

U.S. Chemical Safety and Hazard Investigation Board
MEMORANDUM

November 14, 2017

To: Vanessa Allen Sutherland, Chair and Board Member, CSB
Kristen Kulinowski, Board Member, CSB
Manny Ehrlich, Board Member, CSB
Kara Wenzel, Acting General Counsel
Interested Parties

From: Rick Engler, Board Member

Subject: **Position Statement on CSB Notation Item 2018-02 - Worker Participation and Whistleblower Protection in the Oil and Gas Industry on the Outer Continental Shelf (Revised)**

This individual work product and position statement reflects the views of Board Member Rick Engler and not those of the U.S. Chemical Safety Board (CSB).¹

Summary of Position

I urge the Board to vote against the proposed status change to CSB Recommendation 2010-10-I-OS-15.

On April 17, 2016, this CSB Board voted unanimously to approve CSB’s Volumes 3 and 4 of our report on the Macondo Deepwater Horizon disaster.² Voting now to close this Recommendation as “Closed-Reconsidered/Superseded” is not supported by our statute nor the evidence and analysis provided in Volumes 3 and 4 of the CSB’s Macondo investigation report. The CSB Recommendations Department proposal to the Board for this status change does not consider:

- The clear statutory authority and mandate of CSB to issue reports and studies which can include analyses of gaps in regulatory safeguards.

¹ This statement is a revised and expanded version of my statement at the October 16, 2017, U.S. Chemical Safety Board (CSB) public business meeting. Review the official meeting transcript for my statement, for statements of, and dialogue with, other Board Members, and for public comments. The meeting transcript is posted at http://www.csb.gov/assets/1/7/CSB_-_Business_Meeting_-_10-16-17_PDF.pdf

² Notation Item 2016-40 at http://www.csb.gov/assets/Record/BAR_Notation_Item_2016-40.pdf

- Evidence provided in CSB Macondo investigation reports Volumes 3 and 4 that poor communication, inadequate worker participation (such as reluctance to report hazards), and the absence of whistleblower protection were among factors that could have contributed to this disaster.
- That CSB's enabling statute and current policies require us to consider multiple causative factors for why incidents occur or are allowed to occur.
- That the Department of the Interior has broad authority to promulgate and enforce safety and environmental regulations on the Outer Continental Shelf.

Moreover, closing this Recommendation as "Closed-Reconsidered/Superseded" conflicts with other careful assessments that urged greater worker participation and/or new statutory whistleblower protection for oil and gas workers on the outer continental shelf, including by the Department of the Interior's Outer Continental Shelf Oversight Board (2010), the U.S. House of Representatives (2010), the National Commission on the BP Deepwater Horizon Oil Spill (2011), and the National Academies of Sciences, Engineering, and Medicine (2016).

CSB's whistleblower recommendation to BSEE could have been more clearly articulated. Our *analysis* in Volume 4 found that there was very limited protection from retaliation for offshore workers and that statutory changes by Congress could be required.³

Our *recommendation* to the U.S. Department of the Interior, however, was worded as follows: *Issue participation regulations and training requirements for workers and their representatives that include the following:*

d. Protections for workers participating in safety activities with a specific and effective process that workers can use to seek redress from retaliatory action with the goal to provide a workplace free from fear that encourages discussion and resolution of safety issues and concerns. Protected activities include, but are not limited to reporting unsafe working conditions, near misses, and situations where stop work authority is used.

Our recommendation should have included this clarifying language: **That if legislative authority is required to implement whistleblower protections, the Secretary of the Interior, working with other agencies, shall seek such authority from Congress.**⁴

³ Pages 64-67, Volume 4, *Drilling Rig Explosion and Fire at the Macondo Well*, Report No. 2010-10-I-OS, April 2016.

The Board can easily correct any confusion by adding these words (in bold type above) to the recommendation. Because the underlying report is entirely accurate, *no revision to the underlying report is required.*

On April 20, 2010, 11 workers died and 17 were injured on the Deepwater Horizon. The spill caused massive environmental contamination and enormous economic damage.

The CSB is entrusted by the American people to do all that we can do to prevent such catastrophes. The CSB recommendations at issue, if implemented, can help prevent the next disaster.

I urge Board Members to 1) vote not to approve the status change proposal; 2) to subsequently make the proposed language clarification through approval of a new Notation Item (without revising the underlying report); and 3) to make renewed efforts to engage BSEE about these important recommendations.

Incident Review

On April 20, 2010, a multiple-fatality incident occurred at the Macondo oil well approximately 50 miles off the coast of Louisiana in the Gulf of Mexico during temporary well-abandonment activities on the Deepwater Horizon (DWH) drilling rig. Control of the well was lost, resulting in a blowout—the uncontrolled release of oil and gas (hydrocarbons) from the well. On the rig, the hydrocarbons found an ignition source and ignited. The resulting explosions and fire led to the deaths of 11 individuals, serious physical injuries to 17 others,¹ the evacuation of 115 individuals from the rig, the sinking of the Deepwater Horizon, and massive marine and coastal damage from a reported 4 million barrels of released hydrocarbons. BP was the main operator/lease holder responsible for the well design, and Transocean was the drilling contractor that owned and operated the DWH. On the day of the incident, the crew was completing temporary

⁴ Similar language in CSB's recommendations 2010-10-I-OS-11 through 13 say, "If funding, legislative authority, or other approvals are required to implement the recommended regulatory provisions in Recommendation R11 – R13, the Secretary of the Interior shall seek such authority from Congress or expedited hiring authority from the Office of Personnel Management." For R15, other agencies could include the Coast Guard, the Occupational Safety and Health Administration, and CSB.

