

WHISTLEBLOWER REPRISAL AND MANAGEMENT FAILURES AT THE U.S. CHEMICAL SAFETY BOARD

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
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Thursday, June 19, 2014,

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
WASHINGTON, D.C.

The committee met, pursuant to call, at 10:00 a.m., in Room 2154, Rayburn House Office Building, Hon. Darrell E. Issa [chairman of the committee] presiding.

Present: Representatives Issa, Mica, Turner, Jordan, Chaffetz, Walberg, Gosar, Farenthold, Woodall, Meadows, Cummings, Maloney, Tierney, Connolly, Speier, Kelly and Lujan Grisham.

Staff Present: Melissa Beaumont, Majority Assistant Clerk; Will L. Boyington, Majority Deputy Press Secretary; Molly Boyd, Majority Deputy General Counsel and Parliamentarian; Ashley H. Callen, Majority Deputy Chief Counsel for Investigations; Sharon Casey, Majority Senior Assistant Clerk; Jessica L. Donlon, Majority Senior Counsel; Kate Dunbar, Majority Professional Staff Member; Adam P. Fromm, Majority Director of Member Services and Committee Operations; Ashok M. Pinto, Majority Chief Counsel, Investigations; Andy Rezendes, Counsel; Laura L. Rush, Majority Deputy Chief Clerk; Katy Summerlin, Majority Press Assistant; Sarah Vance, Majority Assistant Clerk; Krista Boyd, Minority Deputy Director of Legislation/Counsel; Jennifer Hoffman, Minority Communications Director; Peter Kenny, Minority Counsel; Chris Knauer, Minority Senior Investigator; Elisa LaNier, Minority Director of Operations; Juan McCullum, Minority Clerk; and Dave Rapallo, Minority Staff Director.

Chairman ISSA. The committee will come to order.

The Oversight Committee exists to secure two fundamental principles: first, Americans have a right to know that the money Washington takes from them is well spent and, second, Americans deserve an efficient, effective Government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold Government accountable to taxpayers, because taxpayers have a right to know what they get from their Government. It is our job to work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy. This is our mission statement.

Without objection, the chair is authorized to declare recesses in the committee's hearing at any time.

Today we are here to perform one of the committee's most basic core functions: to identify and root out waste and mismanagement in the Federal bureaucracy. Usually, when we talk about waste and mismanagement, we talk in terms of dollars and cents. Today we are going to discuss waste and mismanagement at the U.S. Chemical Safety and Hazard Investigation Board, or the CSB, in terms of public safety and lives that can be lost.

CSB's mission is to independently investigate significant chemical incidents and hazards, and effectively advocate for implementation that results in recommendations to protect workers and the public and the environment.

Over the course of an eight month investigation, the committee has identified significant problems at the CSB that undermine its public safety mission. The narrative that emerged from thousands of pages of documents and interview transcriptions and the like are fairly simple: the chairman's management style created a hostile work environment which caused experienced career investigators and at least one of his fellow board members to leave the agency.

CSB's investigations of significant chemical accidents took far longer than they should have. The board failed to make recommendations that might have prevented future accidents in a timely way. And that is why the CSB is under scrutiny by this committee and others, including former chairman of this committee, Henry Hyde.

The Chemical Safety Board exists to investigate industrial chemical accidents, uncover their causes, and provide safety recommendations based upon their investigations. Congress expects the agency to issue its investigations and reports in a timely manner. In fact, Senate recommended that these reports be issued within six months of any accident. Unfortunately, under the direction of the current CSB chairman, Rafael Moure-Eraso, the agency is failing to meet these requirements, it is failing to fulfill its mission, and that is why we are here today.

On September 5th, 2013, the EPA inspector general sent a seven day letter to Congress regarding CSB's refusal to cooperate with its investigation into whether one of the chairman's closest advisors learned the identities of CSB employees who had filed whistleblower complaints with the Office of Inspector General and Special Counsel.

I want to make it very clear here today. This committee would like to receive more seven-day notices than we do. But on the few that we receive, they are a 911 call to this committee and, as a result, we take them very seriously.

