

Written Statement for the
U.S. Chemical Safety and Hazard Investigation Board (CSB)
on Recommendations Made to the
Occupational Safety and Health Administration

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To CSB Board Members and Staff:

I am pleased that your agency has convened this public meeting. I regret that I am unable to attend in person.

The CSB has a vitally important public health mission, and workers' lives and communities are safer because of its activities. That mission has two key components. First, to investigate select industrial chemical explosions, unplanned toxic releases, spills and other catastrophic incidents for the purpose of determining what went wrong. Second, to make recommendations to organizations on preventative steps to avert similar incidents — and loss of life — in the future.

It's a testament to your staff and the value they see in the Board's recommendations that 76 percent of them have been acted upon by their recipients. That's why I'm confident in saying that workers' lives and communities are safer because of the CSB's diligence in seeing recommendations, or acceptable alternatives, implemented.

But still, nearly a quarter of CSB's recommendations have not been addressed satisfactorily. Rightfully so, the agency has been criticized for not doing more to press recipients that have failed to act on specific recommendations.^{1,2,3} The U.S. EPA's Inspector General warned of the consequences of that failure: "chemical accidents may not be prevented to the greatest extent possible."

With the recent deadly incidents in West, TX and Geismar, LA, I'm pleased to see the CSB discuss in a public forum the critical matter of unaddressed recommendations. The subject of today's discussion is recommendations made to OSHA. I hope in the months ahead, additional

¹ EPA Inspector General. Audit Follow-Up Process Needed for the U.S. Chemical Safety and Hazard Investigation Board, February 2013. http://www.epa.gov/oig/reports/2013/20130201-13-P-0128_glance.pdf

² EPA Inspector General. U.S. Chemical Safety and Hazard Investigation Board Should Improve Its Recommendations Process to Further Its Goal of Chemical Accident Prevention, August 2012. <http://www.epa.gov/oig/reports/2012/20120822-12-P-0724.pdf>

³ EPA Inspector General. U.S. Chemical Safety and Hazard Investigation Board Should Track Adherence to Closed Recommendations, March 2007. <http://www.epa.gov/oig/reports/2007/20070326-2007-P-00010.pdf>

public meetings will be held to review the status of recommendations made to other federal agencies,⁴ and other organizations.⁵

The CSB's July 12, 2013 *Federal Register* notice explains concisely the reason you are here today. It describes the circumstances leading to certain key recommendation and the rationale for them; the history of OSHA's response to the recommendations; and the CSB staff's evaluation of whether OSHA's actions to-date are consistent with or adequate to address the Board's recommendation.

CSB staff provide sufficient rationale for classifying seven recommendations previously made to OSHA as "Open-Unacceptable." Reclassifying the status to "Open-Unacceptable" informs the public that, in the CSB's expert opinion, the steps identified to prevent similar catastrophic incidents have not been taken. The public should have the benefit of that expert opinion. Failing to reclassify them implies the Board is satisfied with the timeliness and quality of recipient's response.

The CSB's credibility and value in the public's eye would be diminished if it did not press recipients to adopt its recommendations, especially those that set the bar high. Some recommendations are bound to face objections and push-back from recipients, but the CSB's role is to *advance* protections for workers and communities. Consequently, some recommendations will be challenging for recipients. I shudder to think about a CSB which would simply resort to issuing recommendations that it thinks will be easy for recipients to fulfill.

No matter the Board's ultimate decision about the classification of these recommendations to OSHA, most astute observers of today's meeting will ask this question: Why *hasn't* OSHA acted on the CSB's recommendations for regulatory improvements? Do OSHA's decision-makers think that the changes won't enhance protections for workers? Is the agency just stubborn? Of course not.

The problem lies, I believe, with a dysfunctional regulatory system which has made the act of issuing a new worker safety rule by OSHA a rare event. A GAO report issued last year explained that it takes an average of eight years for OSHA to issue a new health or safety standard.⁶ Topics for new OSHA rules languish in the pipeline for years, stuck there as Administrations come and go. In the last decade, OSHA has only issued four significant rules, three of which affected only a small number industries and employers. I can understand OSHA's reluctance to add to its clogged regulatory pipeline. Why agree to do something when past history shows you're not likely to accomplish it?

