



CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

40 CFR Part 1604

[Agency Docket Number: CSB-2019-0004]

RIN 3301-AA00

Accidental Release Reporting

AGENCY: Chemical Safety and Hazard Investigation Board.

ACTION: Final rule.

SUMMARY: The enabling statute of the Chemical Safety and Hazard Investigation Board (CSB) provides that the CSB shall establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigative jurisdiction. The final rule is intended to satisfy this statutory requirement. The rule describes when an owner or operator is required to file a report of an accidental release, and the required content of such a report. The purpose of the rule is to ensure that the CSB receives rapid, accurate reports of any accidental release that meets established statutory criteria.

DATES: This rule is effective as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Goonan, General Counsel of the Chemical Safety and Hazard Investigation Board, by telephone at 202-261-7600, or by e-mail at rulemaking@csb.gov.

SUPPLEMENTARY INFORMATION: The CSB was established by the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (November 15, 1990). The statute directs the CSB, among other things, to investigate (or cause to be investigated), determine, and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury, or substantial property damages and recommend measures to reduce the likelihood or the consequences of accidental releases and propose corrective steps to make chemical production, processing, handling and storage as safe and free from risk of injury as is possible. 42 U.S.C. 7412(r)(6)(C)(i) and (ii).

The CSB's enabling legislation also includes a requirement that the CSB 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. The 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)(iii).

Although the CSB's enabling legislation was enacted in 1990, the CSB did not begin operations until 1998. Since 1998, the CSB has not promulgated an accidental release-reporting requirement as envisioned in the CSB enabling legislation.

In 2004, the Department of Homeland Security (DHS) Inspector General recommended that the CSB implement the statutory reporting requirement: "The CSB needs to refine its mechanism for learning of chemical incidents, and it should publish a regulation describing how the CSB will receive the notifications it needs." (Department of Homeland Security, Office of Inspector General, "A Report on the Continuing

Development of the U.S. Chemical Safety and Hazard Investigation Board,” OIG-04-04, Jan. 2004, at 14.) In 2008, the Government Accountability Office (GAO) also recommended that the CSB fulfill its statutory obligation by issuing a reporting rule. (U.S. Government Accountability Office, “Chemical Safety Board: Improvements in Management and Oversight Are Needed,” GAO-08-864R, Aug. 22, 2008, at 11.)

On June 25, 2009, the CSB submitted an advanced notice of proposed rulemaking (ANPRM) entitled “Chemical Release Reporting,” at 74 FR 30259-30263, June 25, 2009. The ANPRM outlined four potential approaches to accidental release reporting and requested additional information for developing a proposed rule. Specifically, the CSB sought comments in response to several specific questions, including but not limited to the following:

- Are there Federal, State, or local rules or programs for reporting chemical or other types of incidents that would be an appropriate model for the CSB to consider in developing a reporting requirement?
- Should an initial report be made to the CSB or the National Response Center?
- What information should be reported to the CSB?
- How soon after an accident should reporting occur?
- Should the rule be designed with distinct requirements for rapid notification of high-consequence incidents and more systematic (and slower) notification of other incidents?

Id. at 30262.

In response to the ANPRM, the CSB received 27 comments from a variety of interested parties. These comments are included as part of the docket for this rulemaking and labeled for reference as CSB-ANPR0901-000001 to CSB-ANPR0901-000133.

On February 4, 2019, a U.S. District Court judge ordered the CSB to issue a rule requiring the reporting of accidental chemical releases to the CSB. 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). The court directed the CSB to promulgate a final rule within 12 months of the date of the court's final order.

On December 12, 2019, the CSB published a notice of proposed rulemaking and provided thirty days for public comment. 84 FR 67899, December 12, 2019.

In response to the proposed rule, the CSB received numerous comments from approximately 43 interested parties or groups. In light of these comments and additional analysis, the CSB has revised certain sections of the proposed rule which are reflected in the final rule adopted in this document.

Regulatory Requirements

Unfunded Mandates Reform Act (2 U.S.C. Ch. 25)

The Act does not apply to independent regulatory agencies, 2 U.S.C. 658(1). In any event, the rule does not contain a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year. Nor will it have a significant or unique effect on small governments.

Regulatory Flexibility Act (5 U.S.C. Ch. 6)

The Regulatory Flexibility Act (RFA) requires Federal agencies to assess the impact of a rule on small entities and to consider less burdensome alternatives for rules that are expected to have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603. However, an agency is not required to prepare such an analysis for a rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). For the

reasons discussed below, the CSB has certified to the SBA's Chief Counsel for Advocacy of the Small Business Administration ("SBA") that the rule will not have a significant economic impact on a substantial number of small businesses, small governmental jurisdictions, or small organizations.

Summary of Rule

As authorized by 42 U.S.C. 7412(r)(6)(C)(iii), the CSB is issuing a final rule to require an owner or operator of a stationary source to submit an accidental release report to the CSB. The rule describes when an owner or operator is required to file a report of an accidental release, and the required content of such a report. The purpose of the rule is to ensure that the CSB receives rapid, accurate reports of any accidental release that meets established statutory criteria.

The accidental release reports will require only information that is already known or should be available to an owner/operator soon after an accidental release. To provide the owner/operator more time to gather the necessary information the final rule has increased the reporting window from four to eight hours. The required information is also limited in scope to critical information required for the CSB to make informed decisions about its jurisdiction, interagency coordination, and deployment decision-making. For example, paragraphs (a) through (e) require only minimal contact information and a basic description of the accidental release. Paragraph (g) requests the relevant Chemical Abstract Service (CAS) Registry Number associated with the chemical(s) involved in the accidental release. Paragraphs (h), (i), (j), and (l)(1)-(3) include an important qualifier, "if known." This qualifier recognizes that some or all of this information may not be

known within eight hours of an accidental release. (See discussion under §1604.3, Reporting an accidental release).

Economic Impact

Small Entity Impact

Although the CSB concluded that the rule will not have a significant economic impact on businesses, regardless of size, the CSB nevertheless estimated how many small businesses would be impacted by the proposed rule by using the following methodology.

In order to estimate the percentage of reports that would likely be filed by small businesses each year, the CSB reviewed the 1,923 accidental releases that occurred between 2009 and 2019 to determine how many releases could be matched to an NAICS code and how many distinct NAICS codes were represented. Of the 1,923 incidents, approximately 85 percent (1,625) had a NAICS code identifier. The 1,625 events were distributed among 441 distinct, six-digit NAICS codes.¹

Because of the distribution of accidental releases among so many different NAICS codes, the CSB focused its analysis on the business types most likely to be impacted by the proposed rule: firms with NAICS codes that appeared most often in the dataset. The CSB sorted the 1,625 releases with a NAICS code into three segments: 1) NAICS codes which appeared at least 10 times in the dataset; 2) NAICS codes which appeared between 5-9 times, and 3) NAICS codes that appeared less than 5 times. The CSB concluded that a total of 19 NAICS codes appeared 10 or more times and represented 423 separate incidents, or 26% of the 1,923 events recorded in the database.

¹ The CSB determined that a total of 253 NAICS codes appeared only one time over 10 years. Thus, 57% (253 out of 441) of the codes involved only one incident.

The 19 NAICS codes with at least 10 events over the pertinent time period are listed in Table 2 below. The CSB used these 19 codes as a sample to assess impact on small businesses. The CSB assumed that releases fell evenly across all businesses within each NAICS code. Based on the total number of reports for each code (column 2), the CSB calculated the percentage of accidental releases occurring within each of the 19 most frequent NAICS codes in relation to the total number of 1,923 incidents in the database. This information is summarized in Table 2, column 3.

The CSB used the U.S. Small Business Administration Table of Small Business Size Standards to determine the pertinent small business standard for each of the 19 NAICS categories.² Depending on the NAICS code, a firm's status as a small business is determined by the number of employees or by annual revenue.³ The pertinent measure for each NAICS code, employment or revenue, is set out in Table 2 in the fourth and fifth columns.

The CSB determined the total number of firms in each category, and the total number of small firms in each category, by consulting the most recent census tables summarizing data for U.S. businesses. See Table 1, columns 6 and 7. The most recent data for businesses measured by employment is from 2016.⁴ The most recent data for

² U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes (effective August 19, 2019), available at <https://www.sba.gov/document/support--table-size-standards>.

³ Id. The SBA does set out some alternative measures for certain codes, but the CSB review used only standard measures.

⁴ Number of Firms, Number of Establishments, Employment, and Annual Payroll by Enterprise Employment Size for the United States, All Industries: 2016 (released 12/18/2018), available at <https://www.census.gov/data/tables/2016/econ/susb/2016-susb-annual.html>.

businesses measured in terms of revenue is from 2012.⁵ The percentage of small businesses within each NAICS code is listed in the last column of Table 2.

Table 1 Releases by NAICS Categories in Terms of Frequency of Releases 2009-2019

NAICS Code	NAICS Industry Name	Number (percent) of incidents in sample (N=1,923)	Size standards in millions of dollars of revenue (2012)	Size standards in number of employees (2016)	Total Firms	Small	% Small
324110	Petroleum Refineries	54 (2.8%)	N/A	1,500	96	51*	53%
213112	Support Activities for Oil and Gas Operations	48 (2.5%)	\$42	N/A	8,877	8,595	98%
211111	Crude Petroleum and Natural Gas Extraction	44 (2.3%)	N/A	1250	5,658	5,558*	98%
424690	Other Chemical and Allied Products Merchant Wholesalers	28 (1.5%)	N/A	150	5,912	5,410	92%
213111	Drilling oil and gas	27 (1.4%)	N/A	1000	1,795	1,754*	98%
325199	All Other Basic Organic Chemical Manufacturing	24 (1.25%)	N/A	1,250	584	485*	83%
325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing	24 (1.25%)	N/A	500	1,005	924	92%

⁵ Number of Firms, Number of Establishments, Employment, Annual Payroll, and Estimated Receipts by Enterprise Receipt Sizes for the United States, All Industries: 2012 (released June, 22, 2015), available at <https://www.census.gov/data/tables/2012/econ/susb/2012-susb-annual.html>.

325211	Plastics Material and Resin Manufacturing	20 (1.04%)	N/A	1,250	855	736*	86%
423930	Recyclable Material Merchant Wholesalers	20 (1.04%)	N/A	100	6,776	6569	97%
331110	Iron and Steel Mills	22 (1.14%)	N/A	1,500	442	372*	84%
221310	Water Supply and Irrigation Systems	18 (.94%)	\$30	N/A	3,293	3,243	98%
424720	Petroleum and Petroleum Products Merchant Wholesalers	17 (.88%)	N/A	200	1,690	1490	88%
238910	Site Preparation Contractors	15 (.78%)	\$17	N/A	33,806	33,324	98%
311615	Poultry Processing	13 (.68%)	N/A	1,250	317	258*	81%
325180	All Other Basic Inorganic	16 (.8)	N/A	1000	365	279	76%
221320	Sewage Treatment Facilities	12 (.62%)	\$22	N/A	398	370	93%
237120	Oil and Gas Pipeline and Related Structures Construction	12 (.62%)	\$40	N/A	1,779	1592	89%
811111	General Automotive Repair	11 (.57%)	\$8	N/A	76,336	75,639	99%
713940	Fitness and Recreational Sports Centers	10 (.52%)	\$8	N/A	24,775	24,348	98%
	Total	435 (23%)					

Note 1: An asterisk appears next to numbers in the table that are estimates based on a lack of sufficiently specific census data. For example, the pertinent employment size

standard for iron and steel mills set by the SBA is 1,500 employees. However, census data does not provide specific information on the number of firms with more than 1,500 employees. Instead, the highest category is 500 and more employees. Thus, for purposes of analysis, the firms with less than 500 employees were counted as small firms.

The CSB then multiplied the percentage of small businesses within each category by the total number of reported releases in that category over the 10-year period. Table 2, column 7. This number was then divided by 10 to obtain the number of reports anticipated each year on average from small businesses within each NAICS code.⁶ Table 2, column 8. Because the number of small business reports expected annually is low, (covering a range from .91 to 4.7) for the sectors with the most identifiable releases, the CSB reasons that the impact in sectors with only a few releases over 10 years would be inconsequential.

Table 2- Expected Annual Reports Burden by Sector

NAICS Code	NAICS Industry Name	Total Businesses ⁷	Small	% Small	Expected Reports 2020-2030	Expected-Reports from Small Businesses-2020-2030	Expected Annual Reports-Small Business
213112	Support Activities for Oil and Gas Operations	8,727	8,596	.98	48	47	4.7
211111	Crude Petroleum and Natural Gas Extraction	5,658	5,558	.98	44	43	4.32
324110	Petroleum Refineries	96	51	.53	54	28.29	2.87
213111	Drilling Oil and Gas Operations	1,795	1,754	.98	27	27	2.64
325998	Miscellaneous	1,005	924	.92	24	22	2.2

⁶ The database covered approximately 10.5 years, but the CSB used 10 in its calculation for simplicity.

⁷ In order to calculate the number of small businesses, the CSB had to use two different census tables. If the size standard was based on revenue, the CSB relied on a 2012 table. If the size standard was based on employment, the CSB used the 2016 table.

