

Worker Participation in Investigations – Board Order Addendum 40a

October 24, 2018

1. PURPOSE. The success of the Chemical Safety Board’s (CSB) investigative mission depends in part on the robust participation of diverse parties, including the involvement of employees of all types, and their workplace representatives. Workers are often critical sources of information relevant to the investigation, and individual employees often serve as witnesses. Employee organizations often also possess unique information that is vital to understanding past events, and other facts and circumstances that may have given rise to a chemical incident. This Board Order Addendum establishes CSB policy for worker participation in CSB investigations.

2. EFFECTIVE DATE. This Board Order Addendum is effective upon passage by the Board.

3. SCOPE. This Board Order Addendum applies to all CSB employees directly involved with CSB incident investigations, and CSB Board Members.

4. ACCOUNTABILITY. The Executive Director of Investigations and Recommendations, Investigations Supervisors, the Director of Recommendations, and Investigators-in-Charge (IIC) will oversee adherence to this Board Order Addendum.

5. REFERENCES.

42 U.S.C. § 7412(r)(6)

29 U.S.C. § 657(e)

18 U.S.C. § 1505

42 U.S.C. § 7622

40 C.F.R. Part 1610

CSB Board Order 40, Investigations Program

CSB Board Order 47, Accident Victim and Family Communication Program

6. POLICY. This Board Order Addendum sets forth the policy of the CSB to ensure opportunities for the participation of workers and their workplace representatives in the agency’s investigative process. This policy is an addendum to CSB Board Order 40, Investigations Program.

The terms “workers” and “employees,” used interchangeably in this document, cover employees of all types, including corporate, facility, contract, and temporary employees; however, it does not apply to supervisors or managers, whether at the corporate or facility level.

7. WORKER PARTICIPATION IN CSB INVESTIGATIONS.

7.1 Engagement in Investigative Activities

In accordance with the CSB's enabling statute, regulations, and investigation protocols and procedures, the IIC of any given investigation shall offer a reasonable number of workers and/or their representatives the opportunity to participate in investigative activities, including, but not limited to:

1. Investigation opening meetings, status update meetings, and closing meetings;
2. Site walk-throughs and on-scene investigation activities;
3. Equipment, material, and sample evidentiary testing;
4. Employee witness interviews;
5. Document requests; and
6. Review of draft written reports and recommendations.

Note: Information asserted to be protected as trade secrets, Confidential Business Information (CBI), or security-sensitive information (SSI), by any entity being investigated by the CSB, shall be protected by the CSB per established legal and procedural requirements. Such information shall not be shared under the requirements established by this Board Order Addendum until after a determination has been made by the CSB that the information can properly be shared.

7.2 Collective Employee Involvement

Workers may be represented in various ways at any given facility.

1. If employees are represented by a union, investigation representatives are chosen by the union. Local unions may designate a national union staff member or a safety consultant to represent employees in one or more aspects of a CSB investigation in addition to local union participation.
2. In non-union facilities, there may be a health and safety committee with employee members who have been selected by employees. One of these individuals should be engaged in the investigation.
3. If the facility being investigated is not covered in 1. or 2., or if it is determined that other types of employees (e.g., contract employees) can provide meaningful contributions to a CSB investigation, then investigators shall consult with a reasonable number of those other types of employees, as chosen by CSB investigators, to ensure appropriate employee input into all significant issues.

7.3 Individual Employee Involvement

Employees also have the opportunity to be involved in an individual capacity in CSB investigations. For example, relevant employees will have the opportunity to serve as witnesses in CSB investigations. Employees may have in their possession documents, or other written materials, which CSB investigators may consider important evidence to request for production.

7.4 Notification of Deployment

Promptly after a facility is notified of a CSB investigation deployment, the Executive Director of Investigations and Recommendations ("Executive Director"), or his designee, shall determine if the employees at the facility are represented by one or more unions, and shall identify relevant local and

national union health and safety officials. Notice of deployment shall be provided to appropriate local and national union health and safety officials. If there is no union representation, the Executive Director should determine whether the facility has a health and safety committee with employee members, and, if so, should ask management to provide the CSB with a committee member contact.

7.5 Multiple Unions

If multiple unions represent employees or contractor employees at the facility, the CSB will extend an invitation to participate in the investigation to all unions with employees determined to be relevant to the investigation and any related health or safety issues at the facility. The CSB has discretion to determine the most effective and efficient means to involve all relevant unions in an investigation.

7.6 Meetings

7.6.1 Opening the Onsite Investigation

The IIC will often coordinate an opening meeting or meetings with the facility management, other companies involved (such as contractors), etc., to explain the investigation's purpose and process. When the CSB plans to initiate an opening investigative meeting with the facility management, or other companies involved in the incident (such as contractors), the CSB shall invite union representatives, and members of health and safety committees. The IIC will inform all parties of the CSB's approach to worker participation as explained in this Board Order.

7.6.2. Concluding the Onsite Investigation

When the CSB concludes its onsite activities, it is within the CSB's discretion to conduct a formal closing meeting. If conducted, the CSB shall invite the employee representatives in the same manner as the company representatives. Any communication should include an explanation of the CSB's process for engaging in a confidential review and feedback process on the CSB staff's draft report, recommendations, or other public document.

