

Legislative History

General Concept

(6)(A) "Based on . . . review of the record with respect to chemical accidents and the measures that various Federal agencies, States and other nations are taking to respond to chemical accidents, several conclusions are warranted: III. . . . Accident prevention has great promise, but is not given sufficient attention in current Federal programs. V. . . . no agency of the United States Government is actively engaged in efforts to prevent chemical accidents, today." (Senate Report No. 101-228 (1989); Page 143)

"Based on these conclusions the reported legislation adds a new section 129 to the Clean Air Act which will: (3) create an independent Chemical Safety Board to investigate accidents and recommend measures to reduce the risk of catastrophic events;. . ." (Senate Report No. 101-228 (1989); Page 144)

"Section 304 of S. 1630 as reported adds a new section 129 to the end of Title I of the Clean Air Act. . . . There are four major elements in this proposed program. Perhaps most important is the creation of a new Chemical Safety and Hazard Investigation Board which will investigate chemical accidents which cause death, serious injury or substantial property damage." (Senate Report No. 101-228 (1989); Page 207)

"Testimony from the chemical industry to the Committee in hearings indicated support by the regulated community for a coordinated Federal approach to accident prevention and suggested that an agency like the Board might most effectively carry out that responsibility." (Senate Report No. 101-228 (1989); Page 249)

"...is modeled on the structure, activities and authorities of the National Transportation Safety Board...." (Senate Report No. 101-228 (1989); Page 228)

"The antecedents of the NTSB go back to the Air Commerce Act of 1926 which created an independent agency to investigate, record and make public the causes of accidents in the rapidly growing commercial aviation industry. . . . the Federal Aviation Act of 1958 (. . . firmly separated the rule-making and investigatory functions in aviation safety programs). charged with . . . recommending measures to a regulatory authority (the Federal Aviation Administration) that might prevent similar accidents in the future. The Independent Safety Board Act of 1974 established the current NTSB." (Senate Report No. 101-228 (1989); Page 228)

"The NTSB does not, itself, impose safety requirements on the transportation industry; its function is investigatory." (Senate Report No. 101-228 (1989); Page 228)

"Many of the issues raised. . . reflect lessons learned during the long history of the Federal effort to improve the safety of air travel by supporting an independent and expert safety board to investigate serious accidents, to determine the probable cause or causes of such accidents and to recommend improvements in equipment, training or procedures which, when required of those in the industry, might reduce accidents and fatalities." (Senate Report No. 101-228 (1989); Page 228)

Structure

(6)(B) "The Board members will serve for a term of five years. They may be reappointed and may continue in office (after the five year period) until a successor is appointed." (Senate Report No. 101-228 (1989); Page 229)

"The members are to have demonstrated technical expertise in professional fields related to accident investigation including accident reconstruction, safety engineering, human factors , chemical safety, toxicology or chemical regulation. . . . special emphasis should be put on expertise in "human factors". in the use of operator training and emergency procedures to prevent accidents and minimize their consequences." (Senate Report No. 101-228 (1989); Page 229)

"...special emphasis should be put on expertise in "human factors" and the role that operator failures play in causing accidents. In other fields, the United States has fallen behind the international community in the use of operator training and the development of operating and emergency procedures to prevent accidents and minimize their consequences." (Senate Report No. 101-228 (1989); Page 229)

"The chairperson of the Board is given authority for directing the work and assignments of the staff except that each Board member shall be assigned such personal staff as are necessary to carry out responsibilities of a member. The chair's conduct of the executive function is subject to oversight by the Board as a whole." (Senate Report No. 101-228 (1989); Page 229)

"The Board will operate by majority vote, but may (by vote) delegate responsibilities to the chairperson or other member, except that it shall require a majority vote of the full Board to issue a report on the cause or probable cause of an accident, make a recommendation to the Administrator or the head of another Federal agency, or promulgate a rule." (Senate Report No. 101-228 (1989); Page 229)

"The role of members of the Board in actual accident investigations is not specified. They may, of course, be present at the scene of an accident, at evidentiary hearings and in other proceedings. The precise role that each member takes in these activities will be the prerogative of the member and will depend on his or her expertise and the division of responsibilities within the Board." (Senate Report No. 101-228 (1989); Page 229)

Purpose

(6)(C) "The Board has five enumerated duties:

(1) to investigate serious accidents...and report in writing on the cause or causes.... (2) to make recommendations...on steps that can be taken to reduce the likelihood or consequences of chemical accidents including the proposal of specific rules and orders.... (3) to establish requirements for reporting accidents including measures to preserve evidence.... (4) to conduct general studies and investigations.... (5) to review and make recommendations on the role of hazard assessments and risk management plans in preventing chemical accidents."

