

Chemical Safety Board

The U.S. Chemical Safety and Hazard Investigation Board, a small, independent federal agency, is charged with conducting root-cause investigations of chemical accidents at fixed industrial facilities. The agency underwent significant change in 2015, with the ouster of board's former chairman shortly before the end of his five-year term, the resignation of one board member, the placing of two staffers on administrative leave, and the confirmation of four new board members, including a new chairwoman. In this Bloomberg BNA Insights, Mark Farley of Katten Muchin Rosenman LLP looks to the agency's future as it rebuilds.

The Chemical Safety Board: An Agency at a Crossroads

BY MARK L. FARLEY

One of the smallest agencies in the federal government, the U.S. Chemical Safety and Hazards Investigation Board (more commonly known as the Chemical Safety Board, or CSB) is charged with a unique and significant responsibility: to investigate chemical accidents and make recommendations to prevent a recurrence. Since its inception, the agency has struggled to advance this mission. Management and political issues have impacted its credibility and detracted from its important function. With a newly appointed chairperson and board, the CSB stands at a crossroads. The agency has the opportunity to make meaningful progress and restore public and industry trust—or the agency may fall back to familiar pitfalls that distract from its intended purpose.

The CSB has its roots in the aftermath of the Bhopal, India, disaster that resulted in more than 2,000 fatalities. In the wake of the incident, 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 help prevent catastrophic industrial accidents. Concerned that EPCRA's focus on emergency planning and response gave insufficient emphasis to accident prevention, Congress subsequently 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, at 144 (1989)). Modeled after the National Transportation Safety Board (NTSB), the CSB is an independent federal agency led by five board members appointed by the president and confirmed by the Senate.

Like NTSB, the CSB has no enforcement authority and a limited regulatory role. 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 ways to reduce the likelihood or consequences of chemical incidents, including recommending specific rules to be issued by the U.S. Environmental Protection Agency (EPA) and the federal Occupational Safety and Health Administration (OSHA) (42 U.S.C. 7412(r)(6)(C)(ii)).

Slow Start for CSB. The agency's infancy was politically tumultuous. For nearly five years, the CSB existed only on paper. No board members were nominated until 1994, and Congress did not fund the agency until 1998. Beginning in fiscal year 2001, inspectors general from three separate federal agencies made 32 recommendations to CSB to “address problems in management accountability and control, human capital management, compliance with its statutory requirements and other issues.” (U.S. Gov't Accountability Office, GAO-08-864R, Chemical Safety Board: Improvements in Management and Oversight are Needed, United States Government Accountability Office 2 (2008)).

In 2005, the CSB's status in the Process Safety Management landscape changed dramatically. On March 23 of that year, an overflow of an isomerization unit distillation column at the BP Texas City refinery caused an explosion that resulted in 15 contractor fatalities and more than 170 injuries. The CSB deployed to this inci-

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dent and subsequently issued an “urgent recommendation” that BP convene an independent panel of experts (commonly known as “the Baker Panel”) to assess corporate oversight of process safety culture and safety management system at the company’s five U.S. refineries. The CSB was at the forefront of the government’s response to Texas City. As a lead attorney and investigator for the Baker Panel, I observed firsthand how the agency’s effective use of the “bully pulpit” solidified the agency as a key player in process safety reform, and reinvigorated the importance of process safety, safety culture and the prevention of industrial accidents in the United States.

Notwithstanding the CSB’s important safety reform efforts around Texas City, the agency’s management issues persisted. In carrying out its investigations, the CSB is not supposed to apportion blame or assign liability (S. Rep. No. 101-228, at 3617 (1989); *see also* 42 U.S.C. § 7412(r)(1) (“Nothing in this section shall be interpreted, construed, implied or applied to create any liability or basis for suit for compensation for bodily injury or any other injury or property damages to any person which may result from accidental releases of such substances.”)).

The context and tone of the agency’s public comments surrounding Texas City and other incidents sometimes ignored this fundamental precept. In the fall of 2006, then Chairperson Carolyn Merritt appeared on a “60 Minutes” segment discussing the Texas City incident. The episode aired one week before jury selection in the first civil trial stemming from the accident. Also appearing in that segment were the plaintiff in that lawsuit, whose parents died in the accident, and her lawyer. Critics questioned the tone of the chairperson’s comments and suggested that they were inflammatory and potentially prejudicial.

Impartiality Questioned, Misconduct Investigated. Questions about the agency’s impartiality and judgment became more pronounced during the tenure of former Chairperson Rafael Moure-Eraso from 2010 to 2015. Allegations of misconduct triggered multiple investigations by congressional committees and the U.S. Environmental Protection Agency’s Office of Inspector General (EPA OIG). During this time, a sitting board member resigned citing agency dysfunction, numerous investigators left the agency, and the morale of remaining employees plummeted to one of the lowest satisfaction levels of any federal department.

In March 2015, the U.S. House of Representatives Committee on Oversight and Government Reform (“Oversight Committee”) held a hearing entitled “Rebuilding the Chemical Safety Board: Finding a Solution to the CSB’s Governance and Management Challenges.” Oversight Committee Chair Jason Chaffetz (R-Utah), began the meeting by imploring Moure-Eraso to resign, observing that the agency had “gone off the rails.” He commented that the purpose of the hearing also was to “revisit management issues” afflicting the CSB. During the hearing, representatives discussed a variety of ongoing CSB management problems, including employee morale, CSB’s implementation of prior EPA OIG and Oversight Committee recommendations, termination of three outstanding CSB investigations, and a controversial CSB internal governance order (since rescinded) that consolidated the chairperson’s board power.