*abandonment of the well so that it could be left in a safe condition until a production facility could return later to extract oil and gas from it.*⁵

Recommendation at Issue from Macondo Blowout and Explosion:⁶

2010-10-I-OS-15: Issue participation regulations and training requirements for workers and their representatives that include the following:

- a. Worker-elected safety representatives and safety committees for each staffed offshore facility chosen under procedures overseen by the regulator; these safety representatives will have the authority to interact with employers (such as operators and drillers) and regulators on issues of worker health and safety risks and the development and implementation of the major hazard report documentation;
- b. The elected worker representative has the right to issue an enforceable stop-work order if an operation or task is perceived as unsafe; all efforts should be made to resolve the issue at the workplace level, but if the issue remains unresolved, BSEE shall establish mechanisms such that the worker representative has the right and ability to seek regulator intervention to resolve the issue, and the regulator must respond in a timely fashion;
- c. The regulator will host an annual tripartite forum for workforce representatives, industry management, and the regulator to promote opportunities for interaction by all three entities on safety matters and to advance initiatives for major accident prevention.
- d. Protections for workers participating in safety activities with a specific and effective process that workers can use to seek redress from retaliatory action with the goal to provide a workplace free from fear that encourages discussion and resolution of safety issues and concerns. Protected activities include, but are not limited to reporting unsafe working conditions, near misses, and situations where stop work authority is used.

*Status: Status: Open - Awaiting Response or Evaluation/Approval of Response
Proposed CSB Staff Recommendation: Closed – Reconsidered/Superseded.*

⁵ Page 6, CSB, Investigation Report Executive Summary, *Drilling Rig Explosion and Fire at the Macondo Well*, Report No. 2010-10-I-OS, April 2016. http://www.csb.gov/assets/1/19/20160412_Macondo_Full_Exec_Summary.pdf

⁶ Pages 120-121, CSB, *Investigation Report, 4, Drilling Rig Explosion and Fire at the Macondo Well...* This 4-part recommendation was approved on April 17, 2016. See, generally, Macondo investigation reports and other information at <http://www.csb.gov/macondo-blowout-and-explosion>

Statement

I calendared Notation Item 2018-02 on October 10, 2017 and this proposal was discussed at the CSB public business meeting on October 16, 2017. I do not concur with the CSB Recommendations staff status change proposal to close Recommendation 2010-10-I-OS-15 as “Closed-Reconsidered/Superseded”. Nor do I agree with the Department of Interior’s Bureau of Safety and Environmental Enforcement’s (BSEE) reasons to reject the CSB investigation staff’s considered and adequately documented rationale for CSB proposals for worker participation and whistleblower protection.⁷

Context

According to the Report to the President on the BP Deepwater Horizon Spill, “Offshore oil and gas exploration and production are risky.”⁸ BSEE incident statistics indicate the numbers of reported incidents on the Outer Continental Shelf from fiscal years 2011 through 2016:⁹

Fatalities	13
Injuries	1,419
Loss of Well Control	26
Fires/Explosions	687
Spills >50 bbls	34
Lifting Events	1,000
Gas Releases	124
Evacuation/musters	324

Worker Participation is Essential to Safety

Safety cannot be achieved without the meaningful engagement of workers.

According to the Center for Chemical Process Safety of the American Institute of Chemical Engineers, which is funded by its member companies (including BP):

⁷ Pages 54-70, CSB, *Investigation Report, Vol. 4, Drilling Rig Explosion and Fire at the Macondo Well...*

⁸ Page 218, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 2011. *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling, Report to the President.*

⁹ BSEE, *Offshore Incident Statistics*, <https://www.bsee.gov/stats-facts/offshore-incident-statistics>.

“Those workers directly involved in operating and maintaining the process are most exposed to the hazards of the process.”¹⁰ Moreover, “...these workers are potentially the most knowledgeable people with respect to the day-to-day details of operating the process and maintaining the equipment and facilities, and may be the source for some types of knowledge gained through their unique experiences.”¹¹

The American National Standards Institute and the American Industrial Hygiene Association in ANSI/AIHA Z110 (2012) say: “Effective employee participation should include a role in activities such as incident investigations, procedure development health and safety related audits, training development, job safety analysis, use of occupational risk management processes, and all aspects of the planning process.”¹² The standard also says: “Examples or barriers [to worker participation] include lack of response to employee input or suggestions, reprisals (supervisory and/or peer), or any policy, practice, or program that penalizes or discourages participation.”¹³ The Committee that developed this consensus standard includes the American Petroleum Institute and BP.

Past CSB incident investigation reports made recommendations to strengthen worker participation, including Motiva (2002), BP Texas City (2007), Valero (2008), Tesoro (2014), DuPont (2015), Chevron (2015), and Williams (2016). The CSB said in a 2014 document prepared for OSHA: “The CSB believes that workforce involvement is a key element of improving process safety and accident prevention.”¹⁴

And when BSEE issued their own Safety and Environmental Management Systems rule revisions in 2013, the agency itself demonstrated support for employee engagement through new provisions for an employee participation plan, employee stop work authority, and employee incident reporting.¹⁵

¹⁰ Page 124, *Guidelines for Risk-Based Process Safety*, Center for Chemical Process Safety, 2007.