(Senate Report No. 101-228 (1989); Page 231) ". . . independent Chemical Safety Board to investigate accidents and recommend measures to reduce the risk of catastrophic events;" (Senate Report No. 101-228 (1989); Page 144)

"The Board is not a regulatory agency, but is to function as a source of expertise at the center of the chemical accident prevention and response programs of the Federal Government." (Senate Report No. 101-228 (1989); Page 207)

"The principal role...is to investigate accidents to determine the conditions and circumstances which led up to the event and to identify the cause or causes so that similar events might be prevented." (Senate Report No. 101-228 (1989); Page 231)

"It will investigate serious accidents and other health and safety issues. . . and will make recommendations with respect to accident prevention measures which may be promulgated by the agencies with regulatory authority." (Senate Report No. 101-228 (1989); Page 207)

"The Board may also serve as a point of communication among the various Federal agencies to improve the effectiveness of accident prevention programs and reduce the burden of duplicative requirements on regulated entities." (Senate Report No. 101-228 (1989); Page 208)

"The President may utilize the Chemical Safety Board . . . as the agency to conduct the review required by this section. Employing the Board for such a purpose would facilitate an early integration of the Board's functions with those of other Federal agencies and may provide a continuing point of contact and coordination for this purpose after the initial review is complete." (Senate Report No. 101-228 (1989); Page 249)

Scope of Investigations

6(C) "The accidents...to investigate are those which result from...a chemical substance (not limited to the extremely hazardous substances listed under subsection (c))..." (Senate Report No. 101-228 (1989); Page 231)

"...is to investigate accidents resulting from the production, processing, handling or storage of chemical substances causing death, serious injury, or substantial property damage (including damage to natural resources)." (Senate Report No. 101-228 (1989); Page 228)

"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." (House Conference Report No. 101-952 (1990); Page 340)

"...the phrase "producing, processing, handling or storing an extremely hazardous substance" used throughout this section is to be read in the broadest way to include the transportation of such materials from one site to another." (Senate Report No. 101-228 (1989); Page 231)

". . . the power of the Board to investigate accidents under subsection (e). . . not limited only to facilities handling the substances which have been listed". (Senate Report No. 101-228 (1989); Page 212)

Focus of Inquiries

6(C) "The Board should take an "all cause" theory in discharging its investigatory duties. It is not the single, necessary or sufficient cause which is to be the focus of the Board's inquiry, but all circumstances which contributed to the accident...." (Senate Report No. 101-228 (1989); Page 234)

"...it is expected that the Board will follow many strands of inquiry in response to each accidental release." (Senate Report No. 101-228 (1989); Page 234)

"It is not the role of the Board to apportion blame or to affix liability;.... Rather, the Board is to identify those actions, omissions, events, and conditions (or combination thereof) which led to the accident or incident for the purpose of recommending modifications to processes, equipment, and procedures to prevent similar accidents or incidents in the future." (Senate Report No. 101-228 (1989); Page 232)

"...it is not expected that the Board will accuse any party or fix fault. Rather, and to the extent practical, the Board is to give a precise and factual statement of why the event occurred." (Senate Report No. 101-228 (1989); Page 234)

"It is to be emphasized again that the purpose of the Board's investigation is not to buttress the case for a remedy to those injured or suffering loss by allocating liability, rather it is to provide remedy for the community as a whole by identifying those factors which caused the accident and which may be modified to prevent a recurrence." (Senate Report No. 101-228 (1989); Page 234)

Accident Reports

6(C) "The Board is required to issue a report on each investigation it conducts which will describe the event and identify the cause or probable cause." (Senate Report No. 101-228 (1989); Page 234)

"...Board's report may not absolutely identify the cause (when insufficient information is available) and may include statements which indicate only the probability that a particular factor contributed to the outcome...." (Senate Report No. 101-228 (1989); Page 234)

"These reports are a statement of the Board (not staff)...." (Senate Report No. 101-228 (1989); Page 234)