Allegations in the seven day letter were very serious. The letter signaled a severe problem with an agency and prompted us to begin our own investigation. The committee's investigation of CSB revealed an agency in crisis, unable to properly function and serve its mission because of poor leadership and mismanagement. Our investigation found the CSB chairman improperly exercised his responsibility, intimidates staff, and undermines the well established precedent that designates the board, not the chairman himself, as the agency's ultimate authority.

Current and former CSB employees informed the committee that the chairman's heavy-handed management practices, blatant dis-

regard for authority and protocol, and the erosion of a collegial work environment have devastated the CSB in much the same way as we saw at the Nuclear Regulatory Commission a few years ago. The facts bear out the allegations we heard from current and former CSB employees. There is an extraordinarily high rate of attrition at CSB, investigations have languished for years, and several employees disclosed to us that they feared retaliation from agency management for cooperating with the committee's investigation.

Concerns about CSB's problem have been bipartisan. For instance, after a CSB investigation of an explosion in Washington State that killed seven workers dragged on for four years, Congressman Rick Larsen and Senator Patty Murray were vocal in their criticism, and Congress agreed. With respect to the delay reported on the accident, Senator Murray wrote, I am extremely frustrated that after nearly four years the CSB has still failed to produce a final report. This delay is emblematic of poor leadership at CSB, which continues to do a disservice to workers, companies, and the economy. Without dramatically improved performance, substantial leadership changes at CSB will be necessary.

I agree with the Senator. The final report was finally issued on May 1st, 2014, more than four years after the accident. Considering the importance of industrial workplace safety, the disorder at the CSB is too great for us to ignore. The goal of this hearing is to effectuate change and to allow a struggling agency in charge of public safety to regain that focus on public safety that both sides of the dais wants.

The committee appreciates the witnesses appearing here today. I look forward to hearing their testimony, and I believe that the questions and answers will help the American people understand an agency in crisis.

Before we hear from the ranking member, I want to remind our witnesses today that this committee will not tolerate any reprisals, any effort to block Federal employees or contractors from working cooperatively with the inspector general, the Office of Special Counsel, or Congress. And, in fact, I want to make it very clear to do so is a crime.

I now recognize the ranking member for his opening statement.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I want to agree with you on what you just said. There must be maximum cooperation, and I join you in that statement.

The Chemical Safety Board was created as part of the Clean Air Act amendments of 1990, and the agency's mission is to investigate industrial chemical accidents, a very, very serious mission that goes to life and death.

CSB is a small agency, but it conducts very important investigations. For example, in 2007, CSB produced a landmark report on the BP Texas City Refinery explosion that killed 15 workers and injured 180 people.

In addition, just two weeks ago, CSB formally approved and publicly released a new report on the Deepwater Horizon explosion and well blowout, one of the most devastating environmental disasters in history. This new CSB report finds that the blowout preventer, a key piece of equipment that is supposed to prevent catastrophic

loss of oil, failed to seal the well because drill pipe buckled. CSB also identifies multiple deficiencies that demonstrate Transocean and BP did not treat or manage it as safety critical device.

In addition, CSB concludes that this failure occurred for reasons the offshore drilling industry remains largely unaware of. CSB also identified significant limitations in the U.S. regulatory regime, leaving industry and the public vulnerable to another major accident. This report provides a more in-depth analysis than any previous investigation into serious issues related to the safety systems used by deepwater drilling operations and it deserves very close scrutiny.

But, to date, no committee has held a hearing about the report or its findings to ensure that they are fully addressed so this does not happen again. It is sad today the committee is holding a hearing about the management challenges at the CSB. Let me make clear that I believe this is a worthy topic for the committee to investigate, but it is a shame that we did not spend the same amount of time and energy on the substance of the board's work.

As part of its investigation, the committee interviewed nine current and former CSB employees, and received briefings from the agency's EPA's Office of Inspector General and the Office of Special Counsel. As a result, it is clear there are serious management problems that need to be addressed. And certainly when there are management problems, they have a tendency to trickle down and affect the effectiveness of any agency.