¹¹ Ibid.

¹² Page 7, *American National Standard-Occupational Safety and Health Management Systems*, ANSI/AIHA Z10 Committee, American Industrial Hygiene Association/American National Standards Institute, Approved June 27, 2012.

¹³ Ibid, page 8.

¹⁴ CSB, March 31, 2014. *Response to the U.S. Occupational Safety and Health Administration’s December 9, 2013, Request for Information on revisions to the OSHA Process Safety Management Standard*, at http://www.csb.gov/assets/1/16/CSB_RFComments.pdf

¹⁵ Pages 20439-20443, *Part 250-Oil and Gas and Sulphur Operations in the Outer Continental Shelf*, Department of the Interior, Bureau of Safety and Environmental Enforcement, Federal Register, Volume 78, No. 66, April 5, 2013.

Despite the Deepwater Horizon disaster, offshore incidents continue. BSEE has limited resources and can investigate relatively few of them.¹⁶ The need for greater worker participation in incident investigation and in all aspects of prevention remains critical.

Whistleblower Protection is Prerequisite to Worker Participation

The Occupational Safety and Health Act and more than twenty other federal laws, and numerous state laws, offer some degree of protection to whistleblowers for speaking out about hazards to management, government agencies, and the public. Thousands of whistleblowers file complaints of illegal retaliation every year under the authority of these laws.¹⁷

As Jordan Barab, former Deputy Assistant Secretary of Labor for Occupational Safety and Health (OSHA), said during our October 16, 2017, public meeting, “You can’t actually have worker participation unless you have some protection for workers who are participating.”¹⁸ There is evidence of retaliation against whistleblowers who speak out concerning site safety in the Gulf of Mexico, but no effective measures for penalized workers to gain redress.^{19,20}

Since the severe decline in crude oil prices in 2014, offshore oil and gas worker employment has plummeted. For example, total work hours by drilling contractors on the Outer Continental Shelf went from 54.9 million work hours in 2014 to 30.8 million hours in 2016.²¹ Workforce cutbacks increase economic fears among workers,

¹⁶ *Fire Incidents in Offshore Oil and Gas Rigs: Analyses of Incident Investigation Reports*, S. Zohra et al, Mary Kay O’Connor Process Safety Center, Poster Session, October 24, 2017 based on unpublished manuscript.

¹⁷ *Retaliation Cases Received by OSHA, FY2006-2016*, Whistleblower Investigation Data, at <https://www.whistleblowers.gov/3DCharts-FY2006-FY2016.pdf>

¹⁸ Page 78, meeting transcript, at http://www.csb.gov/assets/1/7/CSB_-_Business_Meeting_-_10-16-17_PDF.pdf

¹⁹ BSEE, November 4, 2013. *BSEE Panel Report 2013-002, BSEE Investigation of November 16, 2012, Explosion, Fire, and Fatalities at West Delta Block 32 Platform E*. No worker invoked his “stop-work” authority despite apparent anomalies. The Panel found evidence, immediately prior to welding, one of the GIS workers asked the others if they smelled gas. The Panel found no evidence the other workers responded or that anyone took steps to suspend operations to investigate further. Some of the construction crew workers for GIS expressed concerns about the possibility of one of the gas detectors not functioning properly. There was no clear explanation of what was done to remedy this situation. Throughout the course of BSEE panel interviews several GIS and DNR employees expressed a fear of losing their jobs. The GIS and DNR employees worried that if they continued to “complain” about work related issues while working on the WD 32 platforms, they would be sent home.

²⁰ Certain limited whistleblower provisions in the Clean Air Act and other statutes may apply, as noted in our report Volume 4, but they do not cover site safety concerns.

²¹ Page 6, <https://www.bsee.gov/sites/bsee.gov/files/safety-and-environmental-performance-data-for-industry-benchmarking-9-11-2017.pdf>

diminishing the likelihood that incidents, hazards, and potential risks are discussed and reported.²²

Declining oil prices worldwide have also affected conditions in the North Sea. While there is no comparable survey of non-union U.S. workers, a survey of 700 North Sea offshore workers by Unite, Scotland's major offshore union, found that 38.5 percent said they had been placed in a position where they have been unable to report an incident for fear of victimization.²³

According to *Beyond Compliance, Strengthening the Safety Culture of the Offshore Oil and Gas Industry*, a 2016 report by the National Academies of Sciences, Engineering, and Medicine:²⁴

Effective employee participation is a key element of the safety culture assessment process and successful follow-up actions. Yet despite this critical role, workers may be hesitant to participate because their opinion has not always been valued. In addition, workers may fear that reporting safety issues or making negative comments could jeopardize their job, create conflict in the workplace, increase workload for themselves or their coworkers, and fail to result in improvements. Front-line employees need a feeling of “psychological safety” to be willing to disclose difficult conditions or events without fear of being embarrassed by their peers or punished by their managers.

Effective whistleblower protection remains prerequisite for workers to help prevent the next disaster.

²² Pages 383-402, Probst, Tahira M., 2013, *The Relationship Between Job Insecurity and Accident Under-Reporting: A Test in Two Countries*, Work and Stress, Vol. 27, No. 4.