	Chemical Product & Preparation Manufacturing						
423930	Recyclable Material Merchant Wholesalers	6,776	6,569	.97	20	19.4	1.94
325199	All Other Basic Organic Chemical Manufacturing	584	485	.83	24	20	1.99
331110	Iron and Steel Mills	442	372	.84	22	18.48	1.85
325211	Plastics Material and Resin Manufacturing	855	736	.86	20	17.2	1.7
221310	Water Supply and Irrigation Systems	3,293	3,243	.98	18	17.6	1.76
424690	Other Chemical and Allied Products Merchant Wholesalers	5,912	5,410	.92	17	15.64	1.56
424720	Petro. and Petro. Products Merchant Wholesalers (except Bulk Stations and Terminals)	1,690	1,487	.88	17	15	1.5
238910	Site Preparation Contractors	34,153	32,997	.98	15	14.7	1.47
325180	All Other Basic Inorganic Chemical Manufacturing	365	279	.76	16	12.16	1.22
221320	Sewage Treatment Facilities	398	370	.93	12	11.2	1.12
811111	General Automotive Repair	76,336	75,639	.99	11	10.89	1.08
237120	Oil and Gas Pipeline and	1,779	1,592	.89	12	11	1.1

	Related Structures Construction						
311615	Poultry Processing	317	258	.81	13	10.5	1.0
713940	Fitness and Recreational Sports Centers	24,775	24,348	.98	10	10	.98

Estimated Reports per Year

The CSB identified 1,923 chemical accidents in its database that occurred between January 1, 2009, and July 15, 2019. Each of these incidents involved either a fatality or hospitalization. A copy of the CSB’s database information regarding the 1,923 accidental releases is included in the docket for reference.⁸ The total number of annual incidents ranged from a low of 113 in 2017 to a high of 291 in 2012. Over 10.5 years, the average annual number of accidents was approximately 183. The median number of accidents per year was 169.

Because the database tracked hospitalizations (as opposed to the broader definition of serious injuries as defined in the proposed rule), it is possible that certain incidents where there was no death or hospitalization are not included in the database. In addition, it is possible that the CSB’s data does not include a small number of accidental releases that resulted in a fatality. A release resulting in a fatality might have been missed if it was not reported to the National Response Center (NRC) pursuant to other law or not reported in the media.⁹ For these reasons, the CSB recognizes that the annual

⁸ Because of the CSB’s limited resources and lack of available information, there are certain limitations to the information contained in the CSB database. The database was not designed to comprehensively collect statistically valid data concerning all accidental releases. Much of the information in the database comes from the first day of incident media reports. The CSB could only follow up on a limited number of events per year to verify information contained in the media reports.

⁹ During the relevant time period, the CSB relied on NRC reports and media surveillance search engines to identify releases of interest.

average of 183 incidents may undercount a certain number of accidental releases which meet the CSB's statutory criteria. On the other hand, the past annual average does not take into account that a certain number of full reports will not be required under the proposed rule if a party has already reported the release to the NRC as required by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In light of all factors, the CSB increased its annual estimate of reports from the historic average of 183 to 200.

Burden Estimate-Time

The CSB considered two areas of burden: familiarization costs and reporting costs. The CSB estimated that it would take approximately 45 minutes for each firm to learn about the rule and when to report. The CSB considers this a one-time cost, which will be borne by all entities that might experience an accidental release, whether or not such a release occurs. The CSB also estimated that it would take each firm approximately 15 minutes to submit a report to the CSB following an accidental release.

The CSB compared forms the NRC uses to guide its operators in taking release information with questions similar to those included in the CSB's proposed form. The main difference is that the proposed CSB form had fewer data queries. The CSB asked NRC how long it typically took its operators to collect information from a caller reporting an accidental release. NRC explained it does have specific information concerning how the length of calls differ based on the type of report being made,¹⁰ but that it had more general information to share. NRC informed the CSB that it receives approximately

¹⁰ The NRC receives reports under many different laws. When NRC receives a call, it does not ask questions based on the specific law. Rather, it asks for information based on the type of "event." For example, there is an offshore release event category and an onshore facility release category. The NRC does not compare how long it takes to obtain information based on the nature of each event category.

30,000 telephone reports each year, and the average time required for each operator to complete the call was approximately eight minutes. The CSB conducted two simulated accidental release phone calls in which the caller was asked for the same information as is required under the proposed rule. These simulated calls also took approximately 8 minutes. Thus, the available information indicated that a phone submission would take approximately 8 minutes. In its judgment, the CSB estimated that it would take 2-3 additional minutes to complete a screen-fillable pdf form and email it to the CSB. To allow for some margin of error in its analysis, the CSB estimates that it will take approximately 15 minutes to submit a report, either by telephone or by emailing a form.

Burden Estimate-Cost

The CSB then estimated an hourly labor cost to translate the time requirement into a cost figure. In order to determine an appropriate hourly rate, the CSB identified six relevant occupation codes, the annual mean wage, and the mean hourly wage for each, based on the Bureau of Labor Statistics' May 2018 National Occupational Employment and Wage Estimates United States.¹¹ The CSB next combined the average hourly rate for each of the six classifications and divided that total by six. This calculation produced an average hourly rate of \$37.20. This information is summarized in Table 3 below.

The CSB then multiplied the average hourly wage (\$37.20) by the total time requirement for the first year of one (1) hour (45 minutes to learn about the rule and 15 minutes to submit a report). This calculation resulted in an estimated per-business compliance cost during the first year of \$37.20. However, not all businesses will need to file a report during the first year or each year thereafter. Further, some businesses who

¹¹ https://www.bls.gov/oes/current/oes_nat.htm

need to file a report each year will not have to submit a full report to the CSB if the firm has already reported the event to the NRC under CERCLA.

Based on the minimal per business cost, the CSB has concluded that the proposed rule will not have a significant economic impact on any business, regardless of size.

Table 3- Occupational Classifications and Wages

Occupational Code	Occupation Title	Mean Annual Wage	Mean Hourly
13-1041	Compliance Officer	\$72,520	\$34.86
17-2081	Environmental Engineers	\$92,640	\$44.54
17-2110	Industrial Engineers ¹²	\$91,800	\$44.14
17-1111	Health and Safety Engineers ¹³	93,630	\$45.01
17-3025	Environmental Engineering Technicians	\$54,800	\$26.34
17-3026	Industrial Engineering Technicians	\$58,860	\$28.30
	Composite Average Hourly		\$37.20

The CSB also requested comments on the threshold economic analysis, presented above, and its underlying assumptions. The CSB received a number of comments concerning the CSB’s estimate of annual reports and the related burden of compliance. The CSB discusses these issues in more detail the preamble and has made revisions to the rule that address such concerns.

¹² Includes health and safety engineers.

¹³ Except Mining Safety Engineers and Inspectors.

After reviewing the comments and making certain revisions to the final rule to address concerns, the CSB has concluded that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act (44 U.S.C. Ch. 35)

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA) provides that an agency generally cannot conduct or sponsor a collection of information, and no person is required to respond to, nor be subject to a penalty for, failure to comply with a collection of information unless that collection has obtained Office of Management and Budget (OMB) approval and displays a currently valid OMB Control Number.

The proposed rule also included the notice required under 5 CFR 1320.5(a)(1)(iv), which is reprinted below.

Type of Information Collection: New Collection.

Title of the Collection: Accidental release report.

Summary of the Collection: The proposed collection requires an owner/operator of a stationary source to report information concerning an accidental release. Specific detail is provided in the proposed information collection request.

Need for the information and proposed use of the information: The CSB is required by law to issue an accidental release reporting rule. The CSB intends to use the information to learn of any accidental release within its jurisdiction and to plan how to respond to that particular accidental release.

A description of the likely respondents: The vast majority of respondents will be private sector businesses involved in the production, storage or handling of regulated substances or extremely hazardous substances.

Estimated number of likely respondents per year: 200.

Proposed frequency of response to the collection of information: Most respondents will only submit a response if an accidental release within the scope of the rule occurs during a given year. For the vast majority of potential respondents, the frequency of responses will likely be “none” in a given year.

An estimate of the total annual reporting and recordkeeping burden:

Reporting: The CSB estimates that approximately 200 reports will be submitted each year, and that each report will take approximately 15 minutes for each respondent to complete and submit to the CSB. Thus, the CSB estimates the total annual labor burden each year for reporting parties will be approximately 50 hours.¹⁴

The CSB then estimated an hourly labor cost to translate the time requirement into an annual cost figure. In order to determine an appropriate hourly rate, the CSB identified six relevant occupational classifications, and the annual salary for each position, based on the Bureau of Labor Statistics’ May 2018 National Occupational Employment and Wage Estimates. A full discussion of this calculation is included in the discussion above concerning the Regulatory Flexibility Act. Based on its analysis, the CSB estimated an hourly rate of \$37.20 was appropriate for purposes of estimated labor cost. The CSB then multiplied the average hourly wage rate of \$37.20 by the total annual time estimate of 50 hours to determine its total annual cost estimate of \$1,860.00.

Recordkeeping

There is no recordkeeping requirement.

¹⁴ This estimate does not include first-year familiarization costs for potentially impacted firms to learn about the rule and its requirements. However, the first year familiarization cost calculation is addressed in the regulatory flexibility section of the preamble.

When the proposed rule was published, the CSB submitted its PRA package to OMB in accordance with 5 CFR 1320.5(a)(3). The proposed rule also provided notice that comments could be provided to OMB's Office of Information and Regulatory Affairs via email to oir_submission@omb.eop.gov, Attention: Desk Officer for the CSB. The notice also indicated the deadline for submitting such comments to OMB.

The notice explained that any interested person could also submit comments directly to the CSB regarding the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden directly. Specifically, the notice asked commenters to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Address the potential to enhance the quality, utility, and clarity of the information to be collected; and
- Discuss options to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

As of this date, the CSB has received one set of comments in response to the notice which it has attempted to address in the preamble. As of this date, the CSB is still awaiting OMB's response to the CSB's PRA submission.

Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. Ch. 6)

The rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (as amended), 5 U.S.C. 804. This rule will

not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

National Environmental Policy Act of 1969 (5 U.S.C. 804)

The rule will not have a significant effect on the human environment.

Accordingly, this rule is categorically excluded from environmental analysis under 43 CFR 46.210(i).

E-Government Act of 2002 (44 U.S.C. 3504)

Section 206 of the E-Government Act requires agencies, to the extent practicable, to ensure that all information about that agency required to be published in the Federal Register is also published on a publicly accessible website. All information about the CSB required to be published in the Federal Register may be accessed at www.regulations.gov.

The E-Government Act requires, to the extent practicable, that agencies ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings under the Administrative Procedure Act of 1946 (5 U.S.C. 551, et seq.). Under this Act, an electronic docket consists of all submissions under section 553(c) of title 5, United States Code; and all other materials that by agency rule or practice are included in the rulemaking docket under section 553(c) of title 5, United States Code, whether or not submitted electronically. The electronic docket for this rulemaking is available at www.regulations.gov.

Plain Writing Act of 2010 (5 U.S.C. 301)

Under this Act, the term “plain writing” means writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience. To ensure that this rulemaking has been written in plain and clear language so that it can be used and understood by the public, the CSB has modeled the language of this rule on the Federal Plain Language Guidelines.

National Technology Transfer and Advancement Act of 1995 Section 12(d)

(NTTAA) (15 U.S.C. 272 note)

The NTTAA requires agencies to “use technical standards that are developed or adopted by voluntary consensus standards bodies” to carry out policy objectives determined by the agencies, unless they are “inconsistent with applicable law or otherwise impractical.” The CSB has determined that there are no voluntary consensus standards that are appropriate for use in the development of this rule.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the CSB will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804 (2).

Discussion

This rule adds a new part to title 40 of the Code of Federal Regulations, which will appear as a new part 1604. The new part consists of six sections. Section 1604.1 states the purpose of the rule. Section 1604.2 sets forth key definitions. Section 1604.3 sets forth who must file a report and when. Section 1604.4 describes the information required in each report. Section 1604.5 implements the enforcement provisions

authorized by 42 U.S.C. 7412(r)(6)(O). Section 1604.6 confirms that the procedure for seeking records obtained pursuant to the rule is governed by the Freedom of Information Act (FOIA), 5 U.S.C. 552, the CSB's procedural regulations for disclosure of records under the FOIA, 40 CFR part 1601, and other pertinent Federal disclosure laws. Before addressing comments and revisions in the final rule to these specific provisions, the CSB will address areas of general concern reflected in the comments.

The CSB's rule is duplicative and unnecessary.

The CSB received a number of comments which complained that the proposed rule was unnecessary, duplicated existing reporting requirements under other laws, would result in a flood of data the CSB could not handle,¹⁵ and divert resources from the CSB's core mission of investigating and reporting on accidental releases.¹⁶ The CSB also received a number of comments that suggested that the CSB rely on information already submitted to the National Response Center (NRC). Other comments suggested that the CSB satisfy its requirements by relying on data collected by other Federal agencies--such as Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency (EPA).

As a threshold matter, the CSB's response to comments concerning the necessity of the rule is simple. The CSB has a statutory duty, confirmed by court order, to issue a reporting rule despite concerns about its necessity or the duplication of existing requirements. At the same time, the CSB has considered comments and explored options

¹⁵ A comment from the "CSB Coalition" observed that the CSB only deployed to a small fraction of the accidental releases the CSB identified from January 1, 2009 to July 15, 2019.

¹⁶ One commenter worried that processing data from the rule would divert far too many of the CSB's limited resources to gathering and screening such information, rather than investigating and developing critical safety recommendations.

for minimizing any burden that might be imposed by adding its own reporting requirement in addition to existing Federal requirements.

In 2013, President Obama issued Executive Order 13650, which established the Chemical Facility Safety and Security Working Group (Working Group). The goal of the Working Group was to improve coordination of Federal chemical safety and security efforts. In its 2014 report, “Actions to Improve Chemical Facility Safety and Security—A Shared Commitment,” the Working Group reported that stakeholders were concerned by duplicative Federal reporting and data requirements. The report (at p. viii.) noted that “this duplication stems in part from multiple regulatory programs that developed and evolved over decades, with each incorporating technologies and data collection requirements independent of one another (often due to differing statutory requirements).” The Working Group found “there is no chemical security and safety data clearinghouse that contains all of the data points germane to all Federal agency regulations.” *Id.*

In this rulemaking, the AFL-CIO submitted a comment which echoed the Working Group’s report:

A number of agencies require some form of chemical accident reporting, including the National Response Center, OSHA, the EPA Risk Management Program, and the Coast Guard. Each has its own reporting procedures and deadlines, its own definition of a reportable accident, and its own lists of covered facilities and chemicals. Much of the required information overlaps. This is an inefficient use of government resources, and it creates unnecessary burdens for owners/operators, researchers, emergency responders and interested members of the public.