"...are to be issued on a majority vote of the Board and should be issued in a timely manner, usually within 6 months of the accident unless a prolonged investigation of contributing causes is necessary." (Senate Report No. 101-228 (1989); Page 234)

"To assure quality in the report, the Board may wish to establish a procedure which allows for publication of a preliminary staff draft report, followed by a period of public comment, before the Board votes on the final report." (Senate Report No. 101-228 (1989); Page 234)

"...Board will establish a public docket for each investigation which will include field reports, factual summaries prepared by staff, communications, and the comments of interested persons or parties to the investigation." (Senate Report No. 101-228 (1989); Page 234)

"...may issue more general reports to the Congress and make recommendations to other Federal or State or local agencies and to owners and operators of facilities engaged in chemical production or handling to suggest measures that might be taken to improve the safety of operations." (Senate Report No. 101-228 (1989); Page 235)

International Investigations

(6)(D) "The Board is encouraged to participate in the investigation of accidents which occur at facilities located in other nations, both to contribute its own expertise... and also to gain insight and experience which may be useful in preventing accidents or minimizing their consequences with respect to events or facilities of a similar type located in the United States." (Senate Report No. 101-228 (1989); Page 233)

"...it shall develop mechanisms that may facilitate participation in foreign investigations which are not inconsistent with FOIA, but which also do not unnecessarily divulge information that would be held confidential in the nation in which the accident occurred." (Senate Report No. 101-228 (1989); Page 233)

NTSB Cooperation

(6)(E) "The Board is to enter into a...(MOU)...which establishes the NTSB as the lead agency with respect to the investigation of chemical accidents in the transportation sector. The MOU shall assure that the responsibilities of the (chemical safety) Board are fulfilled and shall not diminish in any way the jurisdiction or responsibility of the NTSB for transportation-related accidents. There should be no conflict between the interests of the two agencies in this respect." (Senate Report No. 101-228 (1989); Page 231)

"...this statutory provision (*NOTE: reference is to statutory language giving NTSB primary authority for transportation accidents*) specifically preserves the authority of agencies, other than NTSB,...to investigate accidents which are transportation-related to the extent that they have such authority under other law -authority which would be established for the Chemical Safety Board...." (Senate Report No. 101-228 (1989); Page 231)

"The (chemical safety) Board is not precluded from seeking information directly from parties involved in an accident which is in the primary jurisdiction of the NTSB and is being investigated by that agency, whether that information is germane to an NTSB investigation or not. However, whenever possible, the (chemical safety) Board should rely on information collected by NTSB rather than conduct separate information-gathering activities." (Senate Report No. 101-228 (1989); Page 232)

Research

(6)(F) "...may conduct other and more general investigations in furtherance of the purposes of this section. ...may conduct such studies in cooperation with other entities.... In particular, the Board should cooperate closely in the work of the National Spill Test Facility...." (Senate Report No. 101-228 (1989); Page 235)

"...may also conduct investigations and studies at sites where any of the 360 chemicals listed pursuant to section 302 (*NOTE: of EPCRA*)...or other extremely hazardous substances are present, whether or not an accident has occurred when there is evidence of a hazard or potential hazard." (Senate Report No. 101-228 (1989); Page 235)

Legal Proceedings

(6)(G) "The findings, conclusions and recommendations of the Board are not to be used in civil proceedings for damages which result from an accident investigated by the Board." (Senate Report No. 101-228 (1989); Page 232)

"...the Board is instructed to carefully preserve the evidence it gathers as it may be relevant for use in later litigation." (Senate Report No. 101-228 (1989); Page 232)

"...the Board is directed to conduct its investigation (including laboratory testing of materials and equipment involved in an accidental release) so as not to jeopardize such proceedings. This is not, however, an instruction to the Board to conduct its own investigations in a manner which facilitates the use of its findings in other proceedings to determine fault or liability. In most cases the standard of evidence in the Board's proceedings will be less rigorous than that required in a court of law." (Senate Report No. 101-228 (1989); Page 232)

"...questions arise when representatives of possible claimants or insurers seek access to the accident site. Under other authorities (aviation) such parties have been prevented from entering accident sites during the conduct of the governmental investigation. Such exclusion is not provided for here." (Senate Report No. 101-228 (1989); Page 232)

