



## Corporate Environmental Enforcement Council

September 22, 2009

*Via E-mail: [anpr@csb.gov](mailto:anpr@csb.gov)  
Attention Docket ID No. CSB-09-01*

Chemical Safety and Hazard Investigation Board  
Office of General Counsel  
Attn: Christopher Kirkpatrick, Esq.  
2175 K Street, N.W.  
Suite 650  
Washington, DC 20037

Re: Comments of the Corporate Environmental Enforcement Council on  
*Chemical Release Reporting: Advance Notice of Proposed Rulemaking*  
74 Fed. Reg. 30,259 (Jun. 25, 2009); Docket No. CSB-09-01

Ladies and Gentlemen:

The Corporate Environmental Enforcement Council (“CEEC”) submits these comments to the Chemical Safety and Hazard Investigation Board (“Board” or “CSB”) on its Advance Notice of Proposed Rulemaking concerning Chemical Release Reporting, 74 Fed. Reg. 30,259 (Jun. 25, 2009).

As you may know, CEEC is an organization comprised of corporate counsel and environmental professionals from more than 25 major companies representing a wide range of industrial sectors that focuses on civil and criminal environmental enforcement and compliance policy issues. A list of our 2009 members and other information on CEEC is available from our website, [www.ceecinc.org](http://www.ceecinc.org).

CEEC has always been committed to strong, fair and effective environmental enforcement programs, and has worked frequently with the U.S. EPA on a wide variety of compliance policy issues, including those involving prevention of accidental releases consistent with Clean Air Act Section 112(r), accidental release reporting under CERCLA and EPCRA, and related reporting exemptions (e.g., the scope of the CERCLA “federally permitted release” exemption). By the nature of their operations, most if not all of CEEC’s member companies are likely to be subject to any accidental release reporting rule eventually issued by the Board, and, whether or not they ever experience a reportable release, will need to incorporate any such

requirements into existing compliance management systems and employee training in dozens if not hundreds of facilities across the United States.

A. BEFORE CONSIDERING THE OUTLINES OF A REPORTING RULE, THE BOARD SHOULD DEFINE THE INFORMATION IT NEEDS TO ACCOMPLISH ITS MISSION AND HOW IT WILL BE USED

It is the policy of the United States to minimize the paperwork burden on both private entities and government resulting from the collection of information by or for the Federal Government.<sup>1</sup> For example, the federal Paperwork Reduction Act (PWRA) and associated Office of Management and Budget (OMB) information collection review procedures require that any information collection by federal agencies both (1) is necessary for the proper performance of the functions of the collecting agency, and (2) will have practical utility.<sup>2</sup> These requirements recognize the enormous costs to the government and the public of federal information collection, storage and long term management, and act to avoid imposing those costs where the need for particular information is low or disproportionately costly.

Particularly in light of this federal policy, the starting point for the Board's consideration of the outlines of an information collection and reporting rule should be to better define and assess its information needs – (a) what information does the Board need to fulfill its case selection mission, and (b) what part of that information is not captured by its current information collection methods and efforts? Good analysis by the Board identifying its view of the “missing” information, why it is needed and how it will be used, would provide a solid foundation for a public discussion on the best means to obtain the information considering, for example, alternatives sources of the information and means of collecting it, the relative costs to the government and the public of the alternatives, and the relative utility of collecting particular information in light of the Board's particular needs.

The ANPRM does not provide any substantial analysis of the information the Board needs -- but does not currently get -- to timely and properly identify onsite investigation candidates. Indeed, at least until now, the Board has concluded that it *did not need an information reporting rule* to fulfill its mission.<sup>3</sup> While the notice broadly recites that collecting additional information may be generally ‘helpful in improving the timeliness, completeness, and accuracy of the information the Board now collects,’<sup>4</sup> it does not define a “data gap” that a reporting rule might fill, or the value to the Board's core mission of filling any such gap.

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<sup>1</sup> 44 USC § 3501(1).

<sup>2</sup> 44 USC § 3508.

<sup>3</sup> See, e.g., U.S. Government Accountability Office, *Chemical Safety Board: Improvements in Management and Oversight Are Needed*, GAO-08-864R, Aug. 22, 2008, at 36 (“According to CSB officials, the current system of monitoring media reports, searching the Web, and obtaining accident reports from NTSB and other sources is sufficient”).