²³ *Offshore Workers Fear for their Health and Safety*, Unite, December 21, 2016 at <http://www.unitetheunion.org/how-we-help/listofregions/scotland/latestnews/offshore-workers-fear-for-their-health-and-safety/> The survey also found that 58.5 percent of offshore workers said standards had dropped, with 38.2 per cent saying they had stayed the same and just 3.2 per cent saying they had improved. And 82.8 per cent of workers said there was a reduction of skilled personnel, which has created issues around productivity and the ability to perform work tasks.

²⁴ Pages 37-38, *Beyond Compliance: Strengthening the Safety Culture of the Offshore Oil and Gas Industry*, Committee on Offshore Oil and Gas Safety Culture; Policy Studies; Transportation Research Board; National Academies of Sciences, Engineering, and Medicine, 2016.

Reasons for Opposing Status Change

There are eight reasons why I oppose the proposed status change to “Closed-Reconsidered/Superseded” as follows:

- 1) The CSB Recommendations Department proposal does not fully consider the clear statutory authority and mandate of CSB to issue reports and studies, including analyses of gaps in regulatory safeguards.
- 2) The Recommendations Department does not consider evidence provided in CSB Investigation Reports Volumes 3 and 4, including underlying documentation, as well as from other sources, that poor communication, inadequate worker participation, and absence of whistleblower protection were factors that could have contributed to this incident.
- 3) The Recommendations Department proposal applies an exceedingly narrow understanding of incident causation, which is inconsistent with our enabling statute and CSB policy.
- 4) The Recommendations Department and BSEE have failed to make a convincing case that BSEE does not have statutory authority to enhance worker participation.
- 5) The Recommendations Department and BSEE incorrectly assert that other agencies, such as the Department of Homeland Security and the Department of Labor, have the primary authority to address these matters and that the recommendations were issued to the wrong recipient.
- 6) The Recommendations Department incorrectly asserts that if this recommendation were implemented, “...it would be duplicative and inefficient for the federal regulator, as well as confusing to the federal regulator, the regulated industry, and the public at large.”
- 7) BSEE incorrectly asserts that worker safety committees are characteristic of a “safety case” regime not utilized in the United States.

- 8) BSEE, with CSB Recommendations Department concurrence, wrongly rejects the CSB's proposed enhancements to BSEE's Safety and Environmental Management Systems (SEMS) rule, asserting that our recommendations are "prescriptive" rather than "performance-based", and implies that prescriptive regulations are inappropriate.

I will now expand upon these eight points.

1) The CSB Recommendations Department proposal does not fully consider the clear statutory authority and mandate of CSB to issue reports and studies, including analyses of gaps in regulatory safeguards.

According to our enabling statute in the 1990 Clean Air Act amendments, The Board shall, in part:

*investigate ..., 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;*²⁵

But the CSB's statutory role does not end with the investigations of specific incidents. In addition, CSB is to:

*issue periodic **reports** [emphasis added] to the Congress, Federal, State and local agencies, including the Environmental Protection Agency and the Occupational Safety and Health Administration, concerned with the safety of chemical production, processing, handling and storage, and other interested persons recommending measures to reduce the **likelihood or the consequences** [emphasis added] of accidental releases and proposing corrective steps to make chemical production, processing, handling and storage as safe and free from risk of injury as is possible...*²⁶

²⁵ 42 U.S.C. 7412(r)(6)(C)(i)

²⁶ 42 U.S.C. 7412(r)(6)(C)(ii)

Moreover, CSB “is authorized to conduct research **and studies** [emphasis added] with respect to the potential for accidental releases, **whether or not an accidental release has occurred** [emphasis added], where there is evidence which indicates the presence of a potential hazard or hazards.”²⁷ This statutory authority informed the analytic approach of CSB’s Macondo investigation. Volume 4 of the Report says on page 12, “The CSB’s preventive mission as a federal agency is to reduce chemical hazards as broadly as possible (e.g., through recommendations that will effect national preventive changes).”²⁸

Volume 4 of the Macondo report is a regulatory gap analysis report or study that identifies weaknesses in regulation and proposes national preventive changes. It is based, in part, on extensive research of how other advanced industrial nations that are major offshore oil producers approach offshore safety.

2) The Recommendations Department does not consider evidence provided in CSB Investigation Reports Volumes 3 and 4, including underlying documentation, as well as from other sources, that poor communication, inadequate worker participation, and absence of whistleblower protection were factors that could have contributed to this incident.

Volume 3 demonstrates that there was inadequate communication between the well operations crew, mudloggers, and shore engineering staff, as well as between BP (operator), Transocean (drilling contractor), and Sperry Sun (mudloggers).²⁹

Moreover, Volume 3 offered evidence that there could have been worker fear of management retaliation for reporting safety issues among some workers. To quote our report, citing a culture/climate review of Transocean’s North American Division (including the Deepwater Horizon) commissioned by the company

²⁷ 42 U.S.C. 7412(r)(6)(F)

²⁸ Page 12, Volume 4, *Drilling Rig Explosion and Fire at the Macondo Well...*

²⁹ *Ibid*, *Investigation Report, Vol. 3, Drilling Rig Explosion and Fire at the Macondo Well...* See, especially, 1.6 *Phase 4 -Troubleshooting, Multiple Activities, and Communication Gaps Obscure Well Conditions*, pages 63-65; 1.7.1.1 *Role of Mudlogger*, pages 72-74; 1.7.2 *Case Study for NTS: Conversation Between Well Site Leader and Onshore Engineer*, pages 76-81; 1.8 *Work-as-Imagined Versus Work-as-Done: The Operator/Drilling Contractor Gap*, pages 83-85; 1.8.1 *BP’s Development and Communication of the Temporary Abandonment Plan*, pages 85-92.