Hazard Assessments

(6)(H) "...to be actively involved in the preparation and use of hazard assessments.... Because of its expertise the Board will be uniquely qualified to suggest procedures for the conduct of hazard assessments.... " (Senate Report No. 101-228 (1989); Page 235)

"In its first few months, the Board is to review the techniques which have been developed in the field of hazard evaluation and is to consider the facilities and substances for which formal hazard assessment would be most useful making a report of its findings. . . ." (Senate Report No. 101-228 (1989); Page 212)

"...prepare and transmit to the Administrator within 18 months of enactment a report including recommendations on the role of hazard assessments in preventing chemical accidents. ...the Board shall consider which substances it believes should be listed...and the elements of hazard assessment which are most appropriate for facilities of various types. The report is also to consider the role of risk reduction plans...." (Senate Report No. 101-228 (1989); Page 235)

"The Board is to periodically revisit these questions and is to revise its previous recommendations as appropriate taking into account new information which has become available since the previous review." (Senate Report No. 101-228 (1989); Page 235)

Responses from EPA

(6)(I) "The Administrator is to respond to recommendations of the Board within 180 days of receipt. ...response is to be written and will indicate whether the recommendation will be implemented in full, in part or not at all." (Senate Report No. 101-228 (1989); Page 235)

"If the Administrator chooses not to implement some part or all...or if it will be implemented but not according to the schedule recommended...the Administrator will explain in writing why...." (Senate Report No. 101-228 (1989); Page 235)

Reports to OSHA

(6)(J) "The Board may also make recommendations to the Secretary of Labor...." (Senate Report No. 101-228 (1989); Page 235)

"There is no requirement that the Secretary respond...within a specific period of time." (*NOTE: provision subsequently included in Act requiring a response from Secretary within 180 days of receipt of recommendation*) (Senate Report No. 101-228 (1989); Page 235)

Reports to EPA

(6)(K) "...Board is to make recommendations to the Administrator with respect to rules and requirements which may be promulgated ...and administrative orders which may be issued.... These recommendations may also include proposals to list chemicals as extremely hazardous substances...." (Senate Report No. 101-228 (1989); Page 234)

"The list is to be. . . revised (if necessary) at least every five years. . . . reflecting recommendations made by the Chemical Safety Board. . . ." (Senate Report No. 101-228 (1989); Page 212)

"To the extent possible, the Board will make its recommendations in the form of a proposed listing, rule or order. ...may include a schedule for the issuance of and compliance with the rule or order." (Senate Report No. 101-228 (1989); Page 234)

"...requirements which only mandate changes in procedure...can be implemented by both new and existing facilities almost immediately. However, other changes which involve capital investment or the development of specialized programs may require more time to implement at existing facilities. The Board should generally include...a compliance schedule which reflects these considerations." (Senate Report No. 101-228 (1989); Page 235)

"Generally, the requirements promulgated by the Administrator will be in response to recommendations made by the Board. The Board, through its investigations and reports, is to drive the regulatory agenda in this field." (*NOTE: reference here is to establishment of accident prevention requirements applicable to facilities handling extremely hazardous substances*) (Senate Report No. 101-228 (1989); Page 208)

"...Act requires existing facilities to be in compliance with emissions standards within three years. The Board may consider a longer period where it would be justified...." (Senate Report No. 101-228 (1989); Page 235)

Investigatory Practices

(6)(L) "These authorities to conduct hearings, gather information, and conduct inspections are to be construed in the broadest way..." (Senate Report No. 101-228 (1989); Page 233)

"The role of other parties in accident investigations conducted by the Board may be established by regulation." (Senate Report No. 101-228 (1989); Page 232)

"An officer or employee of the Board may conduct an inspection and take samples (including samples of substances present in processes or releases)..." (Senate Report No. 101-228 (1989); Page 233)

"...hearings will generally be recommended to the Board by investigatory staff, will be conducted by administrative law judges employed by the Board, and will be conducted according to the Administrative Procedures Act. The Board may collect written information for the same purpose by order directed to any person engaged in the production, processing, handling or storage of chemicals on matters which are pertinent to the investigation of an accident." (Senate Report No. 101-228 (1989); page 233)

Information Acquisition

(6)(M) *NOTE: Nothing comparable to what appears in Act is found in legislative history*