<sup>4</sup> ANPRM, 74 Fed. Reg. at 30260.

The Board's principal mission is set forth in CAA §112(r)(6)(C)(ii) – to recommend measures to industry and policy makers to reduce the likelihood of or the consequences of the particular accidental chemical release hazards it identifies by surveillance and investigations. In considering whether its current data collection is adequate, it would be relevant for the Board to assess whether the absence of particular information has caused it to fail to learn of accidents that it otherwise would have investigated. To be a *significant* lapse, however, the Board also would have to conclude that the missed investigation caused it to fail to recognize and provide warnings and recommendations that it otherwise would have given. As noted, the value of the Board's work lies less in reaching the root cause of any particular hazard and more in extracting and broadcasting the broader lessons learned to others. Where the missed lesson was only cumulative in the Board's experience, or for whatever reason would not have changed the public recommendations otherwise made by the Board, then there is no harm, and the marginal value of collecting additional information to capture such cases in the future is doubtful.

While the notice asserts, very generally, that media reports are sometimes delayed and that a reporting rule might potentially inform the Board of an incident sooner, in our view, a more rigorous analysis is required before new reporting obligations can be justified. The analysis should address the extent of any such delays, the actual impact on case selection (and ultimately, hazard warnings), the types of reporting that would fill the gap, and the extent of any resulting benefits to meeting the Board's mission.

It is only when the Board's information needs are reasonably well defined that the public can engage with the Board in a more useful and practical dialog on the several particular aspects of a potential reporting rule outlined in the ANPRM, including :

1. the importance and means of avoiding duplicative information collection, and enhancing cooperation and information sharing among federal agencies;
2. leveraging existing public understandings of particular regulatory definitions for the Board's use, without confusing those understandings;
3. alternative reporting mechanisms and repositories, and appropriate use of the National Response Center as a convenient conduit for chemical release information;
4. the appropriate time frame within to make any required reports considering how the information will be used and the significant extra cost of "immediate reporting" obligations;
5. selecting the particular information to be reported considering its utility in relation to the Board's case selection needs, alternative approaches, and the relative cost in light of the utility;
6. the significant administrative challenges involved in developing consistent, non-arbitrary chemical reporting lists and reporting quantity thresholds, and the practical difficulties (and costs) of determining and documenting whether reporting thresholds have been exceeded, particularly in the accidental release context;

7. assessing the utility of using existing chemical reporting lists for the CSB's purposes; and,
8. the best means of educating the wide range of public and private entities that may be obligated to stand ready to report under a final reporting rule from the Board.

Each of these can be important considerations for a reporting rule in general, and we encourage the Board to keep them in mind as it moves forward. But it is difficult to offer meaningful comments concerning these matters in the absence of a clear understanding of what the Board in particular is seeking to accomplish by its information collection, what information is necessary to accomplish those ends, and what information is not already available to it from other sources. In the absence of such contextual information, we can offer little more than generalities:

- collect only information that is *necessary* to accomplish the Board's duties and that is not available from other sources (e.g., media);
- use collection means that make the burden on the general public as low as is reasonably practicable and non-duplicative; and
- assure that the reporting rules will operate in practice as intended and do not become a source of regulatory uncertainty, and/or collateral administrative or enforcement litigation.

CEEC encourages the Board to prepare and make available an analysis of its practical outstanding information needs as described herein, and then present for public comment, as part of a supplemental ANPRM, that analysis and its potential implications for the shape of a potential reporting rule.

#### B. REPORTING SHOULD NOT BE USED TO SUPPORT A COMPREHENSIVE NATIONAL ACCIDENT SURVEILLANCE DATABASE

As indicated in the Notice, the Board developed its incident database as a practical means to assemble relatively uniform information sets concerning individual accidents to be assessed for suitability for onsite investigations, not as a comprehensive national accident surveillance database. Although GAO observed and has commented on the uneven data quality in the database (identifying only a 94-96% accuracy rate for certain data elements in a sample of records it audited), and more accuracy could doubtlessly be achieved by investing more in the system (e.g., compelled data reporting, additional data entry clerks, data quality assurance and auditing clerks, etc.), neither GAO nor the Board has assessed whether the current 95% accuracy is, nevertheless, accurate enough for the data base to meet its purpose – to assist the Board with predictable case selection – and whether there would be any substantial value to fulfilling the Board's mission from a marginal increase in accuracy. This is the analysis the Board should conduct before considering additional reporting.