⁴ E.g., calling on the U.S. EPA to revise its Accidental Release Prevention Requirements (40 CFR 68) to explicitly cover catastrophic reactive hazards (2001-01-H-R3); calling on the U.S. Department of Transportation to expand its regulations to include chlorine railcar unloading operations (2005-6-I-LA-R1).

⁵ E.g., calling on the American Petroleum Institute and the United Steelworkers to develop a consensus ANSI standard with fatigue prevention guidelines for the refining and petrochemical industries that, at a minimum, limit hours and days of work and address shift work (2005-4-I-TX-7).

⁶ Government Accountability Office. "Workplace Safety and Health: Multiple Challenges Lengthen OSHA's Standard Setting," April 2012 (GAO-12-330.)

OSHA's regulatory dysfunction is not something new. Plenty has been written about the legal procedures and analytical hurdles faced by the agency. OSHA operates in what seems like a persistent anti-regulatory climate, with powerful industries, conservative think tanks and their friends on Capitol Hill insisting that regulations are economic poison. It's a sorry state of affairs for workers and communities when Members of Congress label all regulations as "job-killing," even those destined to protect people's lives. Sadly, even the Obama White House has engaged in its own anti-regulatory efforts. The Office of Management and Budget (OMB) has held captive for more than a year five worker safety proposed or final rules.⁷ Politics at both ends of Pennsylvania Avenue bears substantial blame for OSHA's regulatory dysfunction.

By changing the designation of certain unaddressed OSHA recommendations, the CSB is saying this situation is unacceptable. I hope it compels conversations on Capitol Hill among lawmakers who recognize the need for strong worker safety protections. What steps might they take to address OSHA's rulemaking obstacles? More importantly, I hope it compels action by the Obama Administration. Dozens of recommendations have been made over the years on steps the Executive Branch could take to repair OSHA's stagnant rulemaking system. One of the most systematic reviews of the OSHA process was conducted by the National Advisory Committee on Occupational Safety and Health (NACOSH). Their investigation took two years, and their report with concrete recommendations was issued in 2000.⁸ One of the most astute observations made during NACOSH's investigation came from an expert on occupational health and safety law. Her remarks were paraphrased as:

"There is a huge gulf between what the law requires OSHA to do and what OSHA has taken upon itself to do in the standard-setting process. ...OSHA keeps trying to set standards that are going to be immune from challenge in the courts, which is impossible to do and, therefore, a waste of time. ...OSHA should stop spending so much time searching for consensus when it was unlikely to be found."

There *are* steps the Administration can take to accelerate the snail's pace of OSHA rulemaking, but they are yet to show a willingness to do so. One of the first steps — and one they could take today — is to end OMB's obstruction of the issuance of OSHA's proposed and final rules. With only three years left in the Obama Presidency, OMB must give the regulatory process at OSHA a chance to function. When OSHA rulemaking is permitted to operate, the agency has demonstrated the ability to promulgate cost-effective and protective worker safety rules, even with the legal and analytical hurdles it faces. A functioning regulatory process should make OSHA less reticent about adding new topics to its list of needed regulatory improvements.

⁷ OSHA proposed rule on exposure to respirable crystalline silica, submitted to OMB on 2/14/2011; OSHA proposed rule to modernize its injury and illness reporting system, submitted to OMB on 11/22/2011; MSHA proposed rule on proximity detection systems for mobile machines in underground mines, submitted to OMB on 9/16/2011; MSHA proposed rule on assessment of civil penalties, submitted to OMB on 12/2/2011; and OSHA final rule on personal protective equipment involving electric power transmission and distribution, submitted to OMB on 6/27/2012.

⁸ National Advisory Committee on Occupational Safety and Health. "Report and Recommendations to OSHA's Standards Development Process," June 2000. <https://www.osha.gov/dop/nacosh/nreport.html#SUMMARY>