What to Expect When the Chemical Safety Board Shows Up at Your Plant

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Authors:

Steven M. Crawford

Sarah H. Dennis

On January 28, 2021, a liquid nitrogen release at the Foundation Food Group's Prepared Foods Division in Gainesville, Georgia, led to six fatalities and multiple injuries.[1] On April 8, 2021, an explosion and fire erupted at the Yenkin-Majestic Paint and OPC Polymers Corporation.[2] In that incident, one employee was fatally injured, eight employees were transported to hospitals for injuries, and the blast shook neighboring buildings and businesses, causing damage to at least one nearby business.[3] On September 20, 2022, an accidental release of flammable chemicals ignited, creating a fire that fatally injured two workers and resulted in substantial property damages at the BP-Husky refinery in Oregon, Ohio.[4]

Each of these tragic incidents, and hundreds more, have been the subject of an investigation conducted by the Chemical Safety Board (CSB).[5] The CSB, as a cumulation of a thorough and lengthy investigative process for each and every case, aims to create a safer workplace in these industrial plants by identifying all potential causes of these incidents and implementing heightened safety measures.[6] During the CSB's 25-year tenure, the agency has deployed to over 170 chemical incidents and has issued nearly 900 recommendations that have led to numerous safety improvements across a wide variety of industries.[7] In the unfortunate circumstance that you find your plant the subject of a CSB investigation, it is crucial to understand the process and be prepared for the implications associated with that investigation.

What is the Chemical Safety Board and What Authority Do They Have?

Before addressing the legal implications of a CSB investigation and how to begin preparation for navigating the investigation and those implications, it is important to understand the function and authority of the CSB.

A. The Goal of the Chemical Safety Board

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The CSB is an independent federal agency charged with investigating industrial chemical accidents.[8] The CSB is not an enforcement or regulatory agency, but rather a scientific and technical advisory organization.[9] The CSB does not issue fines or citations but does make external recommendations to regulatory agencies, such as the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA), along with internal recommendations to the industry.[10] The goal of a CSB investigation is to determine root and contributing causes and make recommendations to prevent the incident from recurring.[11] The CSB aims for the broadest possible prevention impact; therefore, CSB recommendations are often targeted at regulation, education, and industry practices.[12]

B. The Formation of the Chemical Safety Board

The CSB was established by the Clean Air Act Amendments of 1990 and was designed to be non-regulatory in order for the CSB to review the effectiveness of industrial plant regulations and regulatory enforcement on the ground level.[13] Modeled after the National Transportation Safety Board (NTSB), which investigates aircraft and other transportation accidents for the purpose of improving safety, the CSB similarly makes its actions public through investigation reports, safety studies, special publications, and statistical reviews.[14]

C. Types of Things CSB Investigates

The CSB investigates incidents at several different types of facilities, including oil refineries, chemical plants, pharmaceutical plants, paper and pulp mills, food processing plants, metal processing plants, gas wells and gas plants, chlorine repackaging facilities, and fertilizer distribution and storage facilities.[15] Other factors that could be relevant to the CSB in determining whether to investigate an incident include the severity of the incident and whether any chemicals or hazardous materials were involved in the incident.[16]

How Does the CSB Investigate?

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Because the goal of the CSB is to determine root and contributing causes and make recommendations to prevent the incident from reoccurring, the CSB gathers a large amount of evidence and information throughout a lengthy investigative process.[17] Recent CSB investigations have taken one to two years to complete.[18]

A. Physical Evidence

The first instance in which CSB gathers physical evidence is through a forensic site evaluation.[19] The CSB investigators will close the site to inspect and document the condition and location of items such as process equipment, debris, and other evidence.[20] The second critical onsite task involves documenting and measuring the observable damage.[21] For this task, the CSB employs specialists in blast pattern analysis to measure beam deflections, debris locations, burn patterns, and other indicators to identify the initiating event location and estimate the blast pattern.[22]

B. Witness Information

Witness information is evidence that decays or changes rapidly over time.[23] CSB investigators work quickly to identify and interview key witnesses as soon as possible after arriving at the scene.[24] The CSB speaks with employees who voluntarily participate in the investigative process, but also has the authority to compel noncooperative witnesses to appear for an oral deposition.[25] It is important to note that the CSB can keep all of this information private, and does not have to report witness statements to the owners or operators of the plant where the incident occurred.[26]

Legal Implications of a CSB Investigation

Due to the nature of CSB investigations, several legal considerations arise throughout the investigative process. These include how to navigate closing site access, evidence gathered, responding to requests for information, participating in joint testing of equipment, and the admissibility of CSB findings and conclusions.

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A. Fire Scene Access, Documentary Evidence, and Witness Statements

The first significant obstacle for legal counsel is to secure access to the site on behalf of the private party investigator. Securing early access to the scene and witness statements is a number-one priority for legal counsel for a party or potential party to litigation arising after the incident. The CSB, like other government agencies, has authority to restrict both site access and communication with witnesses within a specified period after the incident. The CSB can also refuse to provide information from witness statements to the employer by way of exemptions to the Freedom of Information Act (FOIA). A private party that does not have access to these firsthand accounts until the discovery phase of litigation suffers a serious disadvantage in determining the cause and origin of the incident.