Accordingly, the CSB carefully considered various suggestions to avoid duplication of existing reporting requirements while ensuring that the CSB appropriately meets its statutory responsibility to issue a new Federal reporting requirement.

Many comments urged the CSB to rely on the NRC for information. For most of its existence, the CSB has received and reviewed NRC reports. Various parties file reports with NRC according to a number of laws, and the CSB reviews this information to determine if there has been an accidental release within the CSB's jurisdiction. In proposing this rule, the CSB considered whether accidents reported to the NRC under other laws¹⁷ could reliably satisfy the CSB's notification requirements. The CSB concluded that reliance on information already reported to NRC would not satisfy its statutory obligation.

The CSB screened 1,923 incidents from 2010 to July 15, 2019 which resulted in an injury or fatality. The CSB compared NRC reports it received during that time period with the information it had collected through other means. The CSB found that it had matching NRC reports for only 13.16 percent (253) of the incidents the CSB had identified through other means. Moreover, of those matching reports, the CSB received notification of the incident from the media prior to receiving an NRC report 61% of the time.¹⁸ During the 10-year review period, the CSB concluded that the primary source of accidental release information was not NRC reports. Prior to proposing this rule, the CSB and NRC have consulted on ways to better utilize NRC information. While improvements can be made, some releases within the CSB's jurisdiction inevitably will not be reported to the NRC. One reason for this difference is that some laws do not require a report unless a threshold quantity of a regulated substance is released. Releases of less than a threshold quantity will not be reported to the NRC pursuant to those laws. However, the same release may have caused a death or serious injury within the

¹⁷ A number of laws require that a report be sent to the NRC if a given event occurs.

¹⁸ The CSB has added its analysis to the docket for this rulemaking.

jurisdiction of the CSB.¹⁹ This analysis supports a comment from the AFL-CIO that suggested the CSB rule should require that a report be filed with the CSB whether or not the accident was also reported to the National Response Center.

Commenters also suggested that the CSB rely on information from other agencies that collect similar information pursuant to other laws. For example, the U.S. Sugar Beet Association argued that the CSB should rely on reports that OSHA obtains under 29 CFR 1904.39 and that a separate report to the CSB should not be required. However, OSHA's reporting rule under 29 CFR 1904.39 does not capture all the accidental releases within the CSB's jurisdiction. For example, an accidental release may result in the death of a member of the general public but no death or injury to an OSHA covered employee. In that instance, there would be no report to OSHA. In addition, OSHA's reporting rule does not require information on serious injuries within the time frame required by the CSB.²⁰

The CSB's estimate of burden is unrealistically low.

Several commenters argued that the CSB's estimate of approximately 200 reports per year was unrealistically low. The reason for the low estimate, according to these comments, was that the CSB relied on one definition of "serious injury" for its estimate but proposed a different, broader definition of "serious injury" in the proposed rule. Specifically, the CSB based its estimate on accidental releases resulting in a death or hospitalization but proposed a definition of "serious injury" in its proposed rule that would require reports even if an accidental release did not result in a death or

¹⁹ There may also be other factors that explain the CSBs findings.

²⁰ OSHA's rule does set an eight-hour deadline for reporting fatalities, but allows 24 hours for employers to submit reports related to inpatient hospitalizations. Compare 29 CFR 1904.39(a)(1) and (2).

hospitalization. Because of this discrepancy, commenters argued that the definition of “serious injury” should be limited to fatalities and hospitalizations.

For example, the Coalition for Responsible Waste Incineration commented:

[T]he 200 reports per year used in the economic impact/burden assessment for the rule and other discussions is based on the OSHA reportable definition (fatality and hospitalization). The proposed definition falls more in line with recordable injuries. If this definition is used, there will be thousands of reports per year, not 200.

Based in large part on these concerns, the CSB has revised the definition of serious injury in the final rule to read as follows: “Serious injury means any injury or illness that results in death or in patient hospitalization.”²¹ The proposed definition of “serious injury” in the rule is now the same as the criteria used in developing the CSB’s estimate in its RFA analysis.

This revision does not mean that the CSB agrees with comments that argued the original definition of “serious injury” would have resulted in thousands of additional accidental release reports each year. Those comments relied on either anecdotal information or on “lost workday” data from the Bureau of Labor Statistics (BLS). The CSB believes that estimates based on the BLS information greatly exaggerated the potential burden of a broader definition of serious injury.

For example, the American Forest and Paper Association based its estimate on 17,000 lost workday cases recorded in 2018 BLS data which was due to exposure to harmful substances. Based on this information, the Association concluded that the proposed definition of “serious injury” would generate thousands of accidental release reports every year. The CSB disagrees with that conclusion. The BLS data does not indicate the nature of the substance involved, or whether the exposure was the result of an

²¹ The CSB has also added a definition of “in patient hospitalization” to the final rule.

accidental release or some other cause. Even if the CSB had retained its proposed definition of “serious injury,” the CSB believes that the estimates based on the BLS lost days cases are exaggerated.

In the past, the CSB has relied on broader injury criteria to help identify accidental releases within its jurisdiction. When the CSB employed this criteria, it did not identify thousands of events within its jurisdiction each year. Thus, the CSB will monitor information received under this rule and culled from public sources to further refine its criteria. For now, however, the CSB is confident that its revised definition of serious injury will capture all serious events which merit consideration for a possible agency deployment.

In addition to the concerns described above, the CSB received numerous comments on each section of the proposed rule. These comments and the CSB’s responses are discussed below.

1604.1 Purpose.

The purpose of the rule remains unchanged—to ensure that the CSB receives prompt notice of any accidental release within the CSB’s investigatory jurisdiction. The purpose of the rule is to collect information useful to the CSB in assessing its jurisdiction and making deployment decisions. Some comments urged the CSB to employ its authority to obtain more detailed information on each accidental release in order to establish and maintain a comprehensive database that might be useful for several purposes. Other comments expressed concern that such an undertaking would divert the

CSB's limited resource from its unique mission of conducting in depth safety investigations and making preventive recommendations.²²

As noted in the proposed rule, the CSB interprets its rulemaking authority as plainly focused on serving its investigative function—that is, to ensure that the CSB receives prompt notice of accidental releases within its jurisdiction. A broader interpretation is inconsistent with the plain meaning of 42 U.S.C. 7412(r)(6)(C)(iii).²³

In addition, there are already a variety of statutes designed to support broader data collection and analysis initiatives. There are also others laws, such as The Emergency Planning and Community Right to Know Act (EPCRA), are more tailored to making the public aware of information to mitigate risks and to enhance emergency preparedness.²⁴ Thus, the final rule remains focused on ensuring that an owner/operator promptly reports an accidental release to the CSB.

1604.2 Definitions.

Section 1604.2 establishes definitions for the final rule. As explained in the proposed rule, the CSB incorporated the following definitions that are established at 42 U.S.C. 7412(r)(2)(A)-(C): “accidental release,” “stationary source,” and “regulated substance.” The CSB exercised its rulemaking authority to define certain other terms important to rule implementation.

²² On a related note, a comment submitted by the American Chemistry Council raised a number of issues for further analysis, including the practical impact of the rule on board operations. ACC suggested that CSB conduct an analysis to determine whether the reporting regulation will, in fact, significantly improve the Board's investigation response time and is justified by the associated costs. Such an analysis is a useful suggestion but, must await implementation of the rule. The ACC had other comments concerning the CSB's historical database in comparison to other sources of chemical incident information. In its discussion of other comments, the CSB generally addressed this issue.

²³ In contrast, when Congress wants an agency to collect information for safety trend analysis and early warning of issues, it employs specific language to carry out such a purpose. E.g., 49 U.S.C. 30166 (establishing clear authority for Secretary of Transportation to collect and analyze motor vehicle defect, accident and other information for purposes of trend analysis and prevention.)

²⁴ See section 303 of EPCRA.

Accidental release is defined as an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.

This proposed definition is adopted verbatim from 42 U.S.C. 7412(r)(2)(A). The CSB uses the statutory term “accidental release” throughout the rule to refer to an event meeting the specific statutory criteria under 42 U.S.C. 7412(r)(2)(A). To the extent there are references, in this or other related documents, to a “chemical accident” or “incident,” the context and specific facts will determine whether the event meets the statutory definition of an “accidental release,” or is instead employed generically to describe an event that may or may not satisfy the statutory definition of an accidental release.

One commenter suggested the CSB clarify that an explosion is not a per se accidental release. The rule does not indicate that an explosion is a per se accidental release. To the extent the commenter has a question or seeks clarification, the CSB may address the issue in guidance documents once the rule is final.

Another commenter wrote:

A literal reading of the definition of “accidental release” would indicate that the proposal only covers unanticipated releases. Consequently, if a person sustains a serious injury that results from an intentional release, such as an approved and controlled discharge, then it is not a CSB-reportable incident. The Board should clarify as to how those injuries would be addressed for reporting purposes.

Again, the CSB cannot revise the statutory definition of “accidental release.” In addition, the commenter’s hypothetical appears to be a compliance question, not a comment on the substance of the proposed rule. The CSB may address the hypothetical in a future guidance document.

Another commenter complained that the statutory definition of accidental release incorporated into the rule contains no explanation of how the term as defined relates to various exemptions under other law such as CERCLA and EPCRA. The comment is not a proposal to revise the definition, which the CSB, of course, cannot do. Instead, the comment is a question for implementation guidance. In any event, if there is an accidental release as defined here which results in a death, serious injury, or substantial property damage, then the CSB expects that the release will be reported as required under this rule.

Ambient air is defined as any portion of the atmosphere inside, adjacent to, or outside a stationary source. The CSB based this definition on the plain meaning of the words “ambient” and “air.”²⁵ The proposed definition also took into account the specific purpose of the CSB and how this purpose differs from other programs established under the Clean Air Act Amendments of 1990.

In proposing this definition, the CSB distinguished its proposed definition from one adopted by the EPA in its rule implementing the National Primary and Secondary Ambient Air Quality Standards. The EPA defines “ambient air” as that portion of the atmosphere, external to buildings, to which the general public has access. 40 CFR 50.1(e). As the CSB explained, EPA’s definition at 40 CFR 50.1(e) may work well for implementation of the National Primary and Secondary Ambient Air Quality Standards. However, use of the EPA’s definition of ambient air in the CSB’s rule would undercut a

²⁵ The plain meaning of the phrase “ambient air” is defined by two words – ambient, meaning “existing or present on all sides” and “air,” meaning “the mixture of invisible odorless tasteless gases (as nitrogen and oxygen) that surrounds the earth” (see, e.g., <https://www.merriam-webster.com/dictionary/ambient>; <https://www.merriam-webster.com/dictionary/air>).

primary purpose of section 112 of the Clean Air Act Amendments of 1990--to protect workers inside structures at a stationary source.

Despite its explanation in the proposed rule, the CSB received several negative comments that argued the CSB's rule should use the EPA definition of "ambient air" at 40 CFR 50.1(e). One commenter asserted that both state and Federal courts have consistently understood, along with EPA, that "ambient air" refers to, at most, the unconfined portion of atmosphere or outdoor air. Another commenter observed that "[e]ven if CSB's purpose is broader than the purpose of the National Ambient Air Quality Standards, as CSB asserts, that purpose cannot justify rewriting a statutory term, as CSB's interpretation accomplishes by including air inside stationary source." Another argued that "[w]hen 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 disagrees with these comments. First, the CSB is not rewriting a "statutory" term as one comment suggested. While the term "ambient air" is used many times in the Clean Air Act, there is no statutory definition of "ambient air" under the Act. The CSB possesses the independent authority to define the term as appropriate for purposes of implementing a reporting rule.

Moreover, the EPA's definition is not applicable to the implementation of the CSB's statute. Adopting EPA's definition would divest the CSB of jurisdiction if an accidental release were not "exterior to buildings" or into some areas "to which the general public has access." Contrary to one comment, neither restriction is mandated by state or Federal courts. Thus, there is no legal requirement or rationale to use the EPA

definition. Even the EPA has successfully argued that the 40 CFR 50.1(e) definition does not apply to other parts of the CAA. *United States v O'Connell*, 2017 WL 4675775 (E. D. Wis. 2017).

The “general public” element of the EPA definition of “ambient air” would also add an additional jurisdictional hurdle not found in the CSB’s enabling legislation.²⁶ In *U.S. v. Transocean Deepwater Drilling, Inc.*, 936 F. Supp. 818, 832 (S. D. Texas, March 30, 2013), Transocean argued that the EPA definition divested the CSB of jurisdiction by reading into 40 CFR 50.1(e) a requirement that air be promptly accessible to the general public. The Court rejected this interpretation, noting that Transocean lacked any authority for the argument. *Id.*

The purpose of the CSB’s enabling legislation is to serve the safety interests of members of the general public *and* workers. If some form of “general public” requirement was read into the definition of “ambient air,” the CSB’s statutory language concerning recommendations to OSHA would be meaningless. See, e.g., 42 U. S. C. 7412(r)(6)(J).

Extremely hazardous substance is defined as any substance that may cause death, serious injury, or substantial property damages, including but not limited to any “regulated substance” at or below any threshold quantity set by the EPA Administrator under 42 U.S.C. 7412(r)(5).

²⁶ On December 2, 2019, the EPA announced a revised interpretation of the term “ambient air” which excludes the atmosphere over land controlled by the source “where the source employs measures, which may include physical barriers that are effective in precluding access to the land by the general public.” The CSB is aware that the EPA has longstanding policy interpretations of “general public” for purposes of implementing other sections of the Clean Air Act. However, these policy interpretations are neither binding nor pertinent to the CSB’s implementation of an accidental release-reporting rule under its statutory authority.