This is not, however, a new revelation by this committee. Yesterday, Representative Henry Waxman, the ranking member of the House Energy and Commerce Committee, sent a letter to our committee outlining his own oversight efforts. Representative Waxman helped establish the CSB in 1990 and has engaged in various oversight since its inception. Last November, Representative Waxman sent a letter to the CSB chairman and to other board members expressing concern about management challenges and asking a series of questions. I will be interested to know what happened with those recommendations.

All three board members responded and Representative Waxman's staff engaged in consultations over several months with them about how the board can function more effectively and efficiently. On May 2nd, 2014, Representative Waxman sent seven recommendations to the CSB. Each board member was given the opportunity to comment on the recommendations before they were finalized. I believe this process and these concrete, sensible recommendations are a prime example of how responsible congressional oversight can and should be conducted.

In his letter yesterday, Mr. Waxman urged our committee to use this hearing to pursue constructive solutions to these challenges. He wrote, I believe that the best oversight makes constructive recommendations to improve agency performance. That is what I have tried to do through my oversight of the CSB, and I hope you will take a similar approach. Your hearing will serve as a valuable purpose if it provides an opportunity to discuss constructive ideas for improving CSB's internal management and operations so that the agency can focus on its core mission and investigative work.

I cannot agree more with these words, and I ask that Mr. Waxman's full letter and his recommendations be entered into the official hearing record.

Chairman ISSA. Without objection, it will be placed in the record.
Mr. CUMMINGS. Thank you.

To conclude, I know that the chairman invited Mr. Waxman this morning, a few minutes before the hearing, to come and be with us. Unfortunately, he could not. But I am hoping that we will be able to meet with him, Mr. Chairman, since this has been something that he has taken a great interest in and follow up, because I think he could be very helpful to us.

To conclude, I hope this committee will review these recommendations very carefully today and use them as a tool to improve the CSB. It is critical that the CSB function properly. This agency is responsible for investigating tragic accidents and making recommendations to protect the safety of workers and the public. We need board members and CSB staff to work together to ensure that the agency can carry out this very, very critical mission.

With that, Mr. Chairman, I yield back.

Chairman ISSA. Thank you.

All members may have seven days to submit opening statements.

At this time I would ask unanimous consent that the 86-page staff report which is also posted on the website, be placed in the record. Without objection, so ordered.

That staff report, by the way, contains all of the recommendations that Mr. Waxman has made, but goes beyond that, and we look forward to working with former Chairman Waxman.

Oh, I apologize. I forgot, it is a joint report with the Committee on Science, Space, and Technology.

I would like to post on the board very briefly 18 U.S.C. 1505. And I would like the witnesses to be aware that under 18 U.S.C. 1505, Obstruction of Proceedings, pertinent part, it says, whoever—well, I will just let you read it. In a nutshell, what I want to make very clear is there are criminal penalties for even suggesting that it would not be liked, acceptable, or encouraged to speak to Congress. I want to make that very clear. It will be part of our line of questioning today.

It is now my pleasure to welcome our witnesses. The Honorable Rafael Moure-Eraso is the Chairman of the U.S. Chemical Safety and Hazard Investigation Board; the Honorable Arthur A. Elkins, Jr., is the Inspector General of the U.S. Environmental Protection Agency. With him is Mr. Patrick Sullivan. He is the Assistant Inspector General for Investigations for the United States Environmental Protection Agency, or EPA. And with us again is the Honorable Carolyn N. Lerner. She is Special Counsel at the U.S. Office of Special Counsel. Lastly, on our request, and we appreciate your being here, the Honorable Beth Rosenberg is the former board member of the U.S. Chemical Safety and Hazard Investigation Board.

Pursuant to the committee's rules, would you please all rise to take the oath and raise your right hands?

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

[Witnesses respond in the affirmative.]

Chairman ISSA. Please be seated.

Let the record reflect that all witnesses answered in the affirmative.

I understand there will only be one opening statement from the two IG representatives. That will be fine; either one can make it.

We now recognize Dr. Eraso.