months before the Macondo incident, after the company had four separate deaths:³⁰

*Transocean required all personnel to monitor work practices and workplace conditions. All Transocean rig personnel were required to participate by each submitting a START observation card daily where they describe observed positive or negative work practices. Such reporting requirements are susceptible to underreporting due to the **perceived negative potential consequences of candid self-reporting** [emphasis added]. This was true on the Deepwater Horizon, where some individuals reported hesitation about writing START observations. Crewmembers stated they did this **out of a fear of discipline or reprisal** [emphasis added] for being observed breaking a safety rule and that completing the START cards according to the “one a day” rule resulted in unnecessary observations, which in turn diluted the efficacy of actual worker concerns.³¹*

As Transocean workers conveyed in CSB interviews, “I’ve seen guys get fired for someone [writing] a bad START card about them, ... I’ve seen the people get fired for it;” “they wrote [a START card] on me and turned it in, and I was called into the office the next day and chewed up one side and down the other,” and “people [tried] not to rat people out so to speak, you know like you wanted to be helpful, [...] whereas some of the higher-ups in the office, they kind of wanted to weed out problems ...”³²

³⁰ Internal Company Document, Transocean, *Transocean Launches Evaluation Safety and Processes and Culture*, October 21, 2009, TRN-MDL-04335708,

<http://www.mdl2179trialdocs.com/releases/release201303211200016/TREX-52646.pdf>

³¹ In interviews, Transocean crew members conveyed to the CSB that they were given 15 minutes on each shift to fill out a START observation card. This requirement was also reflected in some of the publicly available interview notes, e.g., Internal Company Document, Transocean, *Interviewing Form*, June 24, 2010, p 5, TRN-INV-00000300. See Exhibit 3339 http://www.mdl2179trialdocs.com/releases/release201304041200022/Bertone_Stephen-Depo_Bundle.zip. See also Footnote 521, *Investigation Report, Vol. 3, Drilling Rig Explosion and Fire at the Macondo Well...*

³² *Ibid*, Footnote 522.

An inspection of Transocean rigs by the United Kingdom's Health, Safety, and Environment inspectorate in 2009, after interviewing 150 rig staff, found that:

*However, there are several areas where Transocean falls short of HSE's expectations. It is unfortunate that perhaps the most prominent and consistent indicator of Transocean's organizational culture is one of discipline, blame and zero tolerance. Although a culture of leadership, compliance and accountability as an objective is not undesirable, there is an imbalance between the emphasis on management and employee responsibilities in assuring health and safety. Furthermore, the manner by which the desired culture has been communicated to staff has, in some cases, been inappropriate and unhelpful.*³³

*And that, at 5., Unfortunately, unacceptable behaviors by offshore management were raised on more than one rig visited. These behaviors included bullying, aggression, harassment, humiliation and intimidation. OIMs and other managers are perceived to condone such behaviors through their inaction. Staff affected feel unable to raise these issues.*³⁴

*Personnel on all rigs are concerned that they will be punished should they be involved in an accident ("running people off the rig like it was 20 years ago", "culture of fear", "relief when you get through 12 hours without doing something wrong", "muck up once and you're gone", "one strike and you're out", "zero tolerance policy" and "one thing and you're off").*³⁵

Of all the cultural indicators that I have observed in the company, this is by far the most prominent [emphasis added].³⁶

Admittedly, there is also contradictory evidence in CSB documentation which suggests that a healthy safety culture existed on the Deepwater Horizon.

³³ Page 3, *Specialist Inspection Report*, Offshore Division Human and Organizational Factors Team, Transocean-Human and Organizational Factors Intervention, www.hse.gov.uk/humanfactors, by Martin Anderson, Specialist Inspector, July-October 2009, CSB Investigation Files.

³⁴ *Ibid.*, page 4.

³⁵ *Ibid.*, page 18.

³⁶ *Ibid.*, page 18.

However, even if just a very small percentage of workers on the rig were afraid to speak up for any reason, this would be an adequate enough reason for CSB to support whistleblower protection.

The CSB clearly found inadequate communication about safety issues. Inadequate communication can be remedied, in part, by effective worker participation, such as through our recommendations to establish safety representatives and safety committees. *It is impossible, however, to have effective worker participation without whistle blower protection.*

Other investigations also revealed that Deepwater Horizon workers had safety concerns prior to the explosion. Jason Anderson, who died when the rig exploded, had told both his wife and father that working conditions were not safe on the Deepwater Horizon. According to his widow Shelley's testimony before the U.S. Senate Commerce, Science and Transportation committee, Jason was reluctant to talk about these concerns while on the rig and told her: "I can't talk about it now. The walls are too thin."³⁷ This fear was so strong that Jason reportedly talked to Shelley about his will and getting his affairs in order not long before the explosion.

As former U.S. Representative George Miller of California said in support of the *Offshore Oil and Gas Whistleblower Protection Act* a few months after the Gulf disaster: "There is no good policy reason for treating onshore and offshore workers differently. This is because a whistleblower may be the only thing standing between a safe workplace and a catastrophe."³⁸

3) The Recommendations Department proposal applies an exceedingly narrow understanding of incident causation, which is inconsistent with our enabling statute and CSB policy.