The term “extremely hazardous substance” is not defined in the CSB’s enabling legislation. However, the relevant legislative history provides: “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.” Sen. R. 101-228 at 139 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3596. Although it is an important element, the specific property of a substance, such as flammability, toxicity, corrosivity, etc., does not always determine whether a substance is extremely hazardous. For example, a substance on its own may not be considered hazardous. When combined with other substances, however, the consequences may be lethal.

The CSB’s proposed definition of “extremely hazardous substance” focused on the consequences of a substance when it is accidentally released. Thus, an “extremely hazardous substance,” by CSB’s definition, includes any substance that alone, or in combination with other substances or factors, causes death, serious injury, or substantial property damages. The manner in which it inflicts such consequences may vary (fire, explosion, etc.) but what defines the substance as hazardous is its impact on people and the environment.

CSB’s proposed rule explained that other laws or rules that define or list “hazardous substance(s)” provide useful guidance as to what is an “extremely hazardous substance” for purposes of the CSB’s definition, but such lists or associated threshold quantities do not control the CSB’s definition. Again, the pertinent legislative history supports an expansive definition:

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.

S. Rep. 101-228 at 212 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3596.

For example, the CSB asserted that its definition is not limited to substances listed as a “regulated substance” defined as such under 42 U.S.C 7412(r)(3).

The accidents which the Board is to investigate are those which result from the production, processing, handling or storage of a chemical substance (not limited to the extremely hazardous substances listed under subsection (c)) which result in a death, serious injury, or substantial property damage.

S. Rep. 101-228 at 231 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3615.

Thus, “[e]xtremely hazardous substances would include, but are not limited to, those substances which are specifically listed by the Administrator under subsection (c).” S. Rep.101-228 at 212 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3596.

Nor should the CSB definition be limited by threshold quantity limits set by other laws. A “regulated substance” includes a “threshold quantity” set by the Administrator under 42 U.S.C. 7412(r)(5). Limiting the CSB definition to threshold limits set by other laws would potentially lead to results inconsistent with the CSB’s statutory purpose. For example, the accidental release of a “regulated substance” that does not meet a threshold quantity can still cause serious injuries and death. There is nothing in the statutory scheme to suggest that a death or serious injury caused by less than a threshold quantity of a “regulated substance” or other hazardous substance falls outside the CSB’s investigatory jurisdiction.

To emphasize its broad definition and the inapplicability of a threshold limit, the CSB proposed definition of “extremely hazardous substance” includes the phrase

“including but not limited to any ‘regulated substance’ at or below any threshold quantity set by the EPA Administrator under 42 U.S.C. 7412(r)(5).” EPA’s list of regulated substances is a regulation that applies only to owners or operators of stationary sources (see 40 CFR 68.10), not to an independent Federal agency. The EPA lists threshold amounts to determine when a facility owner must develop a Risk Management Plan. 40 CFR 68.150–68.185. Whether a substance is, by definition, a “regulated substance” does not turn on the presence of a threshold amount of that substance. By the same token, whether a substance is, by definition, an extremely hazardous substance, does not turn on the amount of that substance involved in the accidental release.

Thus, the CSB’s definition of extremely hazardous substance remains unchanged.

The AFL-CIO expressed strong support for the CBS’s proposed definition:

We strongly support the proposed definition of Extremely Hazardous Substance as any substance that may cause death, serious injury, or substantial property damage. We urge the CSB to resist pressure to tie the definition of one or more lists of regulated substances. For example, the lists contained in the OSHA Process Safety Management Standard and the EPA Risk Management Program regulations do not include most reactive substances. Neither includes ammonium nitrate, the chemical responsible for the April 17, 2013 explosion and fire at the West, Texas fertilizer storage and distribution facility, which took 14 lives. The CSB is not a regulatory agency. If a chemical accident has caused death, serious injury or substantial property damage it should be reported irrespective of whether the chemical is on some regulatory list.

Some comments suggest that the CSB tie its definition to existing lists of hazardous substances. This approach would frustrate a major purpose of the statute. A key function of the CSB is to make recommendations to the EPA about improving the rules designed to prevent chemical accidents. See 42 U.S.C. 7412(r)(6)(C)(ii), (H), (I), and (K); S. Rep. No. 101–228, at 229 (1989), 1990 U.S.C.C.A.N. 3385, 3613 (explaining the intent that the CSB serve as an “organizational stimulus” to EPA regulatory activity through the

CSB’s investigations and resulting recommendations.”). Such recommendations would include CSB suggestions to the Administrator to list new substances. Thus, the CSB was established specifically to look past established statutory criteria and already understood hazards. Rather, the hazard investigation function of the CSB includes identifying new, previously unknown hazards, even those caused by substances not yet discovered or in widespread use. A narrow definition of “extremely hazardous substance” based on previously established lists or narrow criteria would completely frustrate a key objective of the statute.

Other commenters expressed concern that the proposed definition of extremely hazardous substance could cause confusion. However, a number of factors persuade the CSB that owner/operators will be able to readily apply the definition. The plain meaning of the term “extremely hazardous” provides clear direction. The various established regulatory lists and definitions provide extensive detail concerning known hazards. Finally, the CSB discussion here should provide ample guidance.

The CSB’s consequence-based definition provides a bright line test. When there is an accidental release which results in a death or serious injury, there should rarely be confusion as to whether the substance involved was hazardous.²⁷ Moreover, the CSB will provide a grace period. The CSB can use such a grace period to establish additional explanatory guidance to owner/operators if that proves necessary.

Inpatient hospitalization is defined as a formal admission to the inpatient service of a hospital or clinic for care.

²⁷ Some commenters suggested hypotheticals which could result from a broad definition of “extremely hazardous substances.” However, upon scrutiny, these hypotheticals are tied mostly to concerns about the definition of “serious injury.” When the revised, narrower definition of “serious injury” is taken into consideration, these hypotheticals are no longer problematic.

Owner or operator is defined as any person who owns, leases, operates, controls, or supervises a stationary source.

This proposed regulatory definition is adopted verbatim from 42 U.S.C. 7412(a)(9). As the enabling legislation recognizes, a stationary source may be under the “common control” of different entities. See 42 U.S.C. 7412(r)(2)(C). Multiple owners, leaseholders, or operators can exist alongside each other in complex business relationships such that a stationary source may be considered under the common control of two or more entities. Therefore, this definition applies to any person or entity who owns, leases, operates, controls, or supervises a stationary source, and can include parties with a joint interest, partnership interest, partial ownership interest, co-ownership interest, or any otherwise co-responsible parties who, in some manner, share in the ownership, leasing, operation, control or supervision of a stationary source.

These parties are in the best position to coordinate among themselves to determine which entity should file an accidental release report under this rule for an accidental release. For the purpose of efficiency, multiple owner/operators may agree in advance or at the time of release to a single, consolidated report on behalf of one or more parties who are responsible for reporting an accidental release from a stationary source. Under the definition provided, the owner(s) and operator(s) decide for themselves how best to meet the requirements of the rule, as long as an accidental release report is submitted by one of the parties following an accidental release.

One commenter suggested that the CSB should be clear that only one report is required. If the owner/operators cannot agree on who should file the consolidated report, all owner/operators are required to file individual reports. In response to this comment,

the CSB has added a new paragraph (d) to §1604.3 to clarify reporting options when there are multiple owner/operators.²⁸

Accordingly, the final rule adds new §1604.3(d), while moving the existing paragraph (d) to (e).

Property damage is defined as damage to, or the destruction of, tangible public or private property, including loss of use of that property.

This definition is well-established for purposes of commercial liability insurance policies, and therefore most owner/operators should be familiar with its meaning and have no difficulty in determining whether there has been any property damage. In addition, the proposed definition confirms that pertinent property damage is not limited to the stationary source, but also includes damage to private property (e.g., homes) and public property outside the stationary source.

Several comments suggested changes to the proposed definition of “property damage.” Several commenters disagreed that “loss of use” of property should be considered property damage. Another commenter suggested that only permanent loss of use should be within the definition. Another suggested that the CSB include a definition of “loss of use.”

The CSB declines to adopt these comments. If property sustains enough damage so that it cannot be properly used, that clearly amounts to damages—just as the complete destruction amounts to damages. Obviously, if the property can be repaired and returned to service, the damage would be lessened. But all of these types of damage should be

²⁸ Because this new paragraph has been added, the final rule re-designates paragraph (d) in the proposed rule as paragraph (e).

estimated and figured into whether the damage amounted to “substantial” property damage, i.e., over \$1,000,000.

Another commenter urged the CSB to count only property damage “directly resulting from the incident” for purposes of the \$1 million threshold for “substantial” property damage. The CSB declines to adopt this suggestion, because it would create serious definitional issues in determining whether the damage “directly resulted from” the incident. Moreover, indirect damage can be just as costly or disruptive as direct damage, however defined.

Finally, another commenter urged the CSB to exclude “business interruption costs” as a criterion for accident reporting. The CSB did not explicitly make business interruption costs a reportable item, but if property damage leads to business interruption, that should be factored into calculating the overall costs of such damage.

Regulated substance is defined as any substance listed by the EPA Administrator pursuant to the authority of 42 U.S.C. 7412(r)(3).

This definition is based on the definition at 42 U.S.C. 7412(r)(2)(B). That definition simply refers to “substances listed under paragraph (3).” For clarity, the definition here refers to the full citation at 42 U.S.C. 7412(r)(3). The definition as set out in the rule is no different in substance than the one provided for under 42 U.S.C. 7412(r)(2)(B).

Nonetheless, one commenter expressed concern that the CSB’s definition of “regulated substance” was an attempt to circumvent or supplant the EPA’s authority to list a substance under 42 U.S.C. 7412(r)(3). The CSB definition does not alter EPA’s authority to list substances under 42 U.S.C. 7412(r)(3) in any manner. The CSB may

make recommendations to EPA concerning which substances should be listed. 42 U.S.C. 7412(r)(6)(H). However, the EPA Administrator decides what substances get listed.

Another commenter wrote that “[f]or these regulations, the CSB needs to define ‘regulated substance’ as identical to each substance listed at 40 CFR 68.130.”²⁹ There is no need for the CSB to replace the statutory definition with the proposed definition suggested by the commenter. For practical purposes, the definition of regulated substance in the rule refers to the same list that the Administrator maintains pursuant to the authority of 42 U.S.C. 7412(r)(3).

Serious injury is defined as any injury or illness if it results in death or inpatient hospitalization.

The definition of serious injury in the proposed rule was based on OSHA’s regulations pertaining to Recording and Reporting Occupational Injuries and Illness, found at 29 CFR 1904.7.

As discussed above, many commenters criticized the proposed definition as overbroad and inconsistent with the CSB’s burden estimate. The revised definition (“any injury or illness if it results in death or inpatient hospitalization”) addresses this criticism.

Stationary source is defined as any buildings, structures, equipment, installations or substance emitting stationary activities (i) which belong to the same industrial group, (ii) which are located on one or more contiguous properties, (iii) which are under the control of the same person (or persons under common control), and (iv) from which an accidental release may occur.

²⁹ If the comment meant to suggest that the CSB’s authority to require a report is limited to releases involving a “regulated substance,” the CSB rejects that interpretation. The statutory definition of “accidental release” is clearly not limited to “regulated substances.”

This definition is taken verbatim from 42 U.S.C. 7412(r)(2)(C). While this definition reiterates longstanding statutory language, the CSB notes that the phrase “same industrial group” requires some additional clarification. The CSB interprets this phrase as referring to “industry group” under the Standard Industrial Classification (SIC) system, which was in common use when the Clean Air Act Amendments of 1990 were signed into law. SIC employed a four-digit classification system; the first three digits in the four-digit sequence indicated the “industry group.”

In 1997, the SIC system was replaced by the North American Industry Classification System (NAICS). NAICS employs a six-digit classification system. Under NAICS, the fourth digit in the six-digit sequence indicates industrial group.

www.census.gov/eos/www/naics/faqs/faqs.html#q5.

The USWAG had a concern about the scope of the definition:

While this definition might be acceptable to a discrete industrial facility with fixed and defined property lines, fences, etc., electric and gas distribution and transmission systems necessarily have thousands of stationary sources which include utility poles, vaults and manholes. It would be incredibly challenging to monitor all of these “stationary sources” for potential accidental discharges and to require reporting of these discharges within four hours of the release, especially if property damage is the only impact of the discharge.

The comment further suggested that the CSB “limit the scope of the proposal to significant stationary sources or sources that are regularly staffed.”

The CSB disagrees with the comment. The definition of “stationary source” specifically applies to the subsection of the Clean Air Act that established the CSB. In addition, for a report to be required, there would need to be an “accidental release” which resulted in a “death, serious injury, or substantial property damages.” Such consequences should be a relatively rare occurrence at manholes.

The CSB believes that if an accidental release occurs in a spread-out facility or even in a part of a source that is not regularly staffed, it still should be reported as soon as the owner/operator learns about it. With the increase in the reporting time to eight hours, the owner/operator should have ample time to learn about such a release even in a remote part of the source. Furthermore, the CSB retains discretion whether to refer violations to the EPA for enforcement actions; challenges presented by the nature of different types of sources can be factored into such referral decisions. Consequently the CSB decided not to revise this definition.

The same commenter incorrectly asserted that the CSB's definition of "stationary source" is based on 40 U.S.C. 7411(a)(3). The definition of stationary source under 40 U.S.C. 7411(a)(3) is applicable to a section of the CAA governing performance standards for new stationary sources. Under this subsection of the CAA, the EPA Administrator is required to identify new stationary sources that are significant air pollution sources and then establish requirements that would cover only those sources. See 40 U.S.C. 7411(b)(1). Based on this language, the commenter argued that the CSB's authorities are limited to stationary sources identified by the EPA as new "stationary sources" under 40 U.S.C. 7411(b)(1). The comment concluded that the CSB is not authorized to "identify all those sources that could or should be subject to regulation." However, the comment lacks merit because the CSB's definition of stationary source is taken verbatim from 42 U.S.C. 7412(r)(2)(C)—an entirely different section of the CAA with a different purpose.

