The Chemical Safety Board – Whither or Wither?
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Introduction

The United States Chemical Safety and Hazard Investigation Board, commonly known as the Chemical Safety Board or CSB (website [http://www.csb.gov](http://www.csb.gov)) is a tiny federal agency which is targeted for elimination by the Trump Administration. It has had a relatively short but impactful (and sometimes controversial) history. Some highlights:

- Although modeled on the National Transportation Safety Board (NTSB), and given a statutory mandate to investigate all significant chemical accidents, its budget is only a tenth of the NTSB. Can you say “unfunded mandate”?
- While nominally apolitical, the relations among the Board of the CSB, Congress and the President, not to mention outside interest groups, is highly politicized.
- The CSB’s investigation reports contain recommendations for actions on the part of companies, states, code & standard setting agencies, industry associations, and other federal agencies – especially OSHA & EPA. But both EPA & (especially) OSHA have had difficulties promulgating either new or revised regulations. In addition, the seeds of resentment of OSHA personnel toward the CSB may go back to the initial funding of the CSB, and have frequently been fertilized by CSB leadership – e.g., by lamenting the lack of progress in regulating reactive chemicals and dust explosivity.
- Under the leadership of Chairman Rafael Moure-Eraso, CSB management succeeded in unifying Congress – resulting in bipartisan demands for his resignation and removal of General Counsel Richard Loeb and Managing Director Daniel Horowitz. Reasons cited included evidence of whistleblower retaliation, using non-official emails for official business, and creating a toxic work environment with low morale.

Background and History

The following table summarizes some basic information about the CSB:

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<td>Funded</td>
<td>$4MM in 1998, up to $11MM for FY 2018</td>
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<td>Staffing</td>
<td>Currently 38, with 4 Board Members &amp; 15 Investigators</td>
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<td>Investigations</td>
<td>96 completed, 9 currently open</td>
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| Recommendations         | 657 closed: 97.6% acceptable or reconsidered; 2.4% unacceptable or no response  
152 open: 92.8% acceptable or awaiting response; 7.2% unacceptable                                               |
| Videos                  | 79 total, with 57 safety videos (15 of which are for 6 incidents)                                                                                                  |
The driving force in Congress behind both the initial legislation and the initial funding was the late Senator Frank Lautenberg of New Jersey. From the CSB’s website (bold added):

The Senate legislative history states: "The principal role of the new chemical safety board is to investigate accidents to determine the conditions and circumstances which led up to the event and to identify the cause or causes so that similar events might be prevented." Congress gave the CSB a unique statutory mission and provided in law that no other agency or executive branch official may direct the activities of the Board. Following the successful model of the National Transportation Safety Board and the Department of Transportation, Congress directed that the CSB's investigative function be completely independent of the rulemaking, inspection, and enforcement authorities of EPA and OSHA. Congress recognized that Board investigations would identify chemical hazards that were not addressed by those agencies. The legislative history states:

[T]he investigations conducted by agencies with dual responsibilities tend to focus on violations of existing rules as the cause of the accident almost to the exclusion of other contributing factors for which no enforcement or compliance actions can be taken. The purpose of an accident investigation (as authorized here) is to determine the cause or causes of an accident whether or not those causes were in violation of any current and enforceable requirement.

The composition and function of the Board of the CSB is specified in 42 USC 7412(6)(B) (bold added):

The Board shall consist of 5 members, including a Chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate. Members of the Board shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, toxicology, or air pollution regulation. The terms of office of members of the Board shall be 5 years. Any member of the Board, including the Chairperson, may be removed for inefficiency, neglect of duty, or malfeasance in office. The Chairperson shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board.