WITNESS STATEMENTS

STATEMENT OF THE HONORABLE RAFAEL MOURE-ERASO

Mr. MOURE-ERASO. Thank you. Good morning. I am Rafael Moure-Eraso, Chairperson of the U.S. Chemical Safety Board, or CSB. I would like to thank you for inviting me to speak today.

First, a quick overview of my background. I came to this great Country as an immigrant from Colombia more than 47 years ago and I have been a U.S. citizen for 33 years. I hold engineering degrees, as well as a doctorate in environmental health. I served for 23 years as a university professor and have a lifelong commitment to workers' health and safety. I consider my five-year tenure at the CSB, which ends next year, as an opportunity for me to give back to this Country. And, as a father and a grandfather, I want to ensure that the accidents we have investigated do not befall other communities or other families.

The CSB is an independent Federal agency known internationally for the exceptionally high quality of our accident investigations. We have deployed to over 100 incidents since 1998. The CSB's work has resulted in over 70 major investigation reports. We have released over 25 investigation-based safety videos, which are used for training purposes by almost every one of the top 50 U.S. chemical companies.

In the past year, the CSB has faced its most challenging cases ever. This includes the Deepwater Horizon blowout and explosion in the Gulf of Mexico, which investigation was requested by bipartisan leaders in the House. We are investigating the West Fertilizer accident in Texas, where a plant explosion killed 15 people and devastated a town. Our investigation of the Tesoro refinery in Washington State revealed industry-wide problems maintaining key equipment. Two recent CSB reports on the Chevron refinery in the Bay Area of California have led to dramatic changes making refineries and chemical plants safer in that State. And the CSB continual comprehensive investigation into the chemical contamination of drinking water that occurred in Charleston, West Virginia earlier this year.

Despite this activity, the CSB has come under some criticism for not investigating more accidents and closing more cases faster. I assure you we are rapidly closing our backlog. We are holding this hearing a total of six public meetings to release findings and reports in impacted communities. However, as I have told the IG staff, we are a very small agency charged with a mission of investigating far more accidents than we have the resources to tackle.

Since I was appointed chairperson in 2010, I have worked very hard to improve the operations and management of the CSB to work within the resources we have. This involves reorganizing to

create clear lines of authority in the investigation process, as well as accountability. This was absent before my appointment. I have taken significant steps to improve communications and transparency among board and staff, including establishing a workplace improvement committee and engaging a board facilitator. I brought diversity into leadership and I have hired an organizational consultant to work with staff members on developing solutions to their problems. I am happy to discuss any of those initiatives in more detail.

Let me say that I have known my fellow board members, Dr. Rosenberg, former member, and Mr. Griffin for about 30 years. They were former students of mine. With one exception, all of the votes on CSB reports that have been involved have been unanimous, so the work of the board is getting done.

I also want to very briefly mention the subject of alleged retaliation that you may be discussing. I assure you there is no employee I am aware of who may have lost his or her job, grade, or any pay as a result of complaints made to the Office of the Special Counsel.

In summary, I am fully committed to improving the work environment in the CSB. We have become a highly effective and respected Federal agency, even while operating on a shoestring budget and staff. We are often told we are one of the most efficient and best bargains in Government. I am proud of our work at the CSB.

I look forward to answering any questions you might have on the CSB operations. Thank you, Mr. Chairman.

[Prepared statement of Mr. Moure-Eraso follows:]

Written Testimony of Dr. Rafael Moure-Eraso
Chairperson of the US Chemical Safety Board
House Oversight and Government Reform Committee
June 19, 2014

Good Morning, my name is Rafael Moure-Eraso and I am chairperson of the US Chemical Safety Board or CSB. I would like to thank Congressman Issa and Ranking Member Cummings for inviting me to speak today on behalf of myself and the CSB.

First allow me to give a quick overview of my background. I hold an undergraduate and graduate degree in engineering from Bucknell University as well as a masters and doctorate in environmental health from the University of Cincinnati. I came to this great country -- as an immigrant from Colombia -- more than 47 years ago. I have been a US citizen for 33 years. I consider my tenure at the CSB as an opportunity to give back to this country, after having served for 23 years as a university professor.