The Environment Alliance of New York (EANY) commented that CSB should clarify its definition of stationary source to describe "significant, large emitting sources of air emissions as described in the CAA (42 U.S.C. 7602(j) and 42 U.S.C.

7411(b)(1)(A)). EANY's proposal incorrectly rests on sections of the CAA that are not pertinent to the CSB's authority. In addition, the CSB cannot issue a rule to restrict or limit application of the statutory definition of stationary source. 42 U.S.C. 7412(r)(2)(C).

The CSB is simply applying the definition of "stationary source" applicable to the subsection of the Clean Air Act which established the CSB. The CSB is not required (or authorized) to incorporate a definition of stationary source that is applicable to a different section of the CAA to serve another statutory purpose.

The proposed rule defined substantial property damages as "property damage, at or outside the stationary source, estimated to be equal to or greater than \$1,000,000."

In developing its definition, the CSB began with the plain meaning of the statute.³⁰ The CSB determined that the word "substantial" must be accorded some significance. Merriam Webster defines substantial as "considerable in quantity: significantly great...." Clearly, property damage in a minimal amount (i.e., \$100) should not be considered "substantial." This interpretation is consistent with the available legislative history:

The Board is authorized to investigate accidental releases which cause substantial property damage. Substantial damage would include fires, explosions, and other events which cause damages that are very costly to repair or correct, and would not include incidental damage to equipment or controls.

H.R. Conf. Rep. No. 952, 101st Cong., 2d Sess. 340(1990), reprinted in 1990 U.S.C.C.A.N. 3867, 3872.

At the same time, the CSB determined that a very high dollar threshold, i.e., \$10,000,000, would not be consistent with the statutory intent because there are amounts far below that level that any reasonable person would consider substantial.

³⁰ The CSB separately defined the term "property damage." See discussion above.

The difficulty is where to draw the line between substantial and non-substantial damage. The CSB looked at different sources for guidance.

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 because the CSB has not relied heavily on the substantial property damage factor in selecting accidental releases for investigation. A low-dollar, property-damage-only criterion could result in many accidental release reports that would be unlikely candidates for CSB investigation.

The CSB considered other Government definitions of substantial property damage. For example, FEMA has defined the phrase “substantial damage” as damage of any origin sustained by a structure whereby the cost of restoring the structure to its before-damage condition would equal or exceed 50 percent of the market value of the structure before the damage occurred. 44 CFR 209.2. However, the CSB determined that this definition was too narrow (property damage limited to structure) and would be less easy to apply than an estimate of monetary damage. In addition, due to the wide variety of structures and businesses within CSB’s jurisdiction, a percentage of market value definition would be far too complicated.³¹

In response to its ANPRM, the CSB received few comments regarding this definition. The American Chemistry Council’s (ACC’s) comment suggested that the CSB adopt the DOT regulatory limit of \$50,000. CSB-ANPR0901-000115.

The CSB also considered API 754 (2016). API 754 suggests recording “fire or

³¹ The NTSB’s definition of “substantial property damage” is based on the specific types of damage to airplanes. 49 CFR 830.2. A specific, narrow definition such as this could not work for the CSB due to the variety of damage and businesses involved.

explosion damage greater than or equal to \$100,000 of direct cost” under its Tier 1 category. Under API 754 Table D.1-Tier 1 Process Safety Event Severity Weighting, \$100,000 in property damage would score one point. \$1,000,000 would score three points, \$10,000,000 would score 9 points, and \$100,000,000 would score 27 points.

The CSB also considered EPA’s “Summary of Quantified Damages” in the EPA’s proposed amendments to its risk management plan (RMP) rule. 81 FR 13637 at 13642–43, (March 14, 2016). In looking at EPA RMP-covered facilities over a 10-year period, the EPA estimated an average of \$1,354,578 in onsite property damage for each accident. *Id.* However, this figure is only an average, not a median, and is limited to only a subset of facilities within the scope of the CSB’s final rule.

After reviewing the relevant factors, the CSB proposed \$1,000,000 as a threshold for purposes of defining “substantial property damages.” The CSB believes this amount will likely capture accidental releases of significance when there is no other basis for jurisdiction (i.e., no deaths or serious injuries.) At the same time, this threshold should reduce the number of reports required when there is very little likelihood of serious scrutiny or follow-up investigation by the CSB because the accidental release did not cause any deaths or serious injuries.

The CSB notes, however, that any threshold, even a much lower one, may exclude a small number of very significant accidental releases. This might occur if an accidental release fortuitously did not result in death, serious injury, or substantial property damage, but nevertheless involved the release of a significant amount of an extremely hazardous substance such as hydrofluoric acid. Despite the potential

significance of such an accidental release, the CSB is concerned that its statutory language—“death, serious injury, or substantial property damages” — does not authorize it to require reports when all three consequences are absent.

The CSB received a number of comments on its proposed \$1,000,000 threshold for substantial property damages. One comment argued that the figure was “far too high,” that the CSB had investigated incidents with less than that amount of property damage (and no deaths or serious injuries), and recommended the amount be lowered to \$50,000. Another comment described \$1 million as a “good starting point,” but that it should be phased down to \$50,000 in four years.

On the other hand, several commenters urged a higher threshold (one suggested \$3-5 million) because minor damage to costly specialized equipment could easily exceed \$1 million in repair and replacement costs. Others suggested that the \$1 million threshold may be sensible for damages outside the facility, but that it was too low for damage inside, suggesting a \$2 million threshold for inside damage.

In the middle of the spectrum were a group of commenters who supported the \$1 million threshold. One supported the \$1 million threshold as “a clear, bright-line rule” that is “appropriate.” Another urged “that CSB not lower the threshold” and agreed that it “should likely capture major releases in rare cases where there are no deaths of serious injuries.” Several others simply agreed that it was “appropriate.”

After reviewing all comments, the CSB has determined to keep the \$1 million threshold in its final rule. The CSB believes that a bright-line rule is necessary, and that this figure is a middle-ground marker that best conforms to the Board’s past practice and the legislative history for the provision. It may be true that expensive machinery can

sustain seemingly minor damage that might meet this threshold. However, that does not make the damage any less substantial. Moreover, companies with such expensive machinery should have the wherewithal to make such estimates expeditiously. The CSB also rejects a bifurcated damage threshold for damage inside or outside the plant as impractical and unwarranted.

A few other issues regarding this definition were also addressed in the comments. One commenter urged that the CSB set no threshold dollar amount, but should simply use its established tracking mechanisms to identify where substantial property damage has occurred. The CSB believes a bright-line rule is helpful as a guide to owner/operators when they do their estimates and that inclusion of this factor is necessary to assist the agency in receiving the information it needs to prioritize its investigations. Several commenters suggested that the \$1 million threshold for meeting the criterion of “substantial property damages” should be indexed for inflation. The CSB has decided not to add this complicating factor to what is intended to be a bright-line standard. Instead, the CSB will revisit the standard periodically to make necessary adjustments, if appropriate.

Finally, one commenter made the editorial suggestion to replace the term “damages” with “damage” throughout the rule. Although “damages” is the statutory term, (42 U.S.C. 7412(r)(6)(C)(i)), the CSB agrees that “damage” is the more normal usage in this context and has revised the final rule accordingly.

1604.3 Reporting an accidental release.

Section 1604.3(a) through (d) of the proposed rule set out the basic requirements for reporting an accidental release and as proposed, provided as follows:

- The owner or operator of a stationary source must report in accordance with §1604.3(b) or (c), any accidental release resulting in a fatality, serious injury or substantial property damages.
- If the owner or operator has submitted a report to the National Response Center (NRC) pursuant to 40 CFR 302.6, the CSB reporting requirement may be satisfied by submitting the NRC identification number to the CSB immediately following submission of the report to the NRC.
- If the owner or operator has not submitted a report to the NRC and notified the CSB under §1604.3(b), the owner/operator must submit a report directly to the CSB within four hours of the accidental release and must include the required information listed in §1604.4. A report may be made by email to: report@csb.gov, or by telephone at 202-261-7600.
- Notwithstanding the foregoing, an owner or operator of a stationary source, without penalty, may revise and/or update information reported to the NRC or CSB by sending a notification with revisions by email to: report@csb.gov, or by correspondence to: Chemical Safety Board (CSB) 1750 Pennsylvania Ave., NW, Suite 910, Washington, DC 20006, within 30 days following the submission of a report to the NRC or CSB. If applicable, the notification must reference the original NRC identification number. No update or revisions should be sent to the NRC.

Four-Hour Deadline

The CSB received a number of negative comments regarding the proposed four-hour deadline for submitting a report. Based on the CSB's consideration of these comments, the proposed deadline of four hours has been extended to eight hours in the final rule.

Some commenters understood that the proposed deadline was driven by the CSB's need to be on-scene promptly to commence its investigation and noted that a four hour deadline was consistent with other reporting deadlines, some of which require "immediate" notification. The CSB has learned over its history that prompt deployment (within 24 hours following an accidental release) helps satisfy several legitimate objectives: preservation of key physical evidence and obtaining witness testimony while

the information regarding the release is fresh.³² Prompt arrival of CSB investigators also allows them to gain an understanding of what changes may have been made to an accident scene during emergency response (e.g., what valves were turned, or what equipment was moved). Prompt deployment also facilitates quicker implementation of an appropriate evidence and site control agreement among the parties to an investigation. These activities are only a few of many critical CSB investigation-related tasks that can only be accomplished at the very earliest stages of an investigation. If the CSB cannot get to the site to preserve and otherwise obtain the information it needs to initiate an investigation, the CSB's investigation can be significantly hampered.

Despite the importance of prompt notification, twenty-four commenters were generally critical of the four-hour reporting requirement and suggested that CSB allow additional time. These commenters found the four-hour reporting requirement to be inappropriate for a number of reasons which are discussed below:

The four-hour deadline is impractical and the CSB has no documented basis for it. The CSB explained the basis for the four-hour requirement in its proposed rule. As explained above, some comments were supportive. One commenter noted that four hours was “very generous.” Indeed, other reporting laws require “immediate” notification. The CSB also believes, as explained above, that there are several important factors which support a four-hour deadline, even though it has increased the deadline to eight hours.

A four-hour reporting requirement will detract from the reporting entity's emergency response activities following an accidental release. As the CSB

³² Often, key evidence is maintained in electronic form as distributed control system (DCS) data. In simplest terms, a DCS is an electronic system which provides for control and monitoring of a process within a facility. This information is often critical in determining the cause of an accidental release. Unfortunately, DCS data may be overwritten by new DCS data every 24-48 hours.

acknowledged in its proposed rule, the “CSB understands that the first several hours following an accidental release require a focus on emergency response actions.” 84 FR 67908 at 67908. “The CSB has also considered the need of an owner/operator to focus on numerous matters in the immediate aftermath of accidental release.” *Id.* Thus, the rule requires information that is limited in scope to critical information required for the CSB to make an informed decision about deployment.

In response to the CSB’s 2009 ANPRM, the American Society of Safety Professionals commented, “a minimum of three hours is needed for a site’s emergency response priorities and any extenuating circumstances to be handled.” The CSB’s proposal was designed to avoid conflict with emergency response activities. Still, some commenters requested that the reporting rule be amended to allow 24 hours, 48 hours, or even 72 hours to file an accidental release report. Such delayed notice would defeat the purpose of the rule. However, the final rule does increase the deadline for reporting from four to eight hours. The CSB believes this extension will provide an additional safeguard to avoid any potential conflict with urgent emergency response activities.

Reports to the CSB should generally comport with similar deadlines already imposed by the Occupational Safety and Health Administration for fatalities and serious injuries. The revised eight-hour limit matches OSHA’s eight-hour requirement for reporting fatalities.

Owners/operators should be granted more time to gather all of the necessary information needed to ascertain whether the accidental release is required for reporting, to perform an internal investigation and to inform leadership before completing the report. The CSB originally believed four hours to be sufficient to meet the reporting

requirement under this rule when it was published for notice and comment. The CSB is now convinced that expanding the time to report an accidental release to eight hours is ample time to make an assessment of whether a fatality, serious injuries or substantial property damage has occurred, while still being timely enough for CSB purposes. Within eight hours, an owner/operator should have sufficient information at hand to make a report. The rule requires basic information, and notes that certain information need only be reported “if known.” In addition, the final rule allows for updating an initial report.

A longer reporting deadline will promote the CSB’s ability to coordinate with other agencies. One commenter thought it would be helpful to get recordable and reportable information about injuries from OSHA. The CSB does obtain information from OSHA and other agencies during an investigation. However, such information is typically not readily available during the brief window when the CSB needs to make a deployment determination. In addition, OSHA may not obtain information on all accidental releases important to the CSB. For example, OSHA does not collect information on property damages under its reporting provision. See generally 29 CFR 1904.39. Thus, information from OSHA, even if it could be obtained promptly, would omit certain accidental releases that require a report under the CSB’s criteria.

A four-hour reporting requirement will yield little information to understand the incident or determine root causes, or even whether the incident is reportable. The report requires basic information necessary to inform the CSB of the accidental release and preliminary information regarding the release. The report is not intended to support “root cause” analysis. If the CSB requires additional information following notification, it has

broad investigative authority to do so. Where the CSB's reporting authority ends, the CSB's investigative authority begins.