Despite its nominal creation in 1990, activation the CSB was ignored by President Bush (41), while President Clinton initially backed away from his effort to appoint Board Members, per a 2006 article by later Board Member Andrea Kidd-Taylor (The U.S. Chemical Safety and Hazard Investigation Board: Reflections of a Former Board Member, New Solutions, Vol. 16(4) pp. 419-428, 2006):

I was contacted initially by the Clinton Administration to become a member of the CSB in the spring of 1994 and the process for receiving clearance and confirmation as a presidential appointee began at that time. In the fall elections in 1994 and prior to my confirmation, the Democratic Party—which had
controlled Congress—suffered major defeats. As one consequence of the changed political make-up of Congress, the Clinton Administration in 1995 made the decision not to constitute or fund the board, even though three of the members who were nominated had been confirmed by the Senate. The Administration delegated the Board’s functions, but not its authority, to OSHA and the EPA.

Then in April 1995 a reactive chemical incident which resulted in five deaths occurred at Napp Technologies in Lodi, NJ. Since the CSB was inactive, investigation of this tragedy was done by a joint EPA/OSHA team under a Memorandum of Understanding, with a report finally being issued in Oct. 1997 (https://archive.epa.gov/emergencies/docs/chem/web/pdf/napp.pdf). From Andrea Kidd-Taylor’s article (bold added):

**Organized labor and public interest groups voiced their concerns regarding the inadequacy of the report, pointing out that there was no peer review of the report** in spite of the Clinton Administration’s assurances to Congress that the reports would be peer reviewed to provide a degree of independence. The Oil, Chemical and Atomic Workers International Union (OCAW)’s review of the report criticized OSHA and EPA for not using formal root cause analysis methodology in conducting the investigation and not mentioning management system failure as a major cause of the accident.

So it was that the CSB was activated in January 1998 using $4MM from the EPA’s budget, initially with a Chair and 3 Board Members. Andrea Kidd-Taylor summarized the CSB’s mission as follows:

CSB’s mission is to enhance the health and safety of workers and the public and to protect the environment by uncovering the underlying causes of accidental chemical releases, and using these findings and supporting research to promote preventive actions by both the private and public sectors. The mission is accomplished by:

- Conducting state-of-the-art investigations;
- Producing high-quality investigation reports;
- Conducting hazard, safety, and data studies;
- Issuing targeted recommendations; and
- Advocating effectively for these recommendations.

The board also conducts these specific activities: 1) provides technical information and assistance to business and industry on causes of and ways to prevent chemical incidents; 2) provides Congress and executive agencies with independent expert fact-finding and technical advice to assist in developing, implementing, and evaluating chemical safety policy and government-wide resource allocation decisions; and 3) responds to requests for information from Congress and executive agencies on various matters affecting chemical safety.

Fast forward to the 2017-18 and 2018-19 budgets proposed by the Trump administration (bold added):
CSB is an independent agency authorized by the Clean Air Act Amendments of 1990, whose mission is to investigate accidents at chemical facilities to determine the conditions or circumstances that led to the accident. Congress intended CSB to be an investigative arm that is wholly independent of the rulemaking, inspection, and enforcement authorities of its partner agencies in making recommendations on actions that can be taken to prevent similar accidents from occurring in the future. **While CSB has done some outstanding work on its investigations, more often than not, its overlap with other agency investigative authorities has generated unhelpful friction. In recent years, CSB’s recommendations have also been focused on the need for greater regulation of industry, which has frustrated both regulators and industry.** The pressure to tie investigations to management priorities culminated in whistleblower complaints that led to critical reports issued by both the Environmental Protection Agency Office of the Inspector General and the U.S. House of Representatives Oversight and Government Reform Committee. **While CSB’s new leadership is making progress on the previous management challenges, due to the duplicative nature of its work, the Budget recommends eliminating the agency.**

Per an article by George Zornick in the New York Times (September 1, 2017, **bold** added):

*But that isn’t true—the work is not performed elsewhere.* (In fact, it’s statutorily assigned to the CSB, and if Congress doesn’t repeal the 1990 Clean Air Act amendments that created the agency and its prerogatives, but simply defunded it, **no other part of the federal government could perform those tasks.**)