As the database already reportedly collects some 1,000 new incidents a year and the Board only investigates a very small fraction of those incidents, it is hard to imagine a circumstance where a slight increase in accuracy in the informal database would affect the Board's hazard warning and policy recommendation activities over any period of time. The Board should resist GAO's suggestions of improving the database to serve purposes not contemplated by the Board, particularly where other existing databases may serve the same need (e.g., the ATSDR's Hazardous Substance Emergency Events Surveillance database).

### C. THE BOARD HAS SIGNIFICANT DISCRETION IN SHAPING A REPORTING RULE TO MEET ITS NEEDS

While the Board has concluded that the statute requires the Board to promulgate a reporting rule of some kind, the statute does not put any parameters on that rule, leaving it to the Board's discretion to shape the rule according to its needs, subject, of course, to the overriding good information collection principles (and legal requirements) of the PWRA – the information collection should be limited to what is necessary to satisfy the agency's mission, and useful in proportion to the cost of collecting, storing and managing it. Accordingly, if the Board concludes that the CSB's contribution to the prevention of future chemical release accidents will not be substantially improved by a case selection reporting requirement, its statutory mandate could be satisfied by a rule documenting that conclusion and providing that no one shall have reporting obligations for the time being pursuant to CAA §112(r)(6)(C)(iii).

Alternatively CEEC would support the third approach outlined in the ANPRM – establishing rules creating standard procedures for issuing and responding to incident information requests issued by the Board on an individual basis as the need may arise in assessing individual accident circumstances. These rules might be issued under the authority of §§112(r)(6)(L), (M) and (N) in addition to CAA §112(r)(6)(C)(iii).

CEEC would not support the other reporting options preliminarily outlined by the Board. We agree with the Board that the first option, a comprehensive reporting program, is not necessary for the Board to learn of the most significant accidental release events that might justify an on-sight investigation. To the extent that the Board concludes that it is not learning of all such incidents that it should, we submit that the perceived data gap could be more efficiently and cost effectively filled by increased Board surveillance of media reports, reports to the National Response Center, and other governmental emergency response networks.

Similarly, absent a strong demonstration of need, CEEC would also object to the second approach preliminarily outlined by the Board – a comprehensive reporting obligation subject to high-consequence triggers. While focusing on high-consequence events would reduce somewhat the societal costs of the rule and would better align the rule with the Board's legitimate needs, it is not at all clear that the information generated would in any way improve the Board's selection of the most significant accidental release events that might justify an on-sight investigation. Such an approach is much more appropriate for developing and populating a national

surveillance database, which the Board has no legal mandate to create. Beyond that, such an approach would carry very significant rule development and industry training costs to develop readily comprehensible and objective reporting triggers. Such efforts could be particularly difficult where the triggers are likely to be based on conclusions about cause and effect (the proximate cause of an injury or particular damage).

CEEC can be expected to question reporting approaches targeted at “high risk” facilities or releases of reportable quantities of particular chemicals as defined by other regulations or the Board. Requiring release reports only from “high risk” facilities would simply be arbitrary. While such facilities may have greater potential to experience a significant accidental release, by virtue of such potential they are also more likely to have closely evaluated such risk and taken significant steps to mitigate any risk. CEEC believes that the Board’s case selection focus should be only on the facilities that actually experience such a release, whether or not they were deemed “high risk” beforehand. Further, any new reporting obligations for releases of reportable quantities would be redundant – such releases are already reported to the NRC, and the NRC is obligated by the statute to report them on to the Board.

#### D. CONCLUSION

If the Board determines, after evaluating its information needs, that additional information is necessary for the Board to make its case selection decisions, CEEC believes the Board’s “third approach” -- case-by-case information requests -- would be a better tailored and less burdensome approach to gathering such additional data.

We look forward to continuing to work with the Board on accidental release reporting policy. Please contact me or CEEC’s legal counsel, Ken Meade and James Votaw of Wilmer Cutler Pickering Hale and Dorr LLP (202-663-6196) if you have any questions regarding these comments.

We thank you for your consideration.

Sincerely,



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