The number and nature of fatalities and serious injuries, and the fullness of significant property damage, will often not be fully known or understood within four hours of an accidental release. While complete information may not be available, sufficient information should be known to facilitate CSB deployment decision-making. The CSB has considerable experience monitoring incidents in real time through internet-based news sources and traditional media. This information is also supplemented in many cases by other governmental sources of information. While this early information can be incomplete, the CSB has observed that an owner/operator may have important information concerning fatalities, serious injuries, or significant property damage--often within hours after an accidental release. The CSB is satisfied that an eight-hour deadline provides an owner/operator with sufficient time to gather important information that can be conveyed to the CSB.

A four-hour reporting requirement may preempt prompt notifications to other Federal and state agencies.

To be clear, the proposed rule does not legally preempt any other law. The CSB did not interpret this comment from Consumer Union to be making a legal preemption argument, but the CSB wishes to avoid any confusion. The CSB hopes that the extension of its deadline to eight hours lessens any practical concern about competing reporting obligations. Moreover, with a revised definition of "serious injury" in the final rule, the CSB believes that only a very small fraction of owner/operators will ever need to file a report with the CSB.

§1604.3(a): One commenter argued that §1604.3(a) should require reports from owner/operators if there is a “near miss.” Such a situation arises, the comment suggested, when an accidental release does not cause death, serious injury, or substantial property damage, but where it nonetheless poses a threat to the general public. The comment relied on 42 U.S.C. 7412(r)(6)(E), which provides that 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.

Another commenter interpreted 42 U.S.C. 7412(r)(6)(E) in a similar manner but was concerned that a requirement to report near misses could have negative consequences: “the flow of information would quickly overwhelm the CSB's meager resources.” For the reasons discussed below, the CSB has not revised the proposed rule to require the reporting of near miss events as suggested by the comment.

Both comments are based on an incorrect interpretation of three key statutory provisions. 42 U.S.C. 7412(r)(6)(C)(i), 42 U.S.C. 7412(r)(6)(C)(iii), and 42 U.S.C. 7412(r)(6)(E).

Investigatory Jurisdiction

The Board’s investigatory jurisdiction is set out in subsection C(i) and provides that the Board shall investigate (or cause to be investigated), determine and report to the public in writing the facts, conditions, and circumstances and the cause or probable cause of any accidental release resulting in a fatality, serious injury or substantial property damages.

Reporting Requirement

Subsection C(iii) sets out the CSB’s authority to issue a reporting rule and provides that the CSB may require reports when there is an accidental release “subject to the Board's investigatory jurisdiction” as defined in subsection C(i). Thus, the final rule requires a report whenever there is an accidental release fitting one of the three criteria in subsection (C)(i)-- a death, serious injury, or substantial property damages.

Subsection E is not relevant unless there is an “accidental release resulting in a fatality, serious injury or substantial property damages.” 42 U.S.C. 7412(r)(6)(C)(i). If that condition precedent is not met, the Board does not have the authority to investigate or to require a report. If it is met, the Board requires a report and may investigate. If the 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,” then subsection E becomes relevant.

Interagency Coordination

Subsection E sets out the CSB’s responsibilities with respect to interagency coordination. While that section stresses coordination, it also provides that the CSB shall not “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.”

§1604.3(b): The proposed rule provided if the owner or operator has submitted a report to the National Response Center (NRC) pursuant to 40 CFR 302.6, the CSB reporting requirement may be satisfied by submitting the NRC identification number to the CSB immediately following submission of the report to the NRC.

Some commenters argued that §1604.3(b) is inconsistent with the CSB's rulemaking authority at 42 U.S.C. 7412(r)(6)(C)(iii), which provides that the CSB shall "establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction." Subsection C(iii) also provides as follows:

1. Reporting releases to the National Response Center, in lieu of the Board directly, shall satisfy such regulations; and
2. The National Response Center shall promptly notify the Board of any releases which are within the Board's jurisdiction.

Some commenters interpreted the authority provided in no. 1 to mean one or more of the following: 1) that the CSB's rule must provide for submission of accidental release reports to the NRC only; 2) that submission of any report to the NRC under any statutory scheme satisfies any CSB requirement, and/or 3) the CSB is not authorized to require an owner/operator to submit an NRC number to the CSB if it has already filed a report with the NRC pursuant 40 CFR 302.6. The CSB disagrees with all of these interpretations.

The CSB's enabling legislation does not mandate that all reports be filed with NRC.

The language in 42 U.S.C. 7412(r)(6)(C)(iii) does not require CSB reports to be filed with NRC. Rather, the language simply provides the CSB with the option of having reports submitted to the NRC instead of to the CSB directly. The statutory language does not confer a right to owner/operators. The CSB's interpretation is confirmed by the legislative history, which provides, in pertinent part:

The regulations of the Board for accident reporting *may provide* that any person directed to make a report contact the National Response Center rather

than the Board directly. ... *If the National Response Center is to be the initial point of contact* under such rules, then the Board shall assure that officials at the National Response Center promptly notify the Board or its officers whenever an accidental release requiring an investigation has occurred.

S. Rep. No. 101-228 at 236 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3620.

(Emphasis added.)

The use of the word “may” in the first sentence plainly indicates that the CSB has the option of requiring that reports be filed with the NRC. The phrase “If the National Response Center is to be the initial point of contact,” demonstrates that the use of the NRC in that role is an option, not a requirement.

The submission of a report to the NRC under other laws does not satisfy the CSB’s reporting requirement.

The CSB does not interpret section C(iii) to mean that any report filed with NRC automatically satisfies any reporting obligation to the CSB. As explained above, the information provided to NRC under other laws may not include all accidental releases within the CSB’s particularized jurisdiction.

Moreover, when the CSB receives information from the NRC, the NRC reports do not indicate whether or not the report was submitted pursuant to a specific law. Without this information, the CSB cannot quickly determine why the particular release was reported to the NRC and, the CSB has no way of determining whether a report relates to an accidental release within the CSB’s jurisdiction. In addition, not all reporting laws require the same information or have the same deadline for reporting as the CSB rule. Thus, the CSB cannot simply rely on NRC reports to learn of accidental releases within its jurisdiction.

The CSB was able to identify one exception to the above problem. If an owner/operator reports an “event” to the NRC based on 40 CFR 302.6(a) and notifies the CSB with the pertinent NRC identification number, the CSB can quickly identify the pertinent NRC report and use that information to satisfy its own requirements. The reporting requirement at 40 CFR 302.6(a) provides, in pertinent part, that any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he or she has knowledge of any release (other than a federally permitted release or application of a pesticide) of a hazardous substance from such vessel or facility in a quantity equal to or exceeding the reportable quantity determined by this part in any 24-hour period, immediately notify the National Response Center (1-800-424-8802; in Washington, DC 202-267-2675; the facsimile number is 202-267-1322).

When a person contacts the NRC to report under the above provision, an NRC operator asks a set of questions according to the type of “event” that is being reported. For example, if the report is based on a release from an onshore facility, the caller will be asked a set of standard questions used when there is a release from an onshore facility. Prior to completing the call, the NRC operator will provide the caller with an identification number. The NRC will subsequently provide information submitted by the caller to various Federal agencies, including the CSB.

When the CSB reviewed the data that would be transmitted by the NRC based upon this type of report, it determined that the caller would be asked for information substantially similar to the information required under §1604.4 of this rule. If the person who submitted the report to the NRC knows that the same information should be reported to the CSB, then there is no requirement that the caller file a separate report to the CSB

with the same information. If the caller supplies the CSB promptly with the NRC identification number, the CSB will have sufficient time to locate the pertinent NRC report and review the information in the time frame required under this rule. If the owner/operator does not supply the NRC number to CSB, the CSB will not know that the owner/operator has submitted a report to the NRC.³³

NRC Identification Number

The CSB received several comments which argued that the CSB lacked authority to compel an owner/operator to provide the CSB with the NRC identification number associated with a report filed with NRC under 40 CFR 302.6. The CSB also received comments that the CSB lacked authority to compel an owner/operator to provide the CSB an NRC identification number.

As explained above, the CSB included the option of providing a NRC ID number in an effort to avoid duplicative reporting. Moreover, the rule does not require an owner/operator to file a report to NRC and supply the NRC identification number with the CSB. Rather, the rule provides an owner/operator with an option to avoid dual reporting. Under the CSB rule, the owner/operator has the option to a) file a separate report to CSB for the same event under the authority of this rule, or b) inform the CSB that it has filed a report with NRC pursuant to 40 CFR 302.6.

Some commenters interpreted a sentence in 42 U.S.C. 7412(r)(6)(C)(iii) to mean that CSB could not require an owner/operator to supply the CSB with an NRC identification number because it was the NRC's duty to do that. The pertinent sentence

³³ Although not required, this approach is also consistent with 42 U.S.C. 7412(r)(6)(C)(iii) and the CSB's legislative history. The pertinent legislative history provides, in pertinent part, that the CSB's "reporting requirements may be coordinated with other reporting requirements established by the Agency [EPA] (for instance, under section 103 of CERCLA)." S. Rep. No. 101-228 at 236 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3620

reads: “The National Response Center shall promptly notify the Board of any releases which are within the Board's jurisdiction.” As explained above, the CSB rule does not require an owner/operator to file an NRC identification number with CSB. That approach is merely a simpler alternative to filing a complete, separate report with CSB.

“Immediately”

A commenter argued that the term “immediately” in §1604.3(b) should be revised so it is self-defining, or replaced with a specific time deadline, preferably the same as the one in §1604.3(c). In an effort to avoid confusion, the CSB has replaced the word “immediately” with a specific time limit of 30 minutes.

SERCs and LEPCs

A commenter suggested that the CSB should revise §1604.3(b) and (c) to encourage State Emergency Response Commissions (SERCs) and Local Emergency Planning Committees (LEPCs) to notify the CSB of any releases that are within the CSB’s jurisdiction. The CSB appreciates the suggestion and plans to do more to encourage reports from such state and local bodies. However, the CSB lacks authority to mandate a SERC or LEPC to promptly notify the CSB.

§1604.3(d):

In response to the 2009 ANPRM, the American Chemistry Council suggested that the CSB’s reporting rule include a provision for a reporting party to correct unintentionally incorrect information within a reasonable period of time following an accidental release. The CSB agreed with this comment and §1604.3(d) of the proposed rule included language providing that an owner or operator of a stationary source, without penalty, may revise and/or update information reported to the NRC or CSB by sending a

notification with revisions by email to: report@csb.gov, or by correspondence to: Chemical Safety Board (CSB) 1750 Pennsylvania Ave., NW, Suite 910, Washington, DC 20006, within 30 days following the submission of a report to the NRC or CSB. If applicable, the notification must reference the original NRC identification number. No update or revisions should be sent to the NRC.

Many commenters supported this provision but several suggested modifications. For example, ACC suggested a revision to clarify that updates under §1604.3(d) are voluntary, not mandatory. The CSB believes that the use of the word “may” §1604.3(d) clearly indicates that an update is not mandatory. However, the CSB hopes that an owner/operator will revise and update incorrect information as a matter of course.

Another commenter urged the CSB to clarify that an owner/operator can “pull back” a report where it turns out the incident did not warrant reporting, with a subsequent written response by the CSB. In the event an owner/operator believes that the incident did not warrant reporting, the owner/operator may contact the CSB to explain its position.

Another commenter suggested that an owner/operator be required to correct an initial report within 24 hours of learning that the initial report was faulty. The CSB does not agree that this is required. As the preamble to the proposed rule states, this reporting requirement “is not intended to create a trap for any owner/operator submitting a report on short notice.” Of course, the CSB will monitor compliance with the rule. If necessary, the CSB will amend the rule in the future to address problem areas.

One commentator suggested that the CSB allow for corrected reports even after 30 days, and another agreed on the ground that 30 days may not be enough and provides insufficient safe harbor from penalties. The CSB believes that the 30-day period would

be most useful for it, because after 30 days, the Board would likely have made its determination as to whether to pursue an investigation. However, the Board does recognize that in some circumstances an owner/operator might in good faith have learned about a qualifying serious injury or substantial property damage (especially damage outside the facility) after the 30-day period. In other instances, an owner/operator may wish to supplement its initial reports. Therefore the Board has added a provision to paragraph (d) that allows owner/operators to submit revised or updated reports to the Board within 90 days if the submitter explains why the revised report could not have been submitted within 30 days.

Another commenter suggested that the CSB develop a web-based form to allow easier and quicker reporting. The CSB agrees and has prepared a screen-fillable pdf form for reporting purposes.

1604.4 Information required in an accidental release report

Section 1604.4 of the proposed rule details the information that must be submitted by an owner/operator in a report. The information required is consistent with information that the CSB has collected for years from various public sources, and has attempted to verify, through phone calls or email exchanges with the representatives of an owner/operator in the immediate aftermath of an accidental release. This approach has not always been ideal for either the CSB or an owner/operator because the CSB must make multiple phone calls or send multiple emails to an owner/operator over a period of hours and days.

In this section, the CSB has attempted to balance its need for prompt information with the desirable goal of obtaining as much pertinent information as reasonable. As

reflected in the purpose of the rule (§1604.1), the CSB has determined that the prompt reporting of basic information is its highest priority. While additional, detailed information is desirable, the CSB concluded that it would need to further extend the reporting deadline if it added additional information requirements beyond those set out in the proposed rule. Some additional requirements would arguably require additional hours, or even days, for compliance. At some point, the primary purpose of the rule—prompt notification of an accidental release—would be undermined by the quest for more information.