The current Board Members ([http://www.csb.gov/about-the-csb/board-members/](http://www.csb.gov/about-the-csb/board-members/)) were all installed in 2015. Their principal focus through 2016 was completing and issuing the backlog of investigations (without taking on many new
investigations), scheduling more frequent public meetings (and providing their transcripts), and addressing audit items by the EPA Office of Inspector General (e.g., https://www.epa.gov/sites/production/files/2016-06/documents/20160629-16-n-0221_glance.pdf), and increasing public “transparency” of CSB activities. In January 2017, Tom Zoeller – formerly Managing Director of the National Transportation Safety Board – was brought in as Senior Advisor, in effect to replace Daniel Horowitz. However, Mr. Zoeller was the subject of a CSB employee anonymous complaint to the EPA Inspector General in October 2017 (http://www.govexec.com/management/2017/10/small-agencies-employees-say-they-felt-pressured-report-improved-job-satisfaction/141898/):

The employee described a staff meeting last spring conducted by Zoeller in which the adviser said he had been informed by congressional staffers that if CSB’s [Federal Employee Viewpoint] survey [FEVS] results did not significantly improve, the agency might be eliminated. The CSB staff “took this as a direct threat to our jobs,” the employee said. “Mr. Zoeller never said we had to increase the scores, or that agency management would retaliate against us. He framed the matter as one where congressional committees would simply abolish the agency.”

The results of any investigation have not yet been forthcoming, but it did somewhat “take the shine off” the results which Ms. Sutherland touted:

I am pleased to see that the recent FEVS survey results - released by the Office of Personal Management - saw a significant increase in a number of important areas for the Chemical Safety Board (CSB). Of the six agencies with fewer than 1000 employees, our agency saw the highest increase in employee satisfaction – with a 22 point gain.

In February 2018, it was announced that Stephen Klejst of the NTSB was appointed as Executive Director in charge of the CSB’s investigations and recommendations staff. Per the CSB’s news release:

Mr. Klejst comes to the CSB after nearly ten years with the National Transportation Safety Board where he was deputy managing director and director of the agency’s railroad, pipeline and hazardous materials division. During his tenure with the NTSB, Mr. Klejst led the agency’s investigation of major pipeline accidents including the explosion of a major natural gas line in San Bruno, CA and the rupture of a hazardous liquid transmission line in Marshall, MI. Prior to joining the NTSB, Mr. Klejst had a distinguished executive career in the passenger railroad industry. He is a graduate of the University of Pennsylvania with a degree in chemistry and holds a master of science in management for the Stevens Institute of Technology in New Jersey.

Whither?

Despite the desire of the Trump Administration to eliminate it, the CSB – as an independent federal agency – has been able to submit their proposed annual budgets directly to Congress, with the latest being for FY 2019
This proposal asks for $12.1MM, and includes increasing headcount from 42 to 46 in both FY 2018 & FY 2019, one of which is a fifth Board Member (did you see that, President Trump?); also to be hired are a General Counsel and an Executive Director (Mr. Klejst?). The request summarized CSB 2017-18 achievements, including: six investigation reports issued; seven of eight listed current investigations to be completed with reports issued during 2018 (a ninth investigation was started just as the FY 2019 budget request was issued); and for FY 2017, closure of 43 recommendations and advancement of 74 others from 23 completed investigations. Particularly highlighted were two of three recommendations for which responses substantially exceeded recommendations: FEMA grants for food grade ammonium nitrate training for emergency responders; and American Society of Safety Engineers for approval of a revised confined space standard. Some specific plans mentioned were the following: seeking continued collaboration with Agencies (e.g., OSHA, NIOSH) and safety organizations (e.g., National Safety Council, the American Society of Safety Engineers and the American Industrial Hygiene Association) to raise awareness and understanding of the value of safety and health programs; continual improvement to promote organizational efficiency (e.g., by migration from aging IT hardware to “the cloud”); and live streaming of CSB public events, along with a one-time upgrade of audio-visual equipment. In summary:

The CSB is a modest Federal investment with a large potential return: improved safety practices and long term economic sustainability for all types of industries that use hazardous chemicals, which in turn better protects the environment and saves more lives.