7.6.3. Separate Meetings

If management or employee representatives request separate opening, status update, or closing meetings, the IIC should hold separate meetings.

7.7 Site Walk-throughs and On-Scene Investigation Activities

The CSB shall make all reasonable efforts to provide employee representatives with an opportunity to accompany CSB investigators on any site inspection, site or process orientation, and, if appropriate, in any subsequent site walk-throughs or other on-scene activities of any location that may impact employees. If there is no union representative, or health and safety committee, at the discretion of the IIC, the CSB investigative team may also request the inclusion of a reasonable number of employees in any such walk-through activities. A site walk-through includes initial onsite activities such as: touring or receiving an orientation to a facility, conducting an initial review of process equipment involved in the incident, collecting samples that require immediate action to preserve evidentiary integrity, and taking any initial pictures or video footage of the site. If any of the parties are not amenable to an appropriate (safe and reasonable) site walk-through, or other on-scene activity plan, and any other associated terms

and conditions established by the CSB for the safe and efficient conduct of the investigative activities, those parties may be excluded. Such parties may also choose not to participate. After the site walk-through is accomplished, the IIC or designated investigation team members may, upon request, provide a summary briefing to those parties about the results of those activities.

7.8 Equipment, Material, and Sample Evidentiary Testing

Employee representatives, along with management representatives, shall be provided an opportunity to review and comment on proposed protocols for equipment and sample testing conducted as part of the CSB investigation. All parties will be afforded the opportunity to observe the testing.

7.9 Employee Witness Interviews

7.9.1 Interviews. Employees are often vital witnesses in CSB investigations. At the direction of the IIC, relevant employees may be interviewed in accordance with CSB regulations, investigative protocol and procedures. The CSB may interview employees and their representatives at any location outside of the workplace, as mutually agreed. CSB investigators will ensure that investigative activities involving speaking with employees, including all meetings, informal conversations, or interviews with employees and their representatives, are conducted in an atmosphere that is free from threats, intimidation, or coercion by any party. If disruptive or threatening behavior occurs during an interview, the CSB investigators will suspend the interview until the situation is appropriately resolved, which may include removing any disruptive individual(s).

7.9.2 Employee Representation. Employees may request to have a representative of their choice present during interviews. It is the right of the employee to choose his or her own representative. Interview representatives may include, but are not limited to, another non-supervisory employee, a union representative, an attorney chosen by the witness, or a family member. *See*, 40 C.F.R. Part 1610 - Representation of Witnesses in Investigations.

7.10 Document Requests

The CSB may request any relevant documents, in accordance with all CSB regulations and procedures, from employees or their workplace representatives. Document requests are usually done on a voluntary basis but can be formalized through the issuance of a subpoena.

7.11 Review of CSB Staff Draft Reports, Recommendations or Other CSB Public Documents

If the CSB intends to issue a draft report, recommendations, or other public document about an investigation, and elects to provide such draft documents to the entity being investigated in advance of public release, then local and national employee representatives will also be given an opportunity to review and comment on the draft documents, in accordance with CSB protocols and procedures.

To avoid unauthorized disclosures of trade secrets or confidential business information (CBI) or sensitive security information (SSI), as noted above, the CSB must first provide draft copies of reports, recommendations, or other publications it intends to release outside of the agency, to the company for review. Upon completion of the company trade secret/CBI/SSI review and CSB determination of its merit

under applicable law, the CSB will promptly provide employee representatives with the same document reviewed by the company, except for those portions – if any – deemed by CSB to be trade secret/CBI/SSI.

8. INTERFERENCE WITH EMPLOYEE PARTICIPATION. The CSB seeks to obtain all relevant information necessary for the successful completion of its investigations, including the gathering of information through witness interviews. CSB investigators will take all appropriate actions to ensure relevant witnesses are interviewed and/or deposed. If management representatives or other parties attempt to interfere with employee participation in the CSB’s investigation, the Executive Director, or his designee, shall remind the parties of the CSB’s statutory powers with respect to information gathering, and the agency’s statutory authority to provide employees and their representatives the opportunity to participate in agency investigations. The Executive Director, in consultation with the Office of General Counsel, will address, by all appropriate means, any continued interference with a CSB investigation. Any form of interference with CSB investigations may be reported to Federal law enforcement as obstruction of a Federal investigation.

9. WHISTLEBLOWER PROTECTION. The Clean Air Act provides that no employer may discharge, or otherwise retaliate against, any employee with respect to compensation, terms, conditions, or privileges of employment, for exercising his or her rights in proceedings covered under the Clean Air Act. While no federal regulation details the specific activities that are protected, examples may include: requesting a CSB investigation (irrespective of any decision by the CSB to open an investigation); supplying evidence or testimony in the course of a CSB investigation; identifying health, safety, or environmental concerns to CSB investigators; identifying potentially relevant evidence; and providing the names of individuals that the CSB may wish to interview.

The Occupational Safety and Health Administration (OSHA) enforces whistleblower protections provided under the Clean Air Act, the Occupational Safety and Health Act, and other federal laws. OSHA provides additional information at <https://www.whistleblowers.gov>.

U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

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