The CSB's enabling statute mandates our agency to "*Investigate ... determine and report to the public in writing **the facts, conditions, and circumstances and the***

³⁷ Page 3, *Floor Statement on H.R. 5851*, Offshore Oil and Gas Workers Whistleblower Protection Act, U.S. Representative George Miller, Chairman, House Education and Labor Committee, July 29, 2010, 6:31 P.M.

³⁸ *Ibid*, page 1.

cause or probable cause [emphasis added] *of any accidental release resulting in a fatality, serious injury or substantial property damages.*”

The law does not say that CSB should only investigate the specific *technical* facts that were the immediate cause of the incident. The law directs us to consider ***the facts, conditions, and circumstances and the cause or probable cause...*** [emphasis added]

Moreover, the statute’s legislative history says, and I quote:

*The Board should take on “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 (and which may effectively be modified to improve safety) are circumstances of concern. “Multiple causation” is, in fact, the norm and it is expected that the Board will follow many strands of inquiry in response to each accidental release.*³⁹

In addition, Procedure G of CSB Board Order 40, unanimously approved by the Board on December 7, 2011, takes a broad view of causation to include factors such as the actions or inactions of the corporation, industry, government, and society, and reflects current investigative theory which addresses technical, organizational, and societal causes, including regulatory gaps. The procedure says that the logic tree tool used in CSB investigations should incorporate factors that caused **or allowed** [emphasis added] the incident to occur.⁴⁰

CSB Board Order 22, unanimously approved by the Board on January 28, 2015, says that: “Recommendations shall seek preventive actions in societal, regulatory, technical, management system, organizational, and human or other factors associated with incidents or hazards.”⁴¹

³⁹ P.L. 101-549, *Clean Air Act Amendments of 1989*, Senate Report 101-228, December 20, 1989, page 6.

⁴⁰ Board Order 40, *Procedure G, Causal Analysis*, pages 1 and 4.

⁴¹ Board Order 22, section 6, “Definitions,” subsection a.

Moreover, Board Order 22 says that “...the Board issues recommendations based on the finding and conclusions of incident or hazard investigations, safety studies, or similar evidence.”⁴² And further, that “Recommendations proposed to the Board should: i. Describe a clear rationale that links the findings of an investigation, study, or similar product with explicit conclusions that factually support the need and basis for the recommendation...”⁴³

Volume 4 of the Macondo report concludes that greater worker involvement and whistleblower protection could help, to again quote our enabling statute, “...to reduce the likelihood or the consequences of accidental releases.”

4) The Recommendations Department and BSEE have failed to make a convincing case that BSEE does not have statutory authority to enhance worker participation.

BSEE asserts lack of authority, in part, for its unwillingness to adopt CSB recommendations.

Its Safety and Environmental Management Systems rule (30 CFR Part 250), however, clearly *does* address worker participation.⁴⁴ Under these rules, management must: consult with their employees on the development, implementation, and modification of their SEMS program; develop a written plan of action of how employees will participate in SEMS program development and implementation; and ensure employee access to the SEMS program.

Additionally, the rule includes provisions for employee stop-work authority under some circumstances and for employees to report unsafe working conditions.

In correspondence from BSEE to the CSB Recommendations Department, BSEE says that Recommendation 15 cannot be addressed since it is “**likely**” [emphasis added] that BSEE lacks the statutory authority and that it is “**not clear**” [emphasis added] that BSEE has statutory authority.

⁴² Ibid. section 7, “Recommendation Development and Evaluation Policies,” subsection b.

⁴³ Ibid, paragraph i.

⁴⁴ BSEE cites its authority for this rule as 30 U.S.C. 1751; 31 U.S.C. 9701; and 43 U.S.C. 1334.

In contradiction, BSEE correspondence also states that: “The general concept of requiring the operator to maintain safety representatives and safety committees possessing certain responsibilities and authority aligns, to some extent, with certain elements of BSEE’s **existing regulatory authority** [emphasis added].”

In my view, BSEE’s analysis is at best unclear and confusing, and likely wrong.

I also note that BSEE did not provide CSB with a legal opinion that was prepared for the Bureau by the Department of Interior’s Solicitors Office, and that was cited in BSEE’s correspondence to CSB.

5) The Recommendations Department and BSEE incorrectly assert that other agencies, such as the Department of Homeland Security and the Department of Labor, have the primary authority to address these matters and that the recommendations were issued to the wrong recipient.

My analysis, in section 4 above, suggests that BSEE, in fact, does have authority to issue rules concerning employee participation. Specifically concerning whistleblower protection (paragraph d of our recommendation), the “...Recommendations staff concur with BSEE’s statutory analysis regarding their lack of authority with regard to extending whistleblower protection to offshore workers. Currently, OCSLA provides no such protection.”

The Department of Labor’s Occupational Safety and Health Administration maintains that OSHA does not have authority to adopt such whistleblower protection. Testifying before Congress in June of 2010, Dr. David Michaels, Assistant Secretary for the Occupational Safety and Health Administration, said: “...OSHA has no regulatory or enforcement authority over mobile oil drilling rigs or production platforms located on the Outer Continental Shelf where the Deepwater Horizon was located. Section (4)(b)(1) of the Occupational Safety and Health Act preempts OSHA from enforcing its regulations if a working condition is regulated by another agency of the Federal government.”⁴⁵

⁴⁵ Page 1, *Testimony of David Michaels*, Assistant Secretary for the Occupational Safety and Health Administration, U.S. Department of Labor, Committee on Education and Labor, U.S. House of Representatives, June 23, 2010.

