



U.S. Chemical Safety and Hazard Investigation Board

Office of General Counsel

Memorandum

To: Board Members
From: Christopher Warner^W
Cc: Leadership Team
Subject: Board Action Report – Notation Item 677A
Date: March 27, 2009

On March 20, 2009, the Board disapproved Notation Item 677A, thereby disapproving the publication of the Advanced Notice of Proposed Rulemaking on chemical release reporting in the Federal Register. Member Wright attached a dissent to his vote (attached). Member Visscher filed an explanation of his vote (also attached).

Voting Summary – Notation Item 677A

Disposition: DISAPPROVED

Disposition date: March 20, 2009

	Approve	Disapprove	Calendar	Not Participating	Date
J. Bresland	X				3/11/2009
G. Visscher		X			3/11/2009
W. Wark	X				3/10/2009
W. Wright		X			3/20/2009

Notation 677A

I vote NO on this notation item as I do not believe we have adequately determined what it is we need information for yet. I have a number of questions, based on the fact we have not discussed this issue in a meaningful way before getting the notation item to vote. For example, is this the best course for the agency now (to put out a document that says in essence "tell us how we should do this?"); Have we followed a deliberate process to adequately identify the key elements such a proposed rule should include? Can we piggy-back off of currently required reporting requirements? I do not think we know the answers yet and doubt we have looked into some of them. I am not against submitting an ANPR for comment, but believe we should fashion it based on a discussion of the issue in house first. Perhaps we should narrow our focus and not appear to be projecting complete ignorance on how to approach this task by submitting this open ended approach for comment. The alternatives ("all or targeted" approaches) provided is a good start at narrowing it down but the addition of the approach proposed by Board Member Visscher may help limit our need for unnecessary or duplicative reporting. I realize this is but the first step in what may be a long process; but my preference is to think through and discuss some of the ramifications of and need for specific elements contained in this draft before submitting it for comment. We have known about this requirement for over ten years - and have repeatedly and historically argued that there is no need for such a reporting scheme in order for us to deploy to incidents. Part of this argument has been based on the fact that we have limited resources and are able to select cases directly from the media broadcasts, NRC (National Response Center) reports, and/or the NTSB (National Transportation Safety Board) notification systems that we used (some of which are no longer used or supported by us). Various Government Accountability Office and Inspector General Reports have repeatedly stated that there are other advantages to having such a reporting requirement in place and that it is simply not a deployment decision tool. They have said it would help us improve data within our deployment decision database (something we argue was only to be used for making deployment decisions and not to be relied upon for factual data; but, in fact we have cited data from this data collection in support of various budgets and other requirements), and they said it can, if updated regularly, be used as a means of evaluating possible trends by analyzing the updated data.

Further, some in the past have argued that we should not become a regulatory entity as doing so may damage our ability to conduct full and thorough independent investigations. It may also harm or taint our "neutral white hat" reputation. This may or may not in fact be true should the rule come to fruition. However, I feel it is important to review these and other aspects of advanced notice of a proposed draft rule prior to requesting comments on it. As written it is very broad in scope and ill-defined. To date and to my knowledge we as a Board have not reviewed some of the nuances and not studied let alone discussed the issue in house. Yet we are prepared to go ask others how we should proceed. We even caveat our response to the GAO in our July 11, 2008 letter where we committ to publish an RFI (within 3 months) and present various options for rulemaking but cite that other entities collect chemical incident data, including the EPA and the Agency For Toxic Substances and Disease Registry as well as OSHA. It is now March 2009 and I am not sure we have even a basic understanding of what our intent is here. I believe our draft should include language that we may piggy-back efforts from existing reports and thereby reduce redundancies in required reports too. If we firmly believe we were correct in not needing this requirement as we have espoused for almost a decade now, or that it would be injurious to our standing as a "neutral white-hat agency" then we should develop a sound and logical argument as to why this requirement may not be appropriate today, some ten years after we were funded as an agency. Or proffer a workable solution that may satisfy our need for some limited data collection as espoused by Board Member Visscher and the meet our congressionally mandated requirement to ensure a reporting system is in place.

I gather from my review of the historical documents provided to us as part of this notation package that we have chosen to argue to GAO and various other IGs that we do not need this requirement for deployments and that our position has not changed on that score? But I am not certain based on the draft ANPR. I do not believe we have spent sufficient time and effort in fleshing out key elements that may come to play in submitting an Advanced Notice of Potential Rulemaking on such a reporting system yet. I hope our effort here will not confirm GAO's suspicions that this *"...request for information does not in itself provide assurance that CSB will follow through and issue a regulation as required by CSB's authorizing statue."* I believe if we thoroughly vet the issue internally first and deliberately plan a course or strategy for ourselves we can probably draft a

more acceptable document for all concerned and one that the Board will fully support. To submit this draft implies we do not know how to approach this problem and that we have to ask others to tell us how to do our jobs, vice proffering a potential solution to comment on. Further, a more detailed outline of what should be included would also provide enhanced transparency about what we believe should be included in a realistic and workable reporting requirement.