The CSB also considered the need of an owner/operator to focus on numerous matters in the immediate aftermath of an accidental release. Accordingly, the proposed accidental release reports will require only information that is already known or should be available to an owner/operator soon after an accidental release. The required information is also limited in scope to critical information required for the CSB to make informed decisions about its jurisdiction, interagency coordination, and deployment decision-making. For example, paragraphs (a) through (e) require only minimal contact information and a basic description of the accidental release. Paragraph (g) requests the relevant CAS Registry Number associated with the chemical(s) involved in the accidental release.³⁴ The CAS information will help the CSB in making informed decisions about deploying investigators and initiating an investigation. Paragraphs (h), (i), (j), and (l)(1) through (3) include an important qualifier, “if known.” This qualifier recognizes that

³⁴ A CAS Registry Number is assigned by an organization called CAS (a division of the American Chemical Society). See <https://www.cas.org/support/documentation/chemical-substances/faqs#2>. It is a unique numeric identifier that is well known to the companies who produce, handle, or ship chemicals and will require minimal effort to include in a report.

some or all of this information may not be known within eight hours of an accidental release.

The CSB received a number of comments suggesting revisions to the proposed language. Other comments opined that this section of the proposed rule failed to require certain information deemed important by the commenters. The CSB addresses both types of comments below.

§ 1604.4(a) pertaining to ownership information.

A commenter suggested that the CSB require an owner/operator to provide information concerning a parent company. The CSB agrees that that information would be helpful. However, the information is typically not going to be needed in the hours following notification. If it is, the CSB can generally obtain sufficient information about it on its own.

§ 1604.4(c) pertaining to location information

A commenter suggested the need for clarification on what is meant by “facility identifier.” At this time, compliance with the rule can be met by supplying the EPA facility identification number. Over time, terminology can change or new government identification systems may develop. Using the generic description of facility identifier provides flexibility to adapt the rule to changing circumstances without an amendment. If needed, the CSB can issue guidance information to ensure that there is no confusion.

Another comment suggested that the CSB require the owner/operator to report the latitude and longitude of its facility. The CSB declines to add this requirement to the rule because the CSB is confident that an owner/operator can provide an accurate location description, or if necessary, the CSB can pinpoint a location using other sources.

§ 1604.4(f)(3) & (4) pertaining to deaths and serious injuries.

One commenter suggested that fatalities or serious injuries occurring more than 30 days after the release should be excluded from coverage. The CSB disagrees that there is a need to categorically exclude such occurrences. The rule already makes clear that owner/operators may revise or update reports “within 30 days following the submission of a report (and even 90 days in some circumstances).”

§ 1604.4(g) pertaining to the name of the materials involved in the release

One commenter opined that the names of chemicals involved may not be known within four hours if the cause of the event is unknown, and that the CSB should add an “if known” qualifier for this item as it has for some of the others. First, the CSB has now increased the reporting window to eight hours. Moreover, in the experience of CSB investigators, facilities are very aware of the chemicals and other materials used in their processes and can readily identify the ones potentially involved in an accidental release. In addition, there is an opportunity to file a corrected or updated report.

§ 1604.4(h) pertaining to the amount of the release

A commenter suggested that “the amount of the release” may not be known even within 24 hours. The same commenter suggested that the information is not really necessary for CSB initial screening decision but can be better addressed later. The CSB respectfully disagrees that the information would not be useful for its decision as to whether to deploy resources to the site. CSB understands the concern that the information might not be readily available at the time the report is due. That is why paragraph (h) includes the qualifier, “if known.” The rule also allows supplementing the

report up to 30 days after initial submission (and 90 days in some circumstances), by which time that information should be available in most cases.

That commenter also suggested that it would be better to frame the request as whether the release exceeds an RQ or reportable quantity rather than requiring a release amount. The CSB agrees that it would be generally helpful to know whether a release exceeds an applicable threshold quantity. If an owner/operator has that information, it would be helpful for the owner/operator to supply that information as part of its response to this question. However, the CSB has not revised the rule to require that information within eight hours.

§ 1604.4(k) pertaining to the estimate of the property damage at or outside the stationary source.

One commenter opined that the value of the property damage, especially outside the plant may not be known within four hours if the cause of event is unknown, and that the CSB should add an “if known” qualifier for this item as it has for some of the others. First, the CSB has now increased the reporting window to eight hours. Secondly, the requested information is an estimate. As the preamble to the proposed rule explained: “The owner is required to make an estimate only, not report an exact figure, or to state whether or not the amount of property damage meets or exceeds the definition for ‘substantial property damages.’” There will be certain instances when an owner or operator may need to assess whether a report is required at all by reference to the definition of “substantial property damages.” However, for purposes of including a number in the report, the owner/operator may simply include the best available estimate,

regardless of whether the amount falls above or below the threshold for reporting. Moreover, there is an opportunity to file a corrected or updated report.

Another commenter suggested that this reporting item would be better framed as “estimated property damage exceeds \$X threshold.” The CSB disagrees that such a check-box approach would be better; it can be beneficial for the agency to have an estimated figure even if it is below some sort of threshold to help it decide whether to investigate a particular accidental release.

§ 1604.4(l) pertaining to evacuation orders.

Section 1604.4 (l), as proposed, asks an owner/operator whether the accidental release has resulted in an evacuation order impacting members of the general public and others, and, if known: (1) The number of people evacuated; (2) approximate radius of the evacuation zone; and (3) the type of individuals subject to the evacuation order (i.e., employees, members of the general public, or both).

A comment suggested that a definition of “evacuation order” be added. The CSB has not adopted the proposed change because it believes that the term “evacuation order” is easily understood without detailed elaboration.

Another commenter pointed out that § 1604.4(l)(1) through (3) used three overlapping terms, “general public,” “people,” and “individuals.” For clarity, the words “people” and “individuals” have both been replaced by the word “persons.” The commenter also suggested there was a potential for confusion and double counting because the definition of “general public” in §1604.2 excludes employees and contractors. For purpose of counting people under §1604.4(l)(1), the owner/operator

should include all people impacted by an evacuation order-- employees, contractors, members of the public and anyone else subject to the order.

Another commenter said that the report on evacuation orders should not be a required item, because evacuation of employees may be ordered by owner/operators simply as a precaution and that owner/operators would not likely know the number of persons affected by a public evacuation. The CSB disagrees; this information is important and should be reported.

Another comment suggested that all of paragraph *l* should be preceded by an “if known” qualifier. The CSB disagrees. The components of the evacuation order are preceded by such a qualifier, and the agency believes that the vast majority of evacuation orders are well enough known to be reportable. And in any event, there is an opportunity to file a corrected or updated report.

Union Information

A comment prepared by a group of labor organizations recommended that the rule require an owner/operator to report the names and contact information of any union representing workers at the facility where the accidental release has occurred.

The CSB already collects this information pursuant to its own investigative procedures:

Promptly after a facility is notified of a CSB investigation deployment, the Executive Director of Investigations and Recommendations (“Executive Director”), or his designee, shall determine if the employees at the facility are represented by one or more unions, and shall identify relevant local and national union health and safety officials. Notice of deployment shall be provided to appropriate local and national union health and safety officials. If there is no union representation, the Executive Director should determine whether the facility has a health and safety committee with employee members, and, if so, should ask management to provide the CSB with a committee member contact.

Worker Participation in Investigations-Board Order Addendum 40a (October 24, 2018) section 7.4.

CSB Board Order 40a also largely addresses a related comment which urged that the rule require CSB to notify the representative of any union representing employees of the facility as soon as any initial or follow-up report of an accidental release is received by the CSB.³⁵ Under the order, the CSB's Executive Director of Investigations and Recommendations is required to provide notice of any deployment to appropriate local and national union health and safety officials.

Finally, the same commenter proposed that the rule require that every appropriate union supply to the CSB the contact information for the person to be notified within 30 days of the effective date of this regulation. Presumably, this proposed requirement would help ensure that the CSB had someone at the appropriate union to notify in a timely manner. The CSB appreciates the suggestion, but the statute and this rule establish reporting requirements for owner/operators, not unions. The suggested revision is outside the CSB's authority. In any event, the CSB has not typically encountered any issue with identifying appropriate union officials.

Collection of Other Reports

A comment by Air Alliance argued that the proposed rule was deficient because it failed to require facilities to submit accident investigation reports "already generated" as required by the Process Safety Management (PSM) rule (29 CFR 1910.119) or RMP (40 CFR part 68). According to the comment, "such reports contain a wealth of detailed information on accident risks and causes – already prepared at significant expense to industry – but currently not collected together by any federal agency." *Id.* The CSB

³⁵<https://www.csb.gov/assets/record/bo40a.pdf>.

appreciates the comment, but it has declined to revise the rule because accident information generated by an owner/operator under PSM (or RMP) that pertains to a reported release will not be available during the deployment window. If needed, CSB can use its investigative authority to obtain information generated by the owner/operator or seek such information from the EPA and OSHA, if required.

1604.5 Failure to Report an Accidental Release

As stated in the proposed rule, paragraphs (a) and (b) of §1604.5 implement the enforcement provisions authorized by 42 U.S.C. 7412(r)(6)(O), which provides, in pertinent part, that after the effective date of any reporting requirement promulgated pursuant to subparagraph (C)(iii), it shall be unlawful for any person to fail to report any release of any extremely hazardous substance as required by such subparagraph. The 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 the title.

The CSB is confident that most matters will come to its attention through its ongoing surveillance of accident activity. During the period of one year following the effective date of the rule, the CSB will contact any owner/operator who the agency believes has failed to file a required a report. If a report is filed immediately following notification, the CSB will not refer the failure to report under §1604.5.

A significant number of accidental releases are concentrated within certain industries. The CSB anticipates that firms within these sectors will be the focus of CSB's compliance and educational outreach efforts during the first year following

the issuance of the rule. The remainder of accidental releases occur in a range of other sectors. The CSB anticipates that additional time may be required to adequately educate all sectors. If appropriate, the CSB will extend the grace period for such sectors. Similarly, the CSB may extend the grace period for all facilities with very few employees.

The CSB intends to issue compliance guidance periodically and welcomes comments that address unusual circumstances. For example, the CSB is interested in comments on what exceptions should be made for owner/operators with small operations and few employees.

Several commenters were concerned about complying with the four-hour deadline set out in the proposed rule. The CSB has revised the deadline from four to eight hours. The grace period described above will resolve such issues in a reasonable fashion for at least one year following the date of adoption. The CSB will consider a longer-term approach to any unique situations and propose appropriate compliance guidance and/or amendments to the final rule before the grace period has expired.

Another comment suggested that CSB memorialize, in the rule itself, the statement from the preamble concerning a one-year grace period. The CSB disagrees with this comment. The preamble to this final rule clearly states the following: “For one year following the effective date of the rule, the CSB will refrain from referring violations for enforcement, unless there is a knowing failure to report. This policy is required to allow adequate time for compliance education.”

The CSB stands by its stated intention, and believes it would be inefficient to include an automatically expiring provision in the rule itself.

The CSB has no interest in seeing owners/operators referred to the Administrator for enforcement unnecessarily, and the agency would much rather focus its resources in the year after promulgation of this final rule on education and outreach.

Another comment suggested that a final rule should include a provision penalizing “false reporting.” The CSB has not added such a provision to the final rule. The CSB is not an enforcement agency, and the statute already provides an enforcement provision for any violation of the reporting requirement. See 42 U.S.C. 42 U.S.C. 7412(r)(6)(O). In addition, Federal law already addresses the issue of false statements. *See e.g.*, 18 U.S.C. 1001(a).

Finally, a comment requested that the CSB rule “prohibit the agency from forwarding suspected violations to the EPA for enforcement.” The CSB disagrees with this comment. Such a provision would be contradicted by the plain language of 42 U.S.C. 7412(r)(6)(O), which provides that after the effective date of any reporting requirement promulgated pursuant to subparagraph (C)(iii), it shall be unlawful for any person to fail to report any release of any extremely hazardous substance as required by such subparagraph. The 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 the title.

The CSB understands that its independence from criminal and civil enforcement authorities is important to its ability to accomplish its safety mission.

As noted in the preamble, the CSB's focus will be on education and compliance, not on creating traps for the unwary. Accordingly, the final language of §1604.5 should pose no threat to the special place the CSB has historically held with industry and other stakeholders as a non-regulatory and non-enforcement agency. The CSB looks forward to working with owner/operators and other stakeholders to help ensure compliance.

1604.6 Public availability of accidental release records.

This section was included to clarify that the procedure for seeking records obtained pursuant to the rule is governed by the Freedom of Information Act, 5 U.S.C. 552, (FOIA); the CSB's procedural regulations for disclosure of records under the FOIA, 40 CFR part 1601; and other pertinent Federal laws governing the disclosure of Federal records information.

As noted in the proposed rule, neither 42 U.S.C. 7612(r)(6)(C)(iii) nor 42 U.S.C. 7612(r)(6)(Q),³⁶ alone or in combination, authorize the immediate disclosure of accidental release record information apart from the requirements of the FOIA. Importantly, neither of these provisions, alone or in combination, authorize the immediate disclosure of accidental release report information in order to support emergency response and public safety operations. Such a reading would potentially conflict with the implementation of other existing public information and safety laws, such as EPCRA (see section 303), which are directly focused on emergency response, the protection of public health and safety, and the public release of information. The interpretation is also inconsistent with the National Response Framework (NRF) and the National Incident Management System

³⁶ The CSB does not interpret subsection Q as in any manner amending the FOIA.

(NIMS) ³⁷ The CSB must respect pertinent principles of the NRF and NIMS regarding public communications during the early stages of an emergency response to a disaster.

Similarly, the CSB is not an alerting authority that participates in the Integrated Public Alert and Warning System (IPAWS), the nation’s public alert and warning infrastructure.³⁸ During an emergency, certain agencies and officials need to provide the public with lifesaving information quickly through established channels.