All of this sounds good and worthwhile. The CSB has enjoyed recognition for some significant past successes (e.g., their pioneering use of safety videos), and is widely admired (even envied) by safety professionals outside the USA. However, there are some challenges:

- Presidents, starting with Bush (41) upon signing the 1990 Clean Air Act Amendments (CAAA) ([http://www.presidency.ucsb.edu/ws/?pid=19039](http://www.presidency.ucsb.edu/ws/?pid=19039)), have been cool to the CSB because of its independence:
  
  I strongly object to the bill’s restrictions on removal or review of the Chemical Safety Investigation Board. Although the Board’s principal functions are investigatory and advisory, it has also been given regulatory and enforcement authorities clearly assigned by the Constitution to the executive branch. As such, the provisions purporting to limit my authority to remove Board members and provide them with policy guidance raise serious constitutional questions.

- The CSB is being sued by several public interest groups concerning its failure to promulgate a regulation for chemical release reporting, as required by the 1990 CAAA ([https://www.peer.org/assets/docs/csb/12_7_17_PEER_suit.pdf](https://www.peer.org/assets/docs/csb/12_7_17_PEER_suit.pdf)). This has also been noted in several EPA Inspector General audits of the CSB (most recently [http://www.csb.gov/assets/1/7/2016_management_challenges.pdf](http://www.csb.gov/assets/1/7/2016_management_challenges.pdf)).
The CSB is currently contending that the plaintiffs do not have “standing” to bring suit. Ultimately, CSB’s response to the lawsuit may be similar to their response to the EPA Inspector General (bold added):

On June 25, 2009, CSB published an advance notice of proposed rulemaking in the Federal Register, seeking comments and information in advance of drafting a proposed regulation to implement the accidental release reporting requirement. In the advance notice of proposed rulemaking from the Federal Register, CSB identified four potential approaches for implementing the statutory requirement.

CSB has not taken steps to publish a proposed rule or to request changes to the requirement in the Clean Air Act Amendments of 1990. After further considering this issue, and public comments from the notice of proposed rulemaking, CSB believes that it receives adequate incident notifications through constant media and internet searches, as well as existing federal sources such as the National Response Center. CSB stated that even if it had already adopted a reporting rule, the agency would have essentially no capacity to collect or interpret much of the data it received, or seek enforcement action against any non-reporters.

CSB needs to establish the rule as required by the Clean Air Act Amendments of 1990.

• Even more daunting than establishing a reporting rule is the 1990 CAAA requirement which is detailed in the same 2016 EPA Inspector General report on CSB management challenges (bold added):

CSB is not investigating all accidents that fall within its legal jurisdiction, and should increase the number of investigations it conducts. Pursuant to its enabling statute—the Clean Air Act Amendments of 1990, 42 U.S.C. § 7412(r) (6)—CSB “shall ... investigate (or cause to be investigated), determine, and report to the public in writing the facts, conditions, and circumstances, and the cause or probable cause, of any accidental chemical release resulting in a fatality, serious injury, or substantial property damages.”

Between FY 2009 & FY 2015, the CSB investigated only 9.5% of the chemical-related accidents with fatalities. The CSB has essentially “pleaded poverty” with respect to this requirement, but also backed up by a legal decision (bold added):

CSB believed in 2013 that it could select incidents at its discretion based on funding and resources. CSB believed the Supreme Court settled the issue in City of Arlington, Texas et al. v Federal Communications Commission et al., 133 S. Ct. 1863 (2013). The court decision, relying on Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984), applied an agency’s interpretation of its own statutory jurisdiction. The court held that applying the Chevron doctrine to an ambiguous statute would not upset an agency’s permissible interpretation of its own authorizing legislation and the authority entrusted to the agency administering the law. We noted in 2013 that Arlington addresses deference to agency interpretation when a statute is silent or ambiguous as to the intended creation. However, 42 U.S.C. § 7412(r)(6) is not ambiguous with
regard to the issue of the scope of cases to be investigated, stating that CSB “shall” investigate.