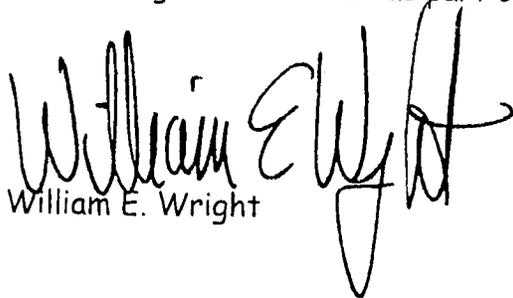
As written the draft ANPR provides limited information other than our longstanding legislative requirement to implement such a rule and proffers a small array of basic questions which tend to indicate that we have no idea of what approach to take in meeting this requirement (the please tell us how to do this implication). Board Member Visscher has suggested repeatedly that we form a working group to discuss the issue and has previously stated that we may be able to have a reporting requirement that uses a "trip wire" scheme which we trigger based on the severity of the situation, keyed on various alerts we might receive from media and other sources. We can under this approach then identify those cases where additional bits of information are required or where repeated updates should be provided in order to fulfill the reporting requirement. But this information would be limited to only those severe cases as determined by us (high consequence event calls we make if you will).

This reporting requirement is a key element of our enacting legislation and I believe we should spend sufficient time and resources to proffer a meaningful document for insertion into the federal register for public comment and not simply submit something that in essence says "tell us how we should do it".

My preference is to do some deliberate planning and not simply toss out a minimally based solution set for others to provide comments. I would prefer to invest our efforts in advance and produce a thoughtful and well reasoned plan for consideration, vice a "tell us how we should proceed" document. Surely after 10 plus years we have some idea of how we should or should not approach this concept? I do not accept the argument that "something is better than nothing" or "this is the first step in a lengthy process". If we accept the premise that we should do this now after having argued against it for 10 plus years then we should discuss it as a Board to get various perspectives on it and the strategy we should pursue from here on out. I see this draft document as a rough attempt to formulate a

reporting rule for our agency. Again, I would prefer to invest more time and resources to proffer a more meaningful concept document vice teeing up a very loosely based requirement.

It is not only a question of what you ask for, but also how you ask for it! Further if we are not capable of adequately reviewing all the core objectives here then perhaps we should conduct an NAS study on this key issue to determine if formulating such a rule will negatively impact our ability to do independent investigations or skew the perception of our independence and how we might offset that as part of our draft.

A handwritten signature in black ink, appearing to read 'William E. Wright'. The signature is stylized with a large, sweeping 'W' and a long, trailing flourish.

William E. Wright

Vote explanation on Notation Item 677A

The CSB's authorizing statute requires the agency to "establish by regulation requirements...for reporting accidental releases into the ambient air subject to the Board's investigative jurisdiction." 112(r)(6)(C)(iii) I agree that the Board must fulfill its statutory mandate, or ask Congress to repeal or modify the provision.

After an earlier version of the ANPR was voted down by the Board because it did not provide enough background and direction for readers and commenters, I recommended that we set up a working group that could work through the issues. While this second version is somewhat better than the first, it still to a very large extent takes the approach that we have not really given much thought to the issues and how to proceed on a rule. Without more carefully directed discussion and questions, we are likely to get such a range of comments that the ANPR is a largely wasted step in the process.

I voted against this notation item for reasons both of process and substance (of the ANPR). With regard to the process, prior to the notation item being distributed, the board members were told that it would be distributed within a few days. In reply, I asked that the board members be given a draft, so that they could indicate any concerns and provide input before receiving the voting copy of the notation item and ANPR. My request was denied by the chairman. Instead we were given the notation (voting) item and ANPR, to vote yes or no on the item as is, with no input or opportunity for input from board members. I think that is really a destructive way for this board and the agency to operate, and certainly is a bad precedent for the variety of other matters on which the board votes. So I want to express in strong terms my objection to the process.

This process was all the more regrettable because had the board members had opportunity to provide input and make changes, I think the ANPR could have been improved and approved by the board. As is, the ANPR falls short for several reasons.

First, the ANPR is confusing as to the purpose that the Board sees for imposing a new reporting requirement. As the chairman's 2008 letter to the GAO expressed, the CSB's position "has been that a reporting regulation is not needed for the narrow purpose of notifying CSB of major accidents warranting the deployment of investigators, which appears to be the sole purpose of the CSB's authority to issue a reporting rule." (Letter to the GAO, July 8, 2008). Page 4 of the ANPR alludes to the Board's position. But page 3 of the ANPR seems to change the CSB's position, and suggests that we do need a reporting rule in order to learn of chemical accidents in a timely manner.