Within days of the hearing, President Barack Obama called on the chairperson to resign. On March 27, 2015, Chairperson Moure-Eraso stepped down. The CSB general counsel and managing director eventually were placed on administrative leave.

Future Success. The future success of this agency and its ability to carry out its responsibilities now rests in the hands of Chairperson Vanessa Sutherland, who was confirmed by the Senate in August 2015. An attorney by training, Sutherland previously was the chief counsel to the Pipeline and Hazardous Material Safety Administration. She also held senior legal counsel positions in industry.

Chairperson Sutherland has received cautious but high marks from internal and external stakeholders. She has demonstrated a willingness to listen and engage with government, industry and organized labor, and has indicated that she recognizes the importance of refocusing efforts on the CSB’s critical mission: to make constructive national chemical safety recommendations.

As someone who regularly works with the recipients of such CSB recommendations and, as someone who routinely interfaces with the agency in supporting client responses to CSB investigations, I respectfully offer the following comments to Chairperson Sutherland and the board for their consideration:

- **Continue internal reform efforts.** The CSB instructs others on the importance of organizational culture, however, the agency has long suffered from low employee morale. The EPA OIG and Oversight Committee have described the agency’s work environment as “toxic.” During some of the agency’s worst internal turmoil, agency staff alleged that agency personnel inappropriately pressured them to sign letters or petitions supporting the agency’s then chairperson and senior executive leadership. The board and the agency’s staff leadership should continue efforts to restore an open and trusting environment and develop a more positive culture. The CSB issued the urgent recommendation that resulted in the Baker Panel’s seminal evaluation of safety culture. The agency should better live the Baker Panel’s observations.

- **Continue to seek broad and balanced input into investigations.** The board should continue to seek a better balance between the role of the board and the agency’s professional staff. Board members should continue to be more assertive in determining the scope of investigations that critics believe can unwisely expand into “fishing expeditions.” The reality is that the CSB will continue to confront limited budgets, scarce resources, and too many chemical incidents. In an agency with fewer than 50 people, this means that a very small group of people can have significant influence over the course of investigations, root cause analyses and industry-driving recommendations. No organization should rely on the perspectives of only a few, no matter their technical expertise and process safety experience. The CSB should look for opportunities to broaden its technical base and solicit the opinions of others during investigations. Board members should step into this space.

- **Increase agency emphasis on impartiality.** As noted above, the CSB is charged with providing neutral process safety recommendations. Recognizing the po-

tential for the agency's role to skew determinations of liability, the agency's enabling statute specifically prohibits the agency's reports from being relied on as evidence in civil proceedings (42 U.S.C. 7412(r)(6)(G)). The CSB should redouble its dedication to this legislative intent. The agency's references to what "management knew" or what "management did" following an incident can be perceived as blaming the employer, and are factually and technically vague. The CSB would not make representations regarding what "labor" or "hourly employees" knew or did—and its investigators would criticize such broad pronouncements in a company's investigation report. The CSB also is concerned by efforts to use its work product in federal grand jury investigations into major accidents, however, the CSB's sometimes inflammatory rhetoric makes the agency's work product attractive in a prosecutorial context. By way of contrast, the National Transportation Safety Board maintains its neutrality—investigating scores of incidents each year, and sharing important lessons without targeting often well-intentioned individuals and organizations.

■ **Resist being political.** Many in Congress seek to pressure the CSB to take certain actions—especially with respect to decisions on whether the agency will investigate an incident. The agency sometimes has decided not to deploy to an accident only to reverse itself once elected officials begin writing letters. Imagine the outcry if the NTSB decided whether to investigate an airplane crash based on the place where the plane went down or the congressional district of the ill-fated passengers. Consistent with the agency's efforts to increase transparency, the board should choose incidents based on their severity and the potential for industry learnings. Depoliticizing accident investigations will yield better outcomes and lessons learned.

■ **Do more with less.** The agency's near-term reality is that of budget stasis. Its staff will not double in size. The CSB is not going to become resourced like the NTSB. The CSB should continue its efforts to conduct investigations in a more timely manner, and look for opportunities to become creative with its limited resources. The agency should consider, for example, whether it can still help publicize important lessons from incidents by peer reviewing a company's own investigation through targeted document requests and briefings.

■ **Remember that bold is not always best.** After the Texas City accident, it became clear that the agency was focused on "big" reforms. Sweeping recommendations are sometimes required to drive change, but accidents often happen because an organization forgets about the basic "blocking and tackling" that is an essential part of major accident prevention. As observed by one CSB board member during a recent public meeting regarding the Caribbean Petroleum accident, if an investigation concludes that a company did not follow already existing regulatory requirements, the resulting recommendation should not be more regulation. A view such as this should continue to receive support in the agency.

The creators of the CSB envisioned a strong, neutral, and technically grounded agency that focuses on facts—not perceptions nor political objectives. As with major accident prevention, there is no easy solution—no "silver bullet"—that will help immediately realign the agency's efforts with its mission. Changing perceptions and reshaping any organization takes time.

With its current chair and board, the agency is positioned for and showing early signs of success. The agency is at a crossroads, but the CSB appears to be on the right path as a result of strong leadership and a recommitment to its independent and neutral mission.