Recognizing this lack of effective protection for offshore workers, the Obama Administration supported passage of the Offshore Oil and Gas Worker Whistleblower Protection Act of 2010. In a statement of administration policy, the Administration said, “There is currently no Federal law adequately protecting offshore workers who blow the whistle on worker health and safety hazards.”⁴⁶ On July 30, 2010, less than four months after the Deepwater Horizon disaster, the House of Representatives passed this bill with a strong bipartisan vote of 315-93.⁴⁷ Unfortunately, this bill did not progress in the Senate.

Last week, a similar bill, H.R. 4304, the Offshore Oil and Gas 5 Worker Whistleblower Protection Act of 2017, was introduced in the House of Representatives by Congressman Desaulnier.

No less than three reports, in addition to that of CSB, urge whistleblower protection for offshore workers.

In a report by the Department of Interior’s Outer Continental Shelf Oversight Board to the Secretary of the Interior in September 2010, the Oversight Board found that that: “Industry employees have limited whistleblower protection for disclosing safety violations”. They recommended: “Consider working with Congress to establish whistleblower protections specifically for individuals employed in private sector oil and gas companies who disclose safety and environmental violations.”⁴⁸

In the “Report to The President” by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling in January 2011, the Commission recommended to the Department of Interior and Congress that they:

Provide protection for ‘whistleblowers’ who notify authorities about lapses in safety. All offshore workers have a duty to ensure safe operating practices to prevent accidents. To

⁴⁶ *Statement of Administration Policy on H.R. 5851, Offshore Oil and Gas Whistleblower Protection Act of 2010*, Executive Office of the President, Office of Management and Budget, July 29, 2010.

⁴⁷ Democrats (247) and Republicans (68) both voted for the bill. See <http://clerk.house.gov/evs/2010/roll506.xml>

⁴⁸ Page 32, Report to the Secretary of the Interior, U.S. Continental Shelf Safety Oversight Board, September 1, 2010, Recommendation 12.

*ensure all workers, regardless of employer, will take appropriate action whenever necessary, Congress should amend the Outer Continental Shelf Land Act or specific safety statutes to provide the same whistleblower protection that workers are guaranteed in other comparable settings.*⁴⁹

In a report by the National Research Council in 2012, the Council recommended “...that BSEE establish a whistleblower program to help monitor the culture of safety at each installation...”⁵⁰

In June 2013, BSEE issued a “Safety Culture Policy Statement”. One of the nine tenets of this statement is that: “A work environment is maintained where personnel feel free to raise safety and environmental concerns without fear of retaliation, intimidation, harassment, or discrimination.”⁵¹

CSB Clarification Appropriate

CSB’s whistleblower recommendation to BSEE could have been more clearly stated. Our analysis *correctly* found that there was very limited protection from retaliation for offshore workers under some *environmental* laws, such as the Clean Air Act, and that statutory changes by Congress could be required to address offshore worker safety.

Our recommendation to the U.S. Department of the Interior, however, was worded as follows: *Issue participation regulations and training requirements for workers and their representatives that include the following:*

d. Protections for workers participating in safety activities with a specific and effective process that workers can use to seek redress from retaliatory action with the goal to provide a workplace free from fear that encourages discussion and resolution of safety issues and concerns. Protected activities include, but are not

⁴⁹Page 254, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 2011. *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling, Report to the President.*

⁵⁰Page 2, To Ensure Safety of Offshore Drilling and Production, Government Should Modify Oversight Practices, Focus on ‘Culture of Safety’, National Research Council Press Release, June 19, 2012.

⁵¹Safety Culture Policy Statement; Memo to BSEE Employees Nationwide, Bureau of Safety and Environmental Enforcement, U.S. Department of the Interior, Press Release, June 20, 2013, characteristic 6.

limited to reporting unsafe working conditions, near misses, and situations where stop work authority is used.

Our recommendation should have also included this clarification: **That if legislative authority is required to implement whistleblower protections, the Secretary of the Interior, working with other agencies, shall seek such authority from Congress.**⁵²

The Board can add these words (in bold type above) to the recommendation. *No revision to the underlying report is required.*

Moreover, CSB's lack of precise language should not have been the basis for BSEE to entirely reject *the intent* of our recommendation concerning this safety critical issue.

CSB's report identified a gap in effective whistleblower protection for offshore workers.⁵³ The appropriate remedy is not to close out the entire four-part recommendation as Reconsidered/Superseded, but to clarify CSB's language and further engage with BSEE and other agencies, such as the Coast Guard and OSHA, to seek opportunities for constructive resolution.

6) The Recommendations Department incorrectly asserts that if this recommendation were implemented, "...it would be duplicative and inefficient for the federal regulator, as well as confusing to the federal regulator, the regulated industry, and the public at large."

The CSB Recommendations Department maintains that CSB's proposal for enhanced stop-work authority (b) duplicates what BSEE already adopted in SEMS. A comparison of the BSEE SEMS provision and the CSB recommendation, however, shows that the CSB recommendation contains important enhancements. For example, if a hazard is unresolved at the workplace level, the

⁵² Similar language in CSB's recommendation R11 through R13 says, "If funding, legislative authority, or other approvals are required to implement the recommended regulatory provisions in Recommendation R11 – R13, the Secretary of the Interior shall seek such authority from Congress or expedited hiring authority from the Office of Personnel Management."