First of all, I think the ANPR needs to be clarified and the background explained, if we hope and expect that readers and would-be commenters will provide their input to the agency with this ANPR. We know how the current process works, but few people outside the CSB do, so a better explanation is warranted. Second, I think we should be clearer about why the Board has in fact argued that the a reporting rule is not necessary for the "narrow purpose" of notifying CSB of major accidents, for making deployment

decisions. I think that position is still the correct one, but it needs to be explained in the ANPR.

Saying that a new reporting rule is not necessary for the purpose of initial notification to CSB of major accidents does not mean that we should not do a reporting rule. There are other purposes that may be served. Obviously a major reason why the Board is attempting this ANPR now is in response to the 2008 GAO report which criticized the Board for failing to complete a reporting rule. The GAO report's focus is not so much that the current system might be missing (that the Board does not get notification of) major accidents, as it is on the validity and "quality of data in the accident-screening database it uses to report to Congress and the public..." (GAO, page 7) One can hardly disagree with the GAO on that point, and what their criticism points to, it seems to me, is that a new reporting requirement should be targeted to addressing *that* purpose, rather than leave to the reader of the ANPR to guess what purpose the Board sees for a new reporting requirement.

Second, the ANPR barely mentions that there are several existing chemical release and accident reporting requirements that employers already have to try to comply with (EPCRA, CERCLA, RMP, OSHA) and the number of existing government databases on chemical releases and accidents (RMP, NRC, ATSDR, OSHA). Again, I think the ANPR would benefit from some background and description of these various reporting requirements and databases. More importantly, I think we need to explain why, in light of all of these existing reports and databases, an additional reporting requirement is needed.

Third, the ANPR uses terms that a reader might assume are well defined, but in fact are not, and we should acknowledge that fact. This is particularly the case with the two "options" that are briefly described. The first "option" would require "the reporting of information on all accidental releases subject to the CSB's investigatory jurisdiction." But in fact questions arise regularly about whether a given incident may be in CSB's "investigatory jurisdiction." Are accidents in school and college laboratories within CSB's investigatory jurisdiction? Are confined space accidents in which a worker is exposed to hazardous substances within the confined space, but there minimal if any emission to the ambient air within CSB's investigatory jurisdiction? Are releases of liquid or solid hazardous chemicals onto land or into bodies of water in CSB's investigatory jurisdiction? Is an explosion caused by and releasing steam an accidental release in CSB's investigatory jurisdiction? What thresholds should be used to determine whether an accident resulted in "serious" injury or "substantial" property damage? Most significantly for the purpose of a reporting requirement, are "potential" releases or releases with potential serious consequences ("near miss incidents") within CSB's investigatory jurisdiction?

Even though these might seem like quite fundamental questions, the agency has never answered them, in part because it has undertaken relatively few investigations, and those have generally been unquestionably within its investigatory jurisdiction. But a reporting rule which required employers to determine whether a report was required would demand

very clear parameters and definition, all the more so because employers would face the possibility of civil and criminal penalties for violating such a rule.

I realize that this is an ANPR, and would not address every issue that needs to be addressed in a proposed or final rule. But I think if we want constructive input we should explain more clearly some of the issues involved, and the agency's thinking on them. Our colleague, Board Member Wark, has particularly expressed the concern that a broad reporting requirement could undermine the current broad acceptance for CSB's core mission and function -- investigating accidents and making sure that the lessons from those accidents are widely distributed to help others avoid and prevent and mitigate similar accidents from occurring. That is all the more reason, in my view, to explain more in this ANPR, rather than, as Board Member Wright put it, simply asking others "to tell us how to do our job."

Finally, although the ANPR does not entirely foreclose the agency from other options, by listing two broad options it strongly suggests that the Board intends to propose one or the other. There is another option which has been discussed and which seems to me to be far better than either of the options listed. Given (as discussed above) that the purpose of a new reporting rule is not for broadening the initial notification of accidents to CSB for deployment (the current system works reasonably well for that) but for improving the quality and completeness of the information in CSB's accident database, and given the difficulty of saying with certainty and precision what the parameters of CSB's investigatory jurisdiction are (as would be necessary with any reporting rule that requires employers to know in advance when reports must be filed), an alternative approach would be to require an employer who has had a serious accident and is notified by the CSB, to file a "secondary report" of the accident, providing additional details and verification of information on the accident as requested by the CSB. This approach would allow us to address the GAO's concern (and ours) about the quality of information in the accident database, allow the CSB to have better and more complete information than is now available on a much greater number of serious accidents (in order to begin to be able to do trend analysis), but would avoid most of the inevitable implementation and enforcement issues that will come with the options described in the ANPR.

Gary Visscher