

## Don't Just Investigate; Promulgate! Court Orders Chemical Safety Board to Produce Chemical Reporting Requirements

February 7, 2019

### Key Points

- A federal court recently ordered the CSB to promulgate final accidental chemical release reporting regulations within 12 months.
- The Clean Air Act requires that those regulations be binding on all entities subject to the CSB's investigation jurisdiction.
- Owners and operators of industrial facilities can reasonably expect to see a new rulemaking—with an accompanying opportunity to submit public comments—by the fall.

Since its inception, the U.S. Chemical Safety and Hazard Investigation Board (CSB or the "Board") has not required reporting of accidental chemical releases. After a scathing court order from a federal judge this week, however, the Board might just find itself reporting for duty after all.

### Air Alliance Houston v. CSB

In a succinct, yet forceful, decision, Judge Amit Mehta of the U.S. District Court for the District of Columbia lambasted the CSB for what he called "an egregious abdication of a statutory obligation" to promulgate reporting regulations under the Clean Air Act Amendments of 1990.<sup>1</sup> Even by its own admission, the CSB is required by the Clean Air Act to "establish by regulation requirements binding on persons for reporting accidental releases into the ambient air subject to the Board's investigatory jurisdiction."<sup>2</sup> In its decision, the court dismissed the CSB's arguments that plaintiff environmental groups lacked standing and found that the Board did "unreasonably delay" action after having failed to promulgate regulations for nearly 28 years.

Ultimately, the court ordered the CSB to promulgate final accidental chemical release reporting regulations within 12 months.<sup>3</sup> Absent a successful appeal or request for extension by the CSB, owners and operators of industrial facilities can expect to see a

### Contact

**David H. Quigley**  
dquigley@akingump.com  
Washington, D.C.  
+1 202.887.4339

**Stacey H. Mitchell**  
shmitchell@akingump.com  
Washington, D.C.  
+1 202.887.4338

**Bryan C. Williamson**  
bwilliamson@akingump.com  
Washington, D.C.  
+1 202.887.4576

new rulemaking—with an accompanying opportunity to submit public comments—by the fall.

## Potential Rulemaking Approaches

With a mere calendar year to finalize regulations, the CSB will need to act promptly. Although it may look to its stalled attempt in 2009 to promulgate reporting regulations, it is anyone's guess whether the Board will ultimately take a different direction altogether given the change of administrations. Nevertheless, in its 2009 advance notice of proposed rulemaking, the CSB announced its intent to promulgate a rule that would “further its current efforts to improve data collection and would permit more accurate surveillance of chemical incidents.”<sup>4</sup> The Board requested public comment on four general approaches:

1. Requiring reporting of information on all accidental releases subject to the CSB's investigatory jurisdiction.
2. Requiring reporting of basic information for incidents that meet significant consequence thresholds.
3. Requiring owners or operators of certain high-risk facilities to report more extensive information on chemical incidents in their workplace after notification by the CSB following an accident.
4. Requiring reporting based on the presence or release of specified chemicals and specified threshold amounts.<sup>5</sup>

## Who Might Be Regulated?

The Clean Air Act requires that CSB reporting requirements be binding on all entities subject to the CSB's investigation jurisdiction. Thus, the CSB rule would cover a wide range of entities, including power plants, refineries, chemical manufacturers, and owners and operators of other industrial facilities. The Board clarified in 2009, however, that it would focus on “high-consequence events,” that is, those that result in death, serious injuries requiring in-patient hospitalization, large public evacuations, very substantial property damage or acute environmental impact.<sup>6</sup> Nevertheless, the CSB also acknowledged that releases of “small amounts of chemicals” and unlisted chemicals can result in serious consequences and could be subject to reporting requirements.<sup>7</sup>

## Likely Scope of New Reporting Requirements

Reporting obligations, at the very least, could require identifying the location, date and time of incidents involving chemical releases, the chemicals involved and the number of injuries.<sup>8</sup> Upon receiving this information, the Board would consider investigating the event and making subsequent recommendations.

In addition, the CSB noted that it may seek to limit the scope of reporting requirements in several key ways to reduce regulatory burdens and the CSB's oversight costs. These include:

- Coordination with other chemical incident reporting requirements to avoid duplication with existing rules by EPA, the Occupational Safety and Health Administration, and the Agency for Toxic Substances and Disease Registry.
- Reporting thresholds that limit reporting requirements to select, high-consequence events totaling, at most, a few hundred incidents throughout the country each year.
- Clarification of key terms, including “ambient air,” “extremely hazardous substance,” “serious” injury and “substantial” property damage.
- Reporting submissions via the CSB website or the National Response Center hotline, as contemplated by the Clean Air Act.<sup>9</sup>

Despite these limitations, the extent of additional compliance protocols required by the rule remains uncertain.

## Conclusion

Although the CSB has yet to comment publicly on the court’s ruling or its intentions to appeal or initiate rulemaking, the court’s 12-month deadline does not leave the Board with much time. Therefore, the Board may be without an option to release a proposed rulemaking with the opportunity for public comment by fall of this year if it has any hope of meeting this court deadline. For questions on the potential impacts of a new reporting rule or assistance with providing public comments to the CSD, please contact:

---

<sup>1</sup> *Air Alliance Houston, et al., v. U.S. Chemical and Safety Hazard Investigation Board*, 17-cv-02608 (D.D.C. 2019), at 21.

<sup>2</sup> *Id.* at 2 (quoting 42 U.S.C. § 7412(r)(6)(C)(iii)). Note that recent actions by the U.S. Environmental Protection Agency (EPA) under President Donald Trump have sought to reshape the legal conception of “ambient air” to exclude the air immediately above the confines of facilities, such as power plants, thus potentially limiting the reach of CSB reporting requirements. See, e.g., Affordable Clean Energy Rule, 83 Fed. Reg. 44746 (Aug. 31, 2018) (proposing to replace the Clean Power Plan, which would have empowered states to regulate carbon emissions outside the fence-line of existing power plants).

<sup>3</sup> *Id.* at 22.

<sup>4</sup> *Chemical Release Reporting*, 74 Fed. Reg. 30259, 30261 (June 25, 2009).

<sup>5</sup> *Id.* at 30262.

<sup>6</sup> *Id.* at 30261.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 30262.

<sup>9</sup> *Id.* at 30261.