reporting Rule to EPA for Enforcement.

Under the 1990 Clean Air Act Amendments, EPA has authority to enforce the requirements of any reporting rule promulgated by the CSB. See 42 U.S.C. § 7412(r)(6)(O) (“The [EPA] Administrator is authorized to enforce any regulation or requirements established by the Board pursuant to subparagraph (C)(iii) using the authorities of sections 7413 and 7414 of this title.”). This provision allows EPA to enforce against companies who allegedly fail to comply with the CSB’s reporting rule. In the proposed rule, CSB states that it will forward any suspected violations to the Administrator of the EPA for appropriate enforcement action. See NPRM, 84 Fed. Reg. at 67910.

The Coalition is concerned that threat of enforcement of the CSB reporting rule will upset the unique relationship companies historically have had with the CSB given its advisory role and independence from enforcement authorities like EPA or OSHA. Unlike enforcement agencies (EPA, OSHA, MSHA, etc.) where inspections are designed to identify non-compliance, CSB investigations are designed to determine the root cause of the incident, and carry with them no enforcement threat. This allows employers to feel comfortable openly sharing information with the CSB and encouraging candid employee interviews with CSB investigators. Indeed, this is exactly what Congress intended by establishing the CSB as an agency that would not have authority to bring enforcement actions or penalize companies based on its findings. See S. Rep. No. 101-228 (1989). In describing its rationale for including a provision prohibiting the use of the findings of the Board in civil proceedings for damages, Congress stated, “In conducting its investigations, the Board will need the fullest cooperation from facility owners and operators, equipment suppliers and other parties involved in an accidental release to determine the probable causes of the event. The likelihood that conclusions drawn from information provided to the Board will be used in a suit from damages will discourage full cooperation.” See id.

If the CSB refers alleged violations of its reporting rule to EPA for enforcement, EPA will serve as the CSB’s enforcement proxy. This could have an unintended “spill-over” effect on CSB’s investigations, causing a chilling effect on the regulated community. To protect the unique relationship CSB has with owners/operators based on the agency’s advisory role and lack of enforcement authority, the CSB rule should prohibit the agency from forwarding suspected violations to the EPA for enforcement. This will allow the reporting rule to be treated by CSB as simply an additional information-gathering tool available to it to collect information to set investigation priorities.
IX. Conclusion.

It is virtually unquestionable that CSB would learn of any high consequence chemical accident that it chooses to investigate through this proposed reporting rule that it would not have already known about without this rule. A rule this broad is not necessary.

Additionally, not only does the proposed rule needlessly add to the existing regulatory obligations facing companies experiencing accidents, it may interfere with their immediate post-accident response activities. And by significantly widening the net of reportable data provided to the agency, it likely will distract CSB from focusing on the type of high-consequence catastrophic incidents it should be investigating.

As the CSB itself concluded just a little over a year ago, today’s instantaneous access to information via the internet and social media renders this regulation unnecessary. Thus, even though the agency is required to promulgate a reporting rule pursuant to the Clean Air Act Amendments and court order, the final rule should: (1) be tailored to the reality of the day; (2) take into account all it has learned over the past 30 years regarding the agency’s focus and limitations; (3) recognize the scarce resources available to the agency to fulfill its mission; (4) consider how its duties overlap with the duties of other reporting agencies; and (5) address the concerns of the regulated community raised in this and other comments. The enabling language in the 1990 Clean Air Act Amendments and the District Court decision allow the agency the flexibility to establish a narrowly crafted rule.

The CSB received nearly unanimous support from the regulated community and no opposition (and some positive comment) from the environmental community for such a narrow rule in response to its 2009 ANPRM. Consistent with those comments, this rulemaking should simply codify the existing information gathering, data compilation and screening processes the agency has long relied on to effectively determine which chemical accidents it will investigate.

CSB cannot possibly conduct a careful review of and give meaningful consideration to public comment submitted on this proposal before its February 5, 2020 deadline for promulgating a final rule. However, the Administrative Procedures Act (APA), 5 U.S.C. § 551 et seq. requires not only that the public be given sufficient time to provide comment, but, as important, that the agency give meaningful review and consideration to those comments. Otherwise, the public comment mandates of the APA become nothing more than a sham, with the agency conducting a perfunctory, check-the-box exercise. That is precisely what will occur here if CSB does not obtain relief from its February 5th deadline for promulgating a rule.

14 In fact, the CSB’s action in filing an appeal of the court decision and then, months later, abruptly withdrawing the appeal, added to the problem. The result of these actions significantly truncated the already very short time period the CSB had under the court order to promulgate this rule. The CSB’s arbitrary and capricious action in appealing and then withdrawing its appeal four months later interfered with the public’s ability to formulate a reasonable expectation that this rulemaking would be forthcoming.
The CSB Reporting Coalition therefore urges CSB to return to court to seek relief from the scheduling order for this rulemaking, explaining the importance of its duty to comply with the letter and spirit of the APA.\textsuperscript{15}

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The CSB Reporting Rule Industry Coalition is pleased to have the opportunity to provide comment on CSB’s proposed Accidental Release Reporting proposal and asks the agency to carefully consider its comments before issuing a final rule.

Sincerely,

Eric J. Conn
Conn Maciel Carey LLP
Counsel to CSB Reporting Rule Industry Coalition

\textsuperscript{15} The Coalition recognizes that the CSB is essentially “between a rock and a hard place” with a court order limiting the rulemaking period to 12 months and the APA requiring sufficient time to allow the public to meaningfully comment and the agency to meaningfully react to those comments and develop a thoughtful rule. This is precisely why the CSB should return to court to seek relief from the court order. As between the court schedule and the APA, the APA mandates should prevail. In requesting additional time from the court, CSB also should consider seeking sufficient time to allow the agency time to approach Congress regarding a revision to the 1990 Clean Air Act Amendments statutory provision mandating the promulgation of a rule altogether. This would eliminate the need for further rulemaking with no loss to the important mission of CSB.