Rulemaking

(6)(N) "...promulgate administrative rules as may be necessary.... These will include rules for the conduct of field investigations and hearings." (Senate Report No. 101-228 (1989); page 236)

"...shall establish regulations for the prompt reporting of accidental releases which are subject to its investigatory jurisdiction. ...may be coordinated with other reporting requirements established by the Agency. ...shall provide for the preservation of evidence at the site of the accident...." (Senate Report No. 101-228 (1989); Page 236)

"...regulations...for accident reporting may provide that any person directed to make a report contact the National Response Center rather than the Board directly. ...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." (Senate Report No. 101-228 (1989); Page 236)

Enforcement

(6)(O) *NOTE: Nothing comparable to what appears in Act is found in legislative history*

Administrative Support

(6)(P) "...is to receive administrative support from the Administrator of the Environmental Protection Agency in establishing facilities and managerial and accounting functions." (Senate Report No. 101-228 (1989); page 236)

Confidentiality

(6)(Q) "Information collected...is subject to the same trade secret protection afforded other information gathered by the Environmental Protection Agency under the Clean Air Act. ...protection...must be formally requested in writing by the person whose competitive position may potentially be damaged and is only subject to protection at the direction of the Board through case-by-case determination." (Senate Report No. 101-228 (1989); page 236)

"In no event shall a request for trade secret protection interfere with the Board's duty to investigate..., determine the cause or probable cause and report to the public the results...." (Senate Report No. 101-228 (1989); page 236)

"No information as to the release or emissions from a facility...shall be afforded...protection." (Senate Report No. 101-228 (1989); page 236)

Independence

(6)(R) "The independence of the Board in its official duties (finding the cause or probable cause of chemical accidents and recommending requirements or orders which will prevent accidents in the future) is essential for several reasons. First, it is unlikely that an agency charged both with rule-making and investigating functions would be quick to acknowledge that existing requirements were insufficient to prevent an accident.Second, the Board is intended as an organizational stimulus to an appropriate amount of regulatory activity by the Environmental Protection Agency in this area. Subsection (f) of the new section 129 gives the Administrator authority to issue requirements to prevent accidents (and mitigate their consequences).... Were this authority completely discretionary, there is some doubt whether the Agency would use it at all." (Senate Report No. 101-228 (1989); Page 229)

"...investigations...conducted by agencies with dual responsibilities tend to focus on violations of existing rules as the cause of the accident almost to the exclusion of other contributing factors for which no enforcement or compliance actions can be taken. The purpose of an accident investigation (as authorized here) is to determine the cause or causes of an accident whether or not those causes were in violation of any current and enforceable requirement. When the causes are fully understood, that understanding may then be used to modify requirements to reduce the possibility of recurrence."(Senate Report No. 101-228 (1989); Page 229)

"A Board which did not operate independent from the Administrator's direction would defeat the objective of stimulating regulatory action - a stimulus created through the organizational tension built into the statutory relationship between the Board and the Agency." (Senate Report No. 101-228 (1989); Page 230)

"The independence of the Board was strengthened by amendments adopted during Committee markup. ...includes new language assuring that reports and recommendations prepared by the Board are not subject to review or modification...before they are released to the public. ...were made to assure that the official actions of the Board would be considered and taken independently and not at the direction of other Federal agencies or officials." (Senate Report No. 101-228 (1989); Page 230)

"Reports and recommendations...are not to be subject to prior review by other officers or agencies of the Executive Branch. To assure the independence of the Board, it is required to transmit any report, recommendation, budget request, Congressional testimony or other document to the appropriate Committees of the House and Senate at the same time that such documents are transmitted to any other officer in the Government." (Senate Report No. 101-228 (1989); Page 236)

"Employees of the Board are not subject to the direction of officers in any other department or agency." (Senate Report No. 101-228 (1989); Page 237)

Annual Report

(6)(S) "...is to report annually on its activities to the President and to Congress. The report shall include: (1) a review of the accident investigations...during...previous fiscal year; (2) a summary of the recommendations including proposed rules or orders....; (3) an accounting of the actions taken by the Administrator...in response to recommendations....; (4) a list of the recommendations...which have not been acted upon by the Administrator; (5) recommendations for legislation or regulatory changes....; (6) a description of the future research program of the Board." (Senate Report No. 101-228 (1989); Page 237)