If the CSB survives, it may only be a matter of time before they are sued about this “investigative gap”. Thus far the US Congress has shown no interest in modifying the statute. Connected to this “investigative gap” is the question of what criteria the CSB use in selecting incidents to be investigated, which is contained in CSB Board Order 036 – Incident Selection Process. At present this Order is not posted on the web because “The Order is being evaluated to assess the extent to which it contains information that may be exempt from public disclosure.” Are requests from members of Congress and specific interest groups one of the criteria?

• What about “peer review” of CSB investigations and recommendations? Andrea Kidd-Taylor – as previously mentioned – noted this as a deficiency in the EPA/OSHA Joint investigation of the 1995 Napp Technologies disaster which led to initial activation of the CSB. The CSB’s recent practice has been to perform internal reviews of an incident investigation report and recommendations, then schedule a public meeting for a Board vote (often at or near the site of the incident), and release the report for public review a few days ahead of the meeting. The meeting itself features opening remarks by the Board (and possibly elected officials), PowerPoint presentation of the report highlights and recommendations by the investigating team, possibly a video, and then questions/statements by Board Members and the public. Finally, the Board votes – generally (but not always!) to accept the report.

When, however, the above scenario unfolded for the Board’s public meeting in September 2016 for the Freedom Industries spill report in Charleston, WV, the Board was surprised to hear widespread criticism from attendees of the facts, conclusions and recommendations presented in the report. Taken aback, the Board hastily voted to give the public an additional 48 hours to submit material – hardly enough time to provide meaningful input. After a month, Ms. Sutherland indicated that the report would likely not be revised. But then the CSB was forced to respond to Dr. Philip Price’s petition for correction under the CSB’s Data Quality Guidelines (http://www.csb.gov/investigations/data-quality/). Ultimately a response to Dr. Price’s petition was quietly posted in January 2017, and a revised report issued in May 2017 – but no new recommendations (https://www.wvgazettemail.com/news/revised-csb-report-on-freedom-spill-makes-no-new-recommendations/article_c57d5ed5-8426-5a80-a522-721f6d88c92d.html). Unfortunately, even the revised report contained uncorrected errors, as well as betraying a fundamental misunderstanding of the processing which was taking place at the Freedom Industries site (https://engage.aiche.org/communities/community-home/digestviewer/viewthread?GroupId=13&MessageKey=a021d857-8ed4-43b0-94df-02a480f7b8b8&CommunityKey=de21ae11-bfdc-41b4-851d-84c7293f0d99&tab=digestviewer&ReturnUrl=%2fcommunities%2fcommunity-home%2fdigestviewer%3fcommunitykey%3dde21ae11-bfdc-41b4-851d-84c7293f0d99%26tab%3ddigestviewer%26ssopc%3d1). The lack of peer review of CSB reports remains a hidden problem.
A final problem for the CSB is its relationship with other Federal Agencies. The CSB is in the awkward situation of relying upon their cooperation while often calling upon them through recommendations to make regulatory changes that could take years (if ever!) to accomplish – and then continually highlighting their lack of progress, such as OSHA’s & EPA’s failure to add reactive chemicals to the Process Safety Management and Risk Management Program regulations (https://www.peer.org/assets/clips/FY15_4th_quarter_clips/BLOOMBERG_For-Chemical_Safety_Board,_Advice_to_Federal_Agencies_Piles_Up.pdf):

Federal agencies failed to respond to CSB recommendations 31 percent of the time. And just 37 percent of the CSB’s recommendations to federal authorities have been adopted since the agency opened in 1998, according to a Bloomberg Environment analysis of CSB data.

