



U. S. Chemical Safety and Hazard Investigation Board  
**MEMORANDUM**

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To: Member Manny Ehrlich  
Member Rick Engler  
Member Kristen Kulinowski, Ph.D. November 15, 2017

From: Vanessa Sutherland  
Chairperson and CEO

Cc: Senior Advisor Thomas Zoeller  
Director Charles Barbee  
Kara Wenzel, Office of General Counsel

Subject: Recommendation Status Change Proposal: CSB Notation Item 2018-02 -  
Worker Participation and Whistleblower Protection in the Oil and Gas  
Industry on the Outer Continental Shelf

**Executive Overview**

The Government in the Sunshine Act (5 U.S.C. § 552b), passed in 1976, affects the operations of the federal government, Congress, federal commissions, and other legally constituted federal bodies. It is one of many Freedom of Information Acts, intended to create greater understanding of decision-making and transparency from the government. Thus, the public may see everything from brainstorming to fully developed or entrenched ideas during a Sunshine Act meeting. The idea is for board members to present information to fellow members prior to voting to adopt certain agency actions.

Much like the Supreme Court, each member has beliefs or experiences and, using one vote, may agree or dissent with the majority's decision. And similarly, a vote on the merits of what is presented for review neither forecloses the Justices from revisiting the same or similar issues later nor implies that one side is unintelligent, soul-less or lacking in moral character for viewing the same information differently.

With approximately 14 public business meetings since August 2015, I value the ability to be transparent, which is part of government's responsibility. Yet, in a societal time of lack of civility & demonization of individuals for their ideas, we must always be vigilant in asking: how honest, vulnerable or receptive to debate are we really encouraging citizens to be? Having an opinion about someone else's opinion before you have heard them speak or reach conclusions is a disturbing trend but I believe transparency must continue.

A recent article said the CSB is "wrestling to define the limits of its authority." I respectfully beg to differ: our statute is clear about our broad authority. The CSB rather

has struggled with answering the question of who it is: is it an independent, objective scientifically-based entity, a grassroots lobbying entity, a political and policy-based entity or a combination of these? The answer of who we are drives behaviors, priorities and outcomes & the expectations of our stakeholders. Stakeholder feedback over the last two years has underscored that academia, regulators & trade associations likewise have been unclear about the role CSB does and should play; and they seek consistency.

Our deliberations on R7 or R15 of the Macondo investigation indirectly may highlight these issues.

### **Recommendations Discussion**

I believe that the CSB could and should be a preferred source of chemical safety information. It should be bold but based in data, collaborative but clear in its own voice **and** independent from undue pressure by single sources at any given time. Data and analysis must be respected, lest inconsistency, unpredictability, low credibility and even absolutism may reign, which I recall as strong prior criticisms of the Board.

While the CSB's most critical role is to drive Chemical Safety change to foster a nation safe from chemical disasters, it must do so through its non-binding recommendations & advocacy based on investigative findings and conclusions. It has no regulatory or enforcement authorities.

*That brings us to one of the recommendations that was calendared in October for the November public business meeting: Notation item 2018-02, also referred to as R-15 after its number in the report.*

The question to resolve has **never** been, never been: does CSB support or believe in whistleblower protection or workers.

In addition to the proposal from the Recommendations staff and four weeks of internal communications and document review among board members, Investigations, Recommendations and Counsel, I reviewed the CSB Statute 42 U.S.C. 7412(r)(6), Board Orders 22 and 40. Our internal discussions highlighted that among us there is unanimous agreement within the Board and among the staff on the critical role of worker participation in safety management systems, inclusive of effective whistleblower protections and stop work authority which help foster worker participation. It was clear based on those discussions that regardless of the disposition of R15 by the Board at the November public meeting, the CSB would explore alternative paths in driving chemical safety change, which I will summarize below.

In the public meeting last month, board members discussed at a high level the potential concerns and questions with the proposal to change the recommendation status to Closed-Reconsidered. The proposal contains two open topics: (1) Was there a causal link between the evidence collected during the investigation and the resulting

recommendation, and (2) even if yes, was the Department of the Interior (BSEE) the correct recipient of the recommendation?

