



U.S. Chemical Safety and Hazard Investigation Board

MEMORANDUM

To: Vanessa Allen Sutherland, Chairperson
Rick Engler, Board Member
Manny Ehrlich, Board Member
Kara Wenzel, Acting General Counsel

From: Kristen Kulinowski, 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

At our public business meeting on October 16, the Board had a lively exchange of ideas surrounding this proposed recommendation status change. The subjects of this recommendation—worker participation in health and safety activities offshore and protections for whistleblowers who are subjected to retaliation for reporting safety violations—are important issues for the CSB and all who advocate safe working conditions. Our conversation in October, as well as subsequent commentary, stretched beyond the specific issues presented in the recommendation evaluation; i.e., causal link and appropriateness of the recipient, to issues of whether the Board **can** make recommendations absent a causal link and even, unfortunately, whether this Board is sufficiently committed to worker safety.

I'll address what I've taken away from my efforts to digest the information presented to the Board, shortly.

But first, here are some things to keep in mind:

The Decision before Us

- ***We must vote on the recommendation as written.*** We cannot make changes to the report, including the text of a recommendation, to reflect what anyone believes in hindsight it should have said then or should say today to achieve the safety objective I believe we all share (worker participation). This recommendation is actually four-in-one. We do not have the option of splitting them up to keep the ones we want open while closing the others. Even if the only action we wanted to take was to change a few words to redirect the recommendation to another Federal agency or the Congress, we cannot change it in any material way without voting to rescind the report, directing the staff to rewrite it, and voting to reissue it with a new recommendation. We may at some future date consider doing this but those theoretical potential future actions have no bearing on the specific decision before us.

- ***We must assess the recommendation evaluation as written.*** We have several options for changing the status of a recommendation, including changing it Closed-Unacceptable Action, indicating the Board still agrees with the validity of the original recommendation yet the recipient remains firmly opposed to implementing it; or changing it to Open-Unacceptable Response, indicating a belief by the Board that the recipient can still be persuaded despite its initial rejection of the recommendation. These are not among the options available to us today. Our choice today is whether to vote YES, meaning the recommendation is Closed-Reconsidered; NO, meaning it remains Open-Awaiting Response; or ABSTAIN.

Conditions for a YES vote: According to Board Order 22, we must vote YES if the recipient rejects the recommendation based on a rationale with which the Board concurs. Of the conditions that trigger this status, the one of particular relevance to our decision is the conclusion of our Recommendations Department that the recommendation should have been directed to a different recipient. Another condition is when later facts indicate that the conclusions of the Board should be modified. One might suppose this could be applied to the question of causal link; i.e., the Board could reconsider the recommendation if it determined there was not a sufficient causal link to establish a foundation for making the recommendation. More on that later.

Conditions for a NO vote: We must vote NO if the recipient has not submitted a substantive response, or the evaluation by CSB staff of a response is pending, or the Board has not yet acted on staff recommendation of status. The recipient has submitted a substantive response and has repeated its position on the recommendation more than once so the first condition is not met. The staff's evaluation of the recipient's response is the very notation item we are discussing, so the second condition has not been met. The third condition is a placeholder that allows staff to mark a recommendation with a status directly after the report is approved. But I suppose the third condition could also pertain to a situation in which the Board wishes to direct the Recommendations staff to consider a different status change. In the case of this recommendation, a NO vote is not merely a request for more time to persuade the recipient, gather more information or amend the recommendation language; in contrast, it is an explicit rejection of the recommendation staff's analysis.

The Merits of the Recommendation Evaluation

I return to the way the decision before us was articulated during the October meeting. We were asked to consider two threshold criteria: (1) whether there was a causal link to the incident (and, by extension, whether our enabling statute or Board Orders even require one); and (2) whether the recommendation was directed to the correct recipient.

Causal Link

Does our enabling statute or do our Board Orders require a causal link?