B. Responding to CSB's Request for Information and the Freedom of Information Act

The CSB typically requests information from the owner of the facility where the incident occurred regarding, among other things, plant equipment and processes, daily and preventative maintenance, housekeeping standards, and safety training provided to employees. Depending on the circumstances of the incident, the CSB may also request information regarding the production process and materials used at some plants. It is important to note that any information provided to the CSB is subject to possible dissemination publicly in response to a FOIA request, including any cover letters authored by legal counsel. Thus, it is imperative to exercise caution when submitting records or information to the CSB which contain confidential and proprietary business information, trade secrets, or employee records. While the CSB will not disclose such records pursuant to a FOIA request except under certain circumstances outlined in the Code of Federal Regulations, in order to provide the greatest amount of protection to your business's records, the appropriate personnel and legal counsel should be familiar with these regulations, including the need to designate such records as confidential information, before providing any documents to the CSB.

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The CSB also has the authority to compel witnesses who refuse to appear voluntarily to appear for an oral deposition as part of the CSB investigation. As a general rule, a witness who is compelled to testify is entitled to have an attorney present, while those who appear voluntarily are not. Despite the general rule, the CSB has been very cooperative in past investigations and allowed counsel to be present even when witnesses are appearing "voluntarily." It is nonetheless important to note that the CSB has the authority to sequester witnesses and exclude counsel from being present. The CSB can also deny a petition to procure an official transcript of the deposition if good cause is shown.

C. Participating in Joint Testing and Analysis of Equipment

Because the CSB investigative approach involves a broad and extensive analysis to drill in on the underlying causes of an incident and formulate measures to prevent similar incidents in the future, the investigation often leads to CSB investigators and investigators retained by private parties in anticipation of litigation to jointly develop evidence gathering and testing protocols and to participate in joint collection and tagging of samples, equipment testing, and other analysis. From a legal perspective, this raises concerns as to the preservation of confidentiality of the investigation and the work product privilege on behalf of a client who may have divergent interests in the outcome of the CSB analysis. While the spirit of cooperation is important in these circumstances, business representatives must be cognizant of the need to maintain the confidentiality of the team's mental impressions and opinions as to the results of the individual testing of equipment and samples, and ultimately the cause and origin of the incident. This information should not be discussed with any expert or other third person who is, or may be, employed by a potentially adverse part to future litigation.

D. Admissibility of CSB Findings and Conclusions

At the conclusion of a CSB investigation, the CSB releases an "Investigation Report." This report is made publicly available in hard copy and through the CSB website. However, the statute creating

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the CSB precludes the use of the CSB Investigation Report or its contents as evidence in a lawsuit. Thus, experts for parties to litigation should not rely on the CSB Investigation Report to support their opinion.

While CSB investigators cannot be called to testify as to the basis of their opinions, CSB employees may testify in a deposition as to factual information obtained during an investigation. However, the CSB Investigation Report does not specifically identify the individuals that provide particular testimony or information relied upon by the CSB to formulate its findings. Consequently, parties are aware that certain information exists and has been provided to the CSB by a witness but do not have the benefit of the identity of the witnesses, content of the witness statements, or notes from the interview conducted by the CSB.

What Should You Be Doing to Prepare Now?

It is crucial for processing and manufacturing plant owners to be aware of the CSB and know the function, purpose, authority, and procedures when the CSB shows up at your facility following an industrial accident involving chemicals. By preparing for these circumstances beforehand, the manufacturing industry can more effectively navigate the investigative process, avoid surprises, and ensure mindfulness of the various legal implications that arise. You should dedicate time now to preparing and developing the appropriate procedures and documents, and reach out to counsel with experience navigating CSB investigations.

For information, contact the authors or any attorney with Frost Brown Todd's Industrials team or Product, Tort, & Insurance practice group.

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[1] CSB, *Foundation Food Group Fatal Chemical Release*, https://www.csb.gov/foundation-food-group-fatal-chemical-release-/ (last visited Oct. 25, 2023).

[2] CSB, *Yenkin-Majestic Paint and OPC Polymers Corporation*, https://www.csb.gov/yenkin-majestic-paint-and-opc-polymers-corporation/ (last visited Oct. 25, 2023).

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[3] *Id.*

[4] CSB, *BP – Husky Oregon Chemical Release and Fire*, https://www.csb.gov/bp—husky-oregon-chemical-release-and-fire-/ (last visited Oct. 25, 2023).

[5] *See generally* CSB, *Investigations*, https://www.csb.gov/investigations/ (last visited Oct. 25, 2023).

[6] *See generally infra* II.A.

[7] CSB, *About the CSB*, https://www.csb.gov/ (last visited Oct. 25, 2023).

[8] Angela S. Blair, P.E., *Dust Explosion Investigations at the CSB in* Int'l. Symp. of Fire Sci. and Tech. (2006).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Gail Bateson and Rocelyn de Leon-Minch with Linda Delp, UCLA Labor Occupational Safety & Health Program, *Instructor Guide: Using Chemical Safety Board Reports and Videos*, https://losh.ucla.edu/wp-content/uploads/sites/37/2021/02/CSB-Guide.pdf (last visited Oct. 25, 2023).

[16] *See generally* Angela S. Blair, P.E., *Dust Explosion Investigations at the CSB in* Int'l. Symp. of Fire Sci. and Tech. (2006), *and* CSB, https://www.csb.gov/ (last visited Oct. 25, 2023).

[17] Angela S. Blair, P.E., *Dust Explosion Investigations at the CSB in* Int'l. Symp. of Fire Sci. and Tech. (2006).

[18] Dr. Timothy Meyers, CFEI, *Concurrent Investigations With the CSB – The Perspective of a Private Party Investigator in* Int'l. Symp. of Fire Sci. and Tech. (2006).

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[19] Angela S. Blair, P.E., *Dust Explosion Investigations at the CSB in* Int'l. Symp. of Fire Sci. and Tech. (2006).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See infra* IV.A and IV.B.

[26] *Id.*

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