I was honored to become the CSB chairperson in 2010 and am currently nearing my fifth and final year of appointment. The CSB's work is important to me not only as a professional undertaking, but because as a father and grandfather, I want to ensure that the accidents I have witnessed do not befall other communities and families I have too often seen so devastated by tragic losses, and often avoidable incidents.

As many of you may know the CSB is an independent federal agency charged with investigating serious chemical accidents. The CSB is internationally known as an expert organization in chemical safety and prevention and has built a solid reputation by deploying to over 100 incidents since 1998.

These investigations have included over 700 new chemical safety recommendations to EPA, OSHA, state regulators, industry organizations, unions, and companies. The CSB tracks recommendations to completion and has so far successfully closed 75% of its safety recommendations (533) based on acceptable actions by recipients. These actions make American businesses, workplaces, and communities safer. Among the major actions prompted by specific CSB investigations and recommendations are:

- The national and international fuel gas codes have been changed, and new codes have been developed, to prohibit unsafe natural gas handling practices (such as releasing natural gas in or near building during pipe cleaning operations) which had previously led to many accidents and fatalities, including Connecticut and North Carolina blasts investigated by the CSB
- New York City comprehensively overhauled its fire code, adopting a modern fire code for the first time since 1918, following the CSB investigation of a building explosion in Manhattan
- Massachusetts developed new stringent hazardous materials rules for plants, following the CSB investigation of a plant explosion that devastated a community in Danvers, MA

- Mississippi enacted new rules increasing safety at thousands of oil sites, following a innovative CSB investigation conducted collaboratively with Mississippi students about the problem of teenagers being accidentally killed while “hanging out” near remote oil tanks containing explosive vapors
- OSHA began rulemaking, in 2009, on a comprehensive standard to prevent combustible dust explosions in industry, which the CSB found had led to nearly 300 plant fires and explosions over a 25 year period
- OSHA modernized its hazard communication standard to require companies to disclose combustible dust hazards through worker right-to-know programs
- OSHA added a new appendix to its laboratories standard (1910.1450) to emphasize the importance of evaluating physical hazards in laboratory settings.
- EPA updated its risk management program requirements to require more timely reporting of accidents to regulators and the public, and to require reporting on accidents caused by reactive chemicals – this followed a number of reactive chemical accidents the CSB investigated
- The Treasury Department strengthened its requirements for the safety of federal contracts directing hazardous activities (following an explosion during fireworks disposal that killed five contract workers)
- The President issued Executive Order 13650, in August 2013, which calls upon federal agencies like OSHA and EPA to evaluate the need for potential regulatory changes to promote chemical safety. As a result of the EO, OSHA issued a Request for Information (RFI) on potential revisions to the PSM standard. The CSB submitted extensive comments to the RFI in a letter dated March 31, 2014 available at: http://www.csb.gov/assets/1/16/CSB_RFComments.pdf
- The American Petroleum Institute developed numerous new safety practices, including safety guidance for starting up and operating oil production sites, for reporting safety indicators from refineries, and banning unsafe trailers from hazardous areas of refineries (the cause of 15 deaths and 180 injuries at BP’s Texas City refinery, investigated by the CSB)
- National engineering curriculum groups developed new requirements so that all U.S. chemical engineers are taught chemical safety concepts as part of undergraduate education, following a reactive chemical explosion the CSB investigated in Florida
- The American Chemical Society developed new guidance for evaluating fire and explosion hazards in chemical research laboratories, that had caused many accidents in universities, including a Texas university explosion the CSB investigated
- The American Institute of Chemical Engineers developed new guidance for evaluating and controlling reactive chemical dangers in industry
- CSB findings and recommendations have led to a broad range of changes in NFPA codes and ICC standards such as those pertaining to safe handling and storage of flammable and combustible liquids, compressed gases and liquefied petroleum gas
- In 2009, Congress passed on a bipartisan basis the American Communities’ Right to Public Information Act to prevent companies’ misuse of secure information designations (such as SSI) to prevent communities from learning about plant safety practices and hazards
- Acting on a specific CSB urgent recommendation, British Petroleum (BP) created and funded, at a cost of \$30 million, the expert Baker Panel to review and improve the safety

culture at all its US refineries, leading to the seminal Baker Report used worldwide by oil and chemical companies