The CSB's enabling statute states: "The Board shall ...investigate the *facts, conditions, and circumstances* and the cause or probable cause of any accidental release ..." [Emphasis added.] It also says we shall "issue periodic reports... recommending measures to reduce the likelihood or the consequences of accidental releases and proposing corrective steps to make chemical production ... as safe and free from risk of injury as is possible." My interpretation is that the phrase "investigate the facts, conditions, and circumstances" is separate from the issue of causation. Likewise, the mandate to issue periodic reports recommending safety measures broadly is not explicitly tied to causation.

CSB Board Order 22 states that "Recommendations proposed to the Board should: 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..." This is more ambiguous as we do not have clear definitions or consistent operational usage of the terms "findings," or "conclusions." In fact, we employ a number of different phrases in our reports to describe the *facts, conditions, and circumstances* we found during our investigation (e.g., "Key Lessons"). Without crisp definitions of these terms, there is room for interpretation of the Board Order.

The language in our statute and Board Order is broad enough that I would not reject the staff's analysis solely based on the argument that, in addition to *facts, conditions, and circumstances*, there must be a direct *causal link*.

Was there a causal link?

In reviewing the report and underlying documentation provided to the Board recently, I do find support for a conclusion that certain Deepwater Horizon workers feared getting someone fired for reporting an unsafe work practice and there were reports of bullying and intimidation within Transocean more broadly. There is also evidence of a safety culture within Transocean that placed too much responsibility for safety on the workers versus management. Negative perceptions were not universal, however, as third-party assessments found many positives about how Transocean engaged workers in safety activities. Nonetheless, I can accept our investigators' conclusion that worker engagement and whistleblower protections could have been stronger in Transocean generally and on the Deepwater Horizon specifically.

It is not possible to say there was a *causal link* between these cultural issues and the incident but I can accept a conclusion that there were *facts, conditions, and circumstances* that contributed to a less-than-ideal working environment for workers on the Deepwater Horizon, that these

conditions likely persist today in the offshore oil industry, and that a remedy is needed to fill this gap.

Recommendation Recipient

The second threshold for approval is whether these recommendations were directed to the correct recipient. The additional legal analysis we received since October does not change my original understanding that most of these recommendations were more appropriately directed to the US Coast Guard, with DOL/OSHA serving as a secondary level of enforcement. BSEE asserts it does not have authority to implement these recommendations and it would appear to be correct on some of the provisions, if not all of them. Part d on whistleblower protection, for example, seems to be more appropriately addressed to the US Coast Guard, given current law.

Make no mistake, this is murky, given the history of the agreements between OSHA and the Coast Guard and BSEE's promulgation of SEMS II, which has some worker participation and stop-work authority provisions in it. It would seem a legislative clarification is needed.

I note that a bill has been introduced in the US House of Representatives to strengthen whistleblower protections for offshore workers. While an introduced bill is not a clear indication of Congressional intent and eventual action, it is noteworthy that this bill, as well as previous versions dating back to 2010, vests enforcement authority with OSHA. Moreover, a letter we received today from the drafter of that legislation explicitly acknowledges that, "the Department of Interior may not have the current legislative authority to complete this on their own..." I'm not sure I see why CSB would seek to force-fit this authority into BSEE, an agency that neither it nor Congressional drafters of pending legislation see as the appropriate one. The argument that we should do so to avoid creating a perception that we are retreating from worker protections in the offshore oil industry is spurious. It is possible to both support protections for offshore workers and to want them assigned to the appropriate authority. I agree with the drafters of the pending legislation that OSHA is that authority.

Conclusion

Let me conclude by saying that, regardless of the outcome of today's vote, I remain committed to strong worker participation as an essential component of major incident prevention. Should the motion pass, it would be erroneous to conclude that I am "giving up on" or "retreating" from this important issue. There is a clear gap in the statute and regulations that leaves offshore workers vulnerable to significant process safety incidents. That gap should be closed. Today's decision is a technical one based on facts and analysis and should be interpreted narrowly as such. It neither broadcasts some sea change in the views of the Board with respect to the importance of worker participation nor precludes us from taking any number of other steps to

signal our commitment to these issues. I look forward to exploring mechanisms of action by the Board in the near future.