- (1) Our Recommendations and Investigations staff has presented thoughtful, detailed discussion about the facts upon which they relied to make their proposals. Both teams' perspectives have merit, and moreover, the review of internal correspondence, surveys and interviews demonstrate that the culture on the Deepwater Horizon and workers' retaliation or stop work authority perceptions were not black and white and were in some instances positive. Thus, I defer on my answer regarding the existence of a causal link to answer the more important question - WHO can or will address the proper implementation of this recommendation?
- (2) THAT is really at the heart of our deliberations.
- (3) Department of Labor's Occupational Safety and Health Administration and the Department of Homeland Security's Coast Guard appear to have concurrent authority to regulate worker safety and health on the Outer Continental Shelf. BSEE and the Coast Guard both acknowledge the references in the OCS Lands Act to carry out responsibilities "individually, or jointly if they so agree . . ." whenever such joint efforts are beneficial." Federal agencies are given great deference in carrying out their programs and interpreting their jurisdiction.
- (4) If the Department of Interior actually does not have jurisdiction over this matter **or** simply believes that it cannot act because it does not have jurisdiction over this matter **or** believes that another federal agency is better suited to carry out the intent and actions in the recommendation, then it is clear that they will not act. CSB can drive safety change on this topic by working with those who are willing and able to address it.
- (5) Most notably, Congress has initiated legislation twice related to offshore whistleblower protection. **And twice it has named the Secretary of Labor as the responsible party for these issues.**
- (6) I pause to repeat that twice Congress has chosen another agency apart from the Department of Interior to address offshore whistleblower protection. As we sit and deliberate about BSEE's determination that it is not the appropriate recipient, Congress re-introduced a bill last week affirming the Secretary of Labor as the proper agency.
- (7) Couple this fact with BSEE's interpretation, the CSB's staff proposal interpretation, the language in OCSLA about shared agency responsibility and the overlapping roles of three different federal agencies on these matters, it is more than reasonable to vote yes to close this recommendation reconsidered.
- (8) Our mission calls for the CSB to drive chemical safety change, and it is clear that there is ambiguity within the Federal government regarding the jurisdiction of offshore worker protections. Thus, CSB is poised to highlight an issue on which both Congress and various Federal agencies must collaborate.

## **Conclusion**

“The safety of the people shall be the highest law.” – *Marcus Tullius Cicero, Roman philosopher born in 106 B.C.*

The most important point of my remarks today is that strong worker participation, whistleblower protections & well-implemented safety management systems are essential to achieve safe workplaces and the CSB’s vision.

Regarding the vote, it appears, based on the correspondence between the CSB and the Bureau of Safety and Environmental Enforcement (BSEE) that BSEE will take no further action on the substance of the recommendation (which alternatively leads to a Closed Unacceptable vote at a later date and no action by the recipient in the interim). If the CSB votes to affirm the Recommendations’ proposal on R-15 as Closed Reconsidered, BSEE also will not take up the matter.

BUT the CSB’s work can continue without delay, and is not diminished or curtailed. We deliberate on documents, facts, data and discussion and in this case, those presented make a reasonable case for reconsidering the recipient of this Recommendation. The latter point is different from a categorical generalization that the CSB will no longer focus on offshore worker safety.

## **Next Steps**

Based on our internal discussions, these are a few low effort/high impact initiatives that can be taken regardless of the outcome of today’s vote. These examples would foster a necessary, continued dialogue on this critical safety issue:

- Issue a letter (or other communication method) to Congress and/or necessary agencies that highlights the critical safety gap and need to redress
- To the extent that the Congress should initiate any legislation, the CSB could offer its views on pending legislative proposals
- Develop opinion pieces for dissemination through all media platforms, such as traditional print media opinion pieces, as well as the CSB's social media platforms about the need and value of worker participation in the safety system
- Develop and issue a safety alert/bulletin about worker participation similar to High Temperature Hydrogen Attack (HTHA) Safety Alert issued in 2016
- Survey industry working groups, particularly API's RP75, to convene broader roundtable discussions on worker participation in order to create industry guidelines that would be issued in-lieu of statutory or regulatory action
- Collaborate with other entities to have joint forums, articles or other activities that highlight challenges faced by offshore workers.