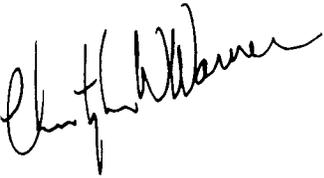




# U.S. Chemical Safety and Hazard Investigation Board

## Office of General Counsel

### Memorandum

To: Board Members  
From: Christopher Warner   
Cc: Leadership Team  
Subject: Board Action Report – Notation Item 677  
Date: December 29, 2008

On December 23, 2008, the Board disapproved Notation Item 677, thereby disapproving the publication of the draft Advance Notice of Proposed Rulemaking, attached to the notation item, in the Federal Register.

### Voting Summary – Notation Item 677

**Disposition: DISAPPROVED**

**Disposition date: December 23, 2008**

	Approve	Disapprove	Calendar	Not Participating	Date
J. Bresland	X				12/23/2008
G. Visscher		X			12/24/2008
W. Wark		X			12/23/2008
W. Wright		X			12/23/2008



## Chemical Safety and Hazard Investigation Board

---

### Memorandum

To: Board Members

From: John S. Bresland

Cc: Leadership Team

Subject: Notation Item 677 – Extension of Voting Period

Date: December 19, 2008

As permitted by section 8.b.(2) of Board Order 001, I am hereby, at my discretion, extending by five workdays the due date for votes on Notation Item 677. This item was distributed on December 15, with an original due date of December 22. It provides for approval of publication of an Advance Notice of Proposed Rulemaking in the Federal Register.

With this extension, votes on Notation Item 677 must now be returned to the Office of General Counsel by the close of business on December 31. The item continues to be designated as “Urgent.” Please see me if you have any questions about this matter. Thank you.

## DISSENTING OPINION OF BOARD MEMBER WRIGHT –NOTATION ITEM 677

There are a number of reasons for my voting against this notation item. First, and foremost, there is insufficient background information provided in the package for me to make an informed decision on this notation item dealing with publication of an Advance Notice of Proposed Rulemaking. As presented it outlines in sketchy detail that our enabling legislation required the CSB to do this and now decades later we are getting around to it. There is little discussion on why we took past positions and why we may be taking an opposite tack now. Yet this is presented as an Urgent Notation Item. Initially issued with a vote date of Dec 22, 2008 but extended to close of business 31 Dec 2008. Why is this urgent? My preference is to have more details about what has been done historically as part of the package so I can make an informed decision vice fewer facts. I have also heard that there may have been roundtable meetings in the past where various alternatives were discussed (but this fact was not presented to us for consideration). It would be helpful to have this laid out in an Issue Paper format using bulletized points about what has transpired and why we are where we are now and why we are using this particular document to respond to the GAO recommendation regarding a reporting regulation.

Secondly, as written this Notation Item does not conform to what we told the GAO in the response letter Chairman Bresland signed out on July 11, 2008 where we stated *“The CSB will publish in the Federal Register a Request for Information (RFI) concerning a reporting regulation. The RFI will present various options for rulemaking and seek the views and opinions of our stakeholders on the best path forward. We intend to publish the RFI within the next three months. In addition, the detailed plan to conduct more investigations will include staffing and resource projections for staff to collect and analyze incident information.”* Based on this statement we appear to be changing course now and producing an ANPR vice RFI (yet no explanation was given us for this change either). Did we do poor staff work before when we stated we would do an RFI within 90 days or are we simply deciding to do an ANPR because we believe it is a better vehicle to get comments from others now? It is confusing to me what is happening here.

Thirdly, why did we take over 150 days to generate this four page double spaced draft ANPR that I believe fails to adequately explain our purpose and/or discuss options as we stated earlier we would do in pursuing this rule (our 11 July 2008 letter to GAO)? What changed our position here? Is it because our appropriators are looking for concrete actions from us with respect to this GAO report? Do we believe it will drive our budgets? If so, then why are we not advising the GAO of our intentions to do something different than what we said in our official correspondence back to them? Changing the format and vehicle (RFI to ANPR) without advising GAO and or the Hill may put us in a bad light with all concerned with respect to the report and our budgets. As it is now GAO does not put much faith in our ability to move forward with a rule anyway. As they have previously stated, *“We recognize that obtaining the views and opinions of CSB’s stakeholders could provide valuable information regarding the preparation of a reporting regulation. However, the request for information does not in itself provide assurance that CSB will follow through and issue a regulation as required by CSB’s authorizing statute. Specifically, the statute provides that the board “shall...establish by*

**DISSENTING OPINION OF BOARD MEMBER WRIGHT –NOTATION ITEM 677**

*regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction.”<sup>8</sup> CSB's comments concerning the need for such a regulation are not relevant because CSB is legally required to promulgate a regulation. In addition, we disagree with CSB about the regulation's usefulness. A reporting regulation would allow CSB to obtain more accurate, complete information to meet its statutory mandate. “*

Finally, if this is an important “urgent” issue for us then we should invest the necessary resources and manpower to flesh out the issue and make an informed decision on the way ahead. Sending this document forward for publication within the Federal Register without adequately staffing it internally and externally with the GAO and Hill may cause us more damage than benefit. Therefore I vote against this notation item for the above reasons.

A handwritten signature in black ink, appearing to read 'William E. Wright', written in a cursive style.

WILLIAM E. WRIGHT

**I have disapproved of Notation Item 677 as it is now written for the following reasons:**

**It suggests that the CSB is getting into the regulatory business. It could, in my opinion, diminish one of our strengths in conducting investigations; i.e. that we are a non-regulatory, independent body interested in finding root causes of incidents and preventing such incidents in the future, period. If we issue the rule with EPA as our enforcement arm, would EPA then be issuing fines on our behalf for non-compliance? Could change the perception of the Board and adversely affect its reputation currently enjoyed as an impartial, "honest broker" that lets the chips fall where they may in the course of determining root causes.**

**The legislation was drafted 18 years ago (or earlier) when many of the sources of info we have today didn't exist, or were in their infancy. Additionally, it could be argued that the data now collected by EPA, OSHA, ATSDR, and NRC is available and could serve to at least partially satisfy the intended purpose of the legislation.**

**If required to establish a full-blown new information collection program it will, in my opinion and experience, take on a life of its own and distract from the current focused, unambiguous and positive activities in which the Board is currently engaged**

**If we're forced into going this route, however, I believe there needs to be additional detail/background given in the ANPR with less onerous suggestions, such as that broached by Member Visscher to collect data on high consequence incidents. Additionally EPA and NRC/Coast Guard should also be given a heads up if it hasn't happened already.**

**Comments on Notation Item 677 – Advanced Notice of Proposed Rulemaking**

I have voted to approve the subject Notation Item for the following reasons:

1. The reporting rule is required by the 1990 Clean Air Act Amendments
2. The DHS IG has recommended that the CSB publish such a regulation
3. The GAO has recommended that we publish a regulation
4. In a meeting with the Chairman of our Appropriations sub-committee, Congressman Norm Dicks, he encouraged us to publish an incident reporting regulation and the CSB in response, committed to publishing the rule.



John Bresland

December 23, 2008