By comparison, trade organizations have implemented 73 percent of recommendations, while facility owners and operators adopted 77 percent. Manufacturers of equipment, vendors, contractors, and suppliers of facilities where a chemical incident has occurred have met 89 percent of recommendations.

“A lot of the agencies they are going to are EPA and OSHA, which have severe cases of regulatory constipation,” Jeff Ruch, executive director of Public Employees for Environmental Responsibility, which advocates for government employees, told Bloomberg Environment.

For example, federal programs that protect workers and the public from unplanned chemical releases haven’t seen rewrites in decades. OSHA has not updated its process safety management standard since 1992, and the EPA has not rewritten its facility risk management program regulation since it was published in 1996.

The ultimate humiliation occurred in 2013 when the Texas State Fire Marshall’s Office and the US Bureau of Alcohol, Tobacco and Firearms (ATF) denied the CSB unfettered access for a month to the site of the ammonium nitrate explosion in West, TX, as well as to key individuals, on the basis of its being a crime scene (http://www.pogo.org/blog/2013/05/20130529-are-chemical-safety-inspectors-being-blocked-from-west-texas.html). OSHA investigators, on the other hand, were granted access for their investigation. After a presentation by OSHA’s investigative team at an ASSE Safety Conference, I asked what they had shared with the CSB investigators; the response was, “as little as possible”. I have yet to encounter an OSHA employee who has a favorable view of the CSB.

Wither?

The key so far to the continuation of the CSB has been Congressional support, especially from Representative Rodney Freylinghuysen (R) of New Jersey, Chair of the House Appropriations Committee. However, he is retiring at the end of this term – will the next Congress and Appropriations Committee Chair be as supportive?

Looking further into the future, all of the current CSB Board Member terms of five years will expire in 2020, well before the November election. Unless President
Trump has a complete change of mind, it is quite possible that the CSB could have no Board Members. Could the agency function under these circumstances?

The heart of the CSB is its Office of Investigations. Bringing Stephen Klejst from the NTSB recently to be its Executive Director is a recognition of its importance. Since 2017, two senior investigators have left – Donald Holmstrom, Director of the Western Regional Office of Investigations, and Johnnie Banks, Supervisory Investigator of the Washington, DC Office of Investigations, along with three other investigators at the Washington, DC Office – Samuel Oyewole, Lucy Sciallo-Tyler and Beeta Lashkari. The importance of key personnel is recognized by the CSB in its FY 2019 Budget Justification (http://www.csb.gov/assets/1/7/FINAL_FY_2019_Budget_Justification_(1-31-2018)_(2).pdf):

In FY 2018, the CSB will focus on the development of a new Human Capital Plan and a Succession Plan that will go into effect in FY 2019. With an average age of 43 for career staff members, planning for the agency's future is critical. Within the next five years, ten members of the agency’s career workforce, or 26.3%, will be eligible for retirement; and within ten years, that number increases to twenty individuals, or 52.6% of the workforce. As a microagency, the CSB must have the resources to train and develop future investigators and support staff. The loss of one employee to retirement or attrition has a significant impact on the agency.

If key personnel see “the writing on the wall” and retire or begin to leave, will the CSB be able to conduct effective operations, and will Congress be willing to continue funding? A particular current problem is the classification “Attorney/Investigator” (Ms. Lashkari was one), which does not fit the federal job classification scheme. If this is reduced to simply “Investigator”, the three remaining CSB employees with this designation are prime candidates to exit the agency, since their legal work would no longer be recognized.

Although Daniel Horowitz has been on administrative leave with intent to be terminated since 2015, the CSB Directory currently still lists him as Managing Director. If the CSB withers away, would it not be ironic if he ends up being the last CSB employee?