⁵³ Pages 64-67, CSB, 2016. *Investigation Report, Vol. 4, Drilling Rig Explosion and Fire at the Macondo Well...*

CSB proposal calls for regulator intervention to resolve the issue. The BSEE SEMS provision does not address regulator intervention.

7) BSEE incorrectly asserts that worker safety committees are characteristic of a “safety case” regime not utilized in the U.S.

Volume 4 of our report discusses the value of worker engagement mechanisms, such as safety representatives and committees, in the offshore oil industry in Norway, the United Kingdom, and Australia.

Correspondence from BSEE to CSB suggests that BSEE misunderstands that establishment of safety representatives and safety committees can be entirely independent of a “safety case” regime.

Federal and state laws in the U.S. are not based on a safety case approach. According to a 2013 study published in the American Journal of Industrial Medicine, “Health and safety committees are very likely the largest worker participation programs in the workplace... and there is extensive general support for this approach to reducing injuries and illnesses, including state laws that either require or provide incentives for health and safety committees,” regardless of whether these sites have a union or not.⁵⁴

Fourteen states require site-specific safety committees to be established by employers or for employers to be eligible for discounts on workers’ compensation premiums.⁵⁵

A U.S. Department of Labor Survey found that 62% of collective bargaining contracts in manufacturing industries included provisions for joint safety committees, with over 70% in the chemical and oil industries.⁵⁶

⁵⁴ Pages 163-179, American Journal of Industrial Medicine, V. 56, Morse, Tim (2013), *Characteristics of Effective Health and Safety Committees: Survey Results*. See also: Ruttenberg, Ruth (1988), *The Role of Labor-Management Committees in Safeguarding Worker Safety and Health*, BLMR 121, U.S. Department of Labor, Bureau of Labor-Management Relations and Cooperative Programs; and Yassi, Annalee (2012), *The Effectiveness of Joint Health and Safety Committees: A Systematic Review*, WorkSafe British Columbia.

⁵⁵ *Summary of State Safety and Health Program Activities*, Occupational Safety and Health Administration, April 2016 at https://www.osha.gov/shpguidelines/docs/Safety_and_Health_Programs_in_the_States_Summary.pdf These states are: Alabama, Connecticut, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oregon, Tennessee, Vermont, Washington, and West Virginia.

⁵⁶ Page 3, Ruttenberg, Ruth.

Workforce safety representatives exist in a wide range of industries, including oil refineries, chemical facilities, paper mills, and auto plants. For example, the United Steelworker’s Tony Mazzocchi Center Triangle of Prevention program⁵⁷ is a cooperative labor-management initiative and includes workforce safety representatives at sites owned by PBF, SCA, Axeon Refining, Shell Chemical, Valero, 3M, PES, Monroe, Tesoro, Chevron, Chevron-Phillips Chemical, Lyondell Bassell, Motiva, etc.⁵⁸

Safety Committees and safety representatives are well-accepted approaches to preventing hazards in a wide range of workplaces. They should be required on major installations in the Gulf of Mexico.

8) BSEE, with CSB Recommendations Department concurrence, wrongly rejects the CSB’s proposed enhancements to BSEE’s Safety and Environmental Management Systems (SEMS) rule, asserting that our recommendations are “prescriptive” rather than “performance-based”, and implies that prescriptive regulations are inappropriate.

SEMS, itself, is a hybrid regulatory system that includes both prescriptive and performance-based elements.

CSB’s recommendations are arguably both, as well. For example, the CSB proposal for worker-elected safety representatives, and safety committees for each staffed facility, leaves much to the discretion of BSEE rulemaking, including to what extent BSEE would address the selection process for safety representatives, the composition and size of the safety committee, the frequency of committee meetings and inspections, who chairs the committee, how minutes are taken, and other matters.

Labeling our proposals as “prescriptive” is a way to dismiss them without considering their merits.

⁵⁷ Pages 343-363, McQuiston, Thomas H., et al (2012) *Triangle of Prevention: A Union’s Experience Promoting A System of Safety Health and Safety Program*, New Solutions, Volume 22(3), 2012.

⁵⁸ *USW TMC Triangle of Prevention Site Directory*, October 2017, at <http://www.uswtmc.org/programs/triangle-of-prevention>.

Conclusion

Unfortunately, BSEE dismissed CSB's specific recommendations for greater worker participation and whistleblower protection. I do not concur with BSEE's position nor our Recommendations Department's agreement with BSEE's analysis.

On April 20, 2010, 11 workers died and 17 were injured on the Deepwater Horizon. The spill caused enormous environmental contamination and economic damage.

The CSB is entrusted by the American people to do all that we can do to prevent such catastrophes. The CSB recommendations at issue, if implemented, can help prevent the next disaster.

I urge fellow Board Members to:

- 1) Not approve the proposal to close R15 as "Closed-Reconsidered/Superseded".
- 2) Clarify the language in R15 paragraph d as follows by adding: "That if legislative authority is required to implement whistleblower protections, the Secretary of the Interior, working with other agencies, shall seek such authority from Congress."
- 3) Initiate renewed efforts to engage BSEE and other agencies about this recommendation.

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This individual work product and position statement reflects the views of Board Member Rick Engler and not those of the U.S. Chemical Safety Board.