Finally, the immediate release of initial, uncorroborated accidental release information would be inconsistent with OMB and CSB’s Data Quality Guidelines. The interest in the transparency of the CSB’s data and methods shall not override other compelling interests such as national security, privacy, trade secrets, intellectual property, and other confidentiality protections. OMB Guidelines, para. V.b.3.ii.B.i.” <https://www.csb.gov/investigations/data-quality/>

One comment supported this proposed section saying that “[s]uch report information is by nature both (i) sensitive and (ii) subject to error, due to the confusion associated with significant releases and the short reporting window. Disclosure via FOIA request should help minimize the propagation of erroneous reports through the news or social media and promote more accurate accounts of

³⁷ https://www.fema.gov/media-library-data/1572366339630-0e9278a0ede9ee129025182b4d0f818e/National_Response_Framework_4th_20191028.pdf

³⁸ <https://www.fema.gov/integrated-public-alert-warning-system> IPAWS provides public safety officials with an effective way to alert and warn the public about serious emergencies using the Emergency Alert System (EAS), Wireless Emergency Alerts (WEA), the National Oceanic and Atmospheric Administration (NOAA) Weather Radio, and other public alerting systems from a single interface.

developments.” Another commenter expressed concerns about data security even under a FOIA-based disclosure policy.

On the other hand, two commenters criticized the proposed rule for not making the reports available proactively. One suggested that “making reporting information available to the public only through FOIA requests severely undermines the utility of the rule to inform workers, unions, affected communities and other interested parties of the existence and nature of accidental releases in a timely fashion.” The commenter argued that some interested parties would lack enough information to make a FOIA request, and that the FOIA review process takes too long, citing the CSB’s own statistics on the backlog of FOIA requests. It urged that all “accidental release records collected by the CSB under this rule shall immediately be placed in a publicly-available, searchable database” on the CSB’s website. Another commenter similarly argued that the CSB should “put at least the initial reports, and any corrections, in a searchable, publically [sic.] available database.” It also suggested that “making the records available on-line would also be easier and cheaper for agency.” In support of its argument, one of the commenters relies on 42 U.S.C. 7412(r)(6)(Q) (“Subsection Q”), which provides that any records, reports or information obtained by the Board shall be available to the Administrator, the Secretary of Labor, the Congress and the public, except that upon a showing satisfactory to the Board by any person that records, reports, or information, or particular part thereof (other than release or emissions data) to which the Board has access, if made public, is likely to cause substantial harm to the person’s competitive position.

According to this comment, Subsection Q requires immediate disclosure of any accidental release report.

However, the comment misinterprets the basic purposes of this regulation and of Subsection Q. This is a reporting rule, not a disclosure rule. The CSB has been delegated specific authority to issue this reporting rule by 42 U.S.C. 7412(r)(6)(C)(iii). That provision authorizes the CSB to “establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board’s investigatory jurisdiction.” The provision does not authorize the CSB to disclose accidental release reports notwithstanding other laws governing the disclosure of Federal records. That is why the CSB final rule reiterates the applicability of its normal FOIA-based disclosure process for these records.

The commenter’s reliance on Subsection Q is mistaken for several reasons. First, Subsection Q is not linked to the rulemaking authorization. Second, while the subsection indicates that reports and other information are "available" to the public unless they cause substantial harm to a person’s competitive position, it does not require or authorize the CSB to publicly disclose any information, let alone incident notifications to be obtained via a reporting rule mandated by a separate subsection. Indeed, one purpose of this provision is to describe when documents *cannot* be released. Third, Subsection Q does not by its terms supersede the FOIA or exempt the CSB from other statutes governing sensitive information, such as the Privacy Act. This point is reinforced by 5 U.S.C 559, which provides that “Subsequent statute [sic] may not be held to supersede or modify this subchapter . .

.. except to the extent that it does so expressly.” Because the FOIA, 5 U.S.C. 552 is in the same subchapter of Title 5 as section 559, and was enacted in 1966, this provision means that a subsequent statute like Subsection Q may not supersede or modify the FOIA unless it does so expressly—which it clearly does not.

Another flaw in the commenter’s reasoning is that interpreting Subsection Q as a mandatory disclosure provision would also require the CSB to immediately disclose other types of sensitive documents it may have in its possession, such as those that contain (a) classified national security information shared by sister agencies, (b) confidential business information, or (c) information that might invade privacy interests.

Finally, the commenter’s interpretation of Subsection Q contradicts a recent decision of the DC District Court that denied access to plaintiffs who had filed a FOIA action which turned on the interpretation of the same key language that is in Subsection Q, *Environmental Integrity Project v EPA*, 177 F. Supp. 3d. 36 (D.D.C. 2016). In that case, plaintiffs argued that a provision of the Clean Water Act (CWA), which includes the phrase “shall be available to the public,” entitled them to full disclosure of certain information collected by the EPA pursuant to the CWA, and that pertinent FOIA exemptions were inapplicable. The court disagreed, holding that the provision is not a comprehensive, freestanding scheme that replaces the FOIA exemption of confidential business information from release to the public. For all of the above reasons, the CSB disagrees with the commenter’s interpretation of Subsection Q, and has not made revision to the final rule.

As discussed above, the CSB is obligated to comply with a number of Federal information disclosure laws. At the same time, the CSB has opposed efforts to use such laws to improperly shield such information from public disclosure. For example, the CSB successfully resisted such an attempt during the course of its investigation at Bayer Crop Sciences.³⁹ The CSB's efforts led to a congressional oversight hearing, and soon thereafter, Congress passed the "American Communities' Right to Public Information Act," which amended the disclosure law that had been at issue during the Bayer investigation.⁴⁰

In 2010, the CSB successfully opposed Excel Energy's effort to delay publication of the CSB's Investigation Report into the Cabin Creek disaster in Georgetown, Colorado, in which a fire claimed five lives. *U.S. v. Excel Energy, Inc.*, 2010 WL 2650460 (D. Colo. 2010).⁴¹ More recently, a panel of the Ninth Circuit Court of Appeals ruled in favor of the CSB in its lengthy effort to obtain information from Exxon regarding the use of Hydrofluoric Acid at a refinery formerly owned by Exxon in Torrance, California. *U.S. v Exxon Mobil Corp.*, 943 F.3d 1283 (9th Cir. 2019).⁴²

Thus, the CSB's commitment to seek the facts and to report on them remains strong. The CSB's primary methods of sharing information with the public will remain investigation reports, videos, and safety recommendations. In particular, the CSB has often made recommendations to improve emergency

³⁹ CSB Investigation Report: Pesticide Chemical Runaway Reaction Pressure Vessel Explosion (2011) at pp. 11-13. <https://www.csb.gov/bayer-cropscience-pesticide-waste-tank-explosion/>.

⁴⁰ The Act amended title 46 Section 70103(d).

⁴¹ <https://www.csb.gov/xcel-energy-company-hydroelectric-tunnel-fire/>.

⁴² CSB Investigation Report: ExxonMobil Torrance Refinery Electrostatic Precipitator Explosion Torrance, California (2015) at pp. <https://www.csb.gov/exxonmobil-refinery-explosion-/>

preparedness and to promote the welfare of those living near facilities. However, the CSB recognizes the public interest in learning from initial accidental release information. The CSB occasionally receives FOIA requests for incident screening information. After appropriate review, the CSB has disclosed this information and will continue to do so. Moreover, as part of this rulemaking process, the CSB disclosed 10 years of information on 1,923 incidents.⁴³

The CSB understands commenters' concerns about FOIA processing delays. The CSB's Chief FOIA Officer has acknowledged the backlog of FOIA requests, and the CSB is improving its response process, including by devoting additional personnel to the task. With the adoption of this final rule, the CSB will also devote additional resources to the collection and processing of initial accidental release information. In light of this, the CSB will proactively disclose, subject to any Federal statutory prohibitions on such disclosure, initial incident information, as defined in this rule at §1604.4, at least once per year.

Effective Date

Two commenters suggested that the CSB delay the effective date of the rule to allow compliance education to take place. One suggested a delay of six months and the other of one year. The CSB understands and agrees with the intent of the comment. However, the CSB is concerned that a delayed effective date could be viewed as inconsistent with the court-ordered deadline for the rule. For this reason, the CSB has determined that it will not delay the effective date beyond the 30 days required by the Administrative Procedure Act. Instead, as discussed in the

⁴³ The CSB has also collected and published information on laboratory accidents spanning the years 2001 to 2018, which is available at www.csb.gov.

preamble to the proposed rule, to allow adequate time for compliance education and to address any other compliance issues raised in the comments, the CSB will provide a one-year grace period.

List of Subjects in 40 CFR Part 1604

Hazardous substances, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Chemical Safety and Hazard Investigation Board adds part 1604 to title 40 of the Code of Federal Regulations to read as follows:

PART 1604 – REPORTING OF ACCIDENTAL RELEASES

Sec.

1604.1 Purpose.

1604.2 Definitions.

1604.3 Reporting an accidental release.

1604.4 Information required in an accidental release report.

1604.5 Failure to report an accidental release.

1604.6 Public availability of accidental release records.

Authority: 42 U.S.C. 7412(r)(6)(C)(iii); 42 U.S.C. 7412(r)(6)(N).

§ 1604.1 Purpose.

The enabling legislation of the Chemical Safety and Hazard Investigation Board (CSB) provides that the CSB shall 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). This part establishes the rule required by the enabling legislation. The purpose of this part is to require prompt notification of any accidental release within the CSB's investigatory jurisdiction.

§ 1604.2 Definitions.

As used in this part, the following definitions apply:

Accidental release means an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.

Ambient air means any portion of the atmosphere inside or outside a stationary source.

Extremely hazardous substance means any substance which may cause death, serious injury, or substantial property damage, including but not limited to, any “regulated substance” at or below any threshold quantity set by the Environmental Protection Agency (EPA) Administrator under 42 U.S.C. 7412(r)(5).

General public means any person except for:

(1) Workers, employees, or contractors working for (or on behalf of) the owner or operator of a stationary source from which an accidental release has occurred; and

(2) Any person acting in the capacity of an emergency responder to an accidental release from a stationary source.

Inpatient hospitalization means a formal admission to the inpatient service of a hospital or clinic for care.

Owner or operator means any person or entity who owns, leases, operates, controls, or supervises a stationary source.

Property damage means damage to or the destruction of tangible public or private property, including loss of use of that property.

Regulated substance means any substance listed pursuant to the authority of 42 U.S.C. 7412(r)(3).

Serious injury means any injury or illness that results in death or inpatient hospitalization.

Stationary source means any buildings, structures, equipment, installations, or substance-emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur.

Substantial property damage means estimated property damage at or outside the stationary source equal to or greater than \$1,000,000.

§1604.3 Reporting an accidental release.

- (a) The owner or operator of a stationary source must report in accordance with paragraph (b) or (c) of this section, any accidental release resulting in a fatality, serious injury, or substantial property damage.
- (b) If the owner or operator has submitted a report to the National Response Center (NRC) pursuant to 40 CFR 302.6, the CSB reporting requirement may be satisfied by submitting the NRC identification number to the CSB within 30 minutes of submitting a report to the NRC.
- (c) If the owner or operator has not submitted a report to the NRC and notified the CSB under paragraph (b) of this section, the owner/operator must submit a report directly to the CSB within eight hours of the accidental release and must include the required information listed in §1604.4. A report may be made by email to: report@csb.gov, or by telephone at 202-261-7600.

(d) For the purpose of efficiency, multiple owner/operators may agree in advance or at the time of release to a single, consolidated report on behalf of one or more parties who are responsible for reporting an accidental release from a stationary source. However, any consolidated report must include all pertinent information required under § 1604.4.

(e) Notwithstanding paragraphs (a) through (d) of this section, an owner or operator of a stationary source, without penalty, may revise and/or update information reported to the NRC or CSB by sending a notification with revisions by email to: report@csb.gov, or by correspondence to: Chemical Safety Board (CSB) 1750 Pennsylvania Ave., NW, Suite 910, Washington, DC 20006, within 30 days following the submission of a report to the NRC or CSB. If applicable, the notification must reference the original NRC identification number. No update or revisions should be sent to the NRC. In addition to the opportunity to revise and/or update information within 30 days, an owner or operator may also submit a revised report to the Board within 60 additional days if the submitter explains why the revised report could not have been submitted within the first 30 days.

§ 1604.4 Information required in an accidental release report.

The report required under §1604.3(c) must include the following information regarding an accidental release as applicable:

- (a) The name of, and contact information for, the owner/operator;
- (b) The name of, and contact information for, the person making the report;
- (c) The location information and facility identifier;
- (d) The approximate time of the accidental release;
- (e) A brief description of the accidental release;
- (f) An indication whether one or more of the following has occurred:

- (1) Fire;
- (2) Explosion;
- (3) Death;
- (4) Serious injury; or
- (5) Property damage;
- (g) The name of the material(s) involved in the accidental release, the Chemical Abstract Service (CAS) number(s), or other appropriate identifiers;
- (h) If known, the amount of the release;
- (i) If known, the number of fatalities;
- (j) If known, the number of serious injuries;
- (k) Estimated property damage at or outside the stationary source; and
- (l) Whether the accidental release has resulted in an evacuation order impacting members of the general public and others, and, if known:
 - (1) The number of persons evacuated;
 - (2) Approximate radius of the evacuation zone; and
 - (3) The type of person subject to the evacuation order (i.e., employees, members of the general public, or both).

§ 1604.5 Failure to report an accidental release.

- (a) It is unlawful for any person to fail to make reports required under this part, and suspected violations of this part will be forwarded to the Administrator of the EPA for appropriate enforcement action.
- (b) Violation of this part is subject to enforcement pursuant to the authorities of 42 U.S.C. 7413 and 42 U.S.C. 7414, which may include—

- (1) Administrative penalties;
- (2) Civil action; or
- (3) Criminal action.

§ 1604.6 Public availability of accidental release records.

Accidental release records collected by the CSB under this part may be obtained by making a request in accordance with 40 CFR part 1601, the CSB's procedures for the disclosure of records under the Freedom of Information Act. The CSB will process requests, and if appropriate, disclose such records, in accordance with 40 CFR part 1601 and relevant Federal information disclosure laws.

Dated: February 3, 2020.

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Chemical Safety and Hazard Investigation Board.

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