In the past few years, the CSB has had the most challenging and important cases before it in its history. These include a major investigation, requested and supported by bipartisan leaders in the House, of the Deepwater Horizon blowout and explosion in the Gulf. Within the past two weeks, the CSB issued its report which was the first – among all the much costlier and better resourced investigations by other groups – to accurately determine and report on why the Deepwater Horizon’s blowout preventer failed to seal the well and stop the 87-day release of oil into the Gulf. Other major CSB investigations include West Fertilizer in Texas, where a plant explosion killed 15 and devastated a town; the CSB was the first to call for stronger storage practices for ammonium nitrate, the fertilizer that caused the blast, leading Senate authorizing chairman Barbara Boxer to call the CSB “heroes” in 2013. The CSB also recently completed an investigation at the Tesoro refinery in Washington State, revealing industry-wide problems in how the integrity of key refinery equipment is assured, leading the CSB to call on EPA to require companies to use safer technologies and materials of construction. In addition, the CSB has two reports on the Chevron refinery fire in California in 2012, which endangered the lives of 19 refinery workers and sent more than 15,000 community residents to the hospital for exposure to smoke and fumes. Following the CSB investigation, California has begun a complete overhaul of its process safety regulations for refineries and chemical plants (California alone has 15 refineries) and has tripled the number of state process safety inspectors.

Finally, the CSB has begun in January 2014 a major investigation of the chemical tank rupture at Freedom Industries in West Virginia which contaminated the drinking water supply for 300,000 residents, sent hundreds to emergency rooms, and shuttered businesses and schools. The CSB has been leading the federal investigation to determine why the accident happened (including overseeing the forensic examination of all the storage tanks) and has testified twice before Congress on its initial findings. The CSB investigation will be critical for assuring the safety of chemical storage facilities located around the country near drinking water supplies or other critical infrastructure.

This year, we will hold six public meetings in communities which have been severely affected by serious chemical accidents in those areas. We are rapidly closing in on the backlog of open cases.

Despite all this activity, investigations, reports, and safety recommendations – that is, performing our congressionally mandated mission, the CSB has come under some criticism for not investigating more accidents and closing more cases.

I can understand some of the criticism. But Mr. Chairman and members of the committee, I have to tell you, as we have told IG staff, we are a very small agency charged with a huge mission of investigating far more accidents than we have the resources to tackle.

As chairperson I have focused on completing ongoing investigations which will alleviate the current backlog and allow the CSB to increase the number of deployments to accident sites in subsequent years. We've made a lot of progress.

I want to very briefly make a few observations about some of the themes you may touch upon in this hearing. First, I am unaware of *any* CSB employee who may have lost their job, grade or any pay, as a result of complaints made to the Office of Special Counsel. It just hasn't happened. Second, I have known Dr. Rosenberg and Mr. Griffon for approximately 30 years. They were former students of mine. There is no question that we have had spirited debates about chemical safety issues. However, with one exception, all of our votes on CSB reports have been unanimous. That hasn't always been easy to achieve, but it is a fact that is on the record.

Before my tenure at the CSB, in 2008 GAO issued a report on the need for the CSB to address certain management issues. Since 2010 I have worked very hard to improve the operations and management of the CSB. I reorganized lines of management to create clear lines of authority as well as accountability that were virtually non-existent before 2010. The result has been to raise the already high-quality of CSB reports and broaden the scope of the root cause investigations.

We are accomplishing our mission on a shoestring budget of just around 11 million dollars and a staff that is under fifty total employees. The bottom line is, the CSB has become a highly respected chemical accident investigative agency since its beginning in 1998. We are often told we are one of the most efficient and best bargains in government. My 42 year career in occupational safety and health has culminated in my job as chairperson. I am proud of our work at the CSB. I look forward to answering any questions you may have on the CSB's operations.

Chairman ISSA. Thank you.
Mr. Elkins.

STATEMENT OF THE HONORABLE ARTHUR A. ELKINS, JR.

Mr. ELKINS. Good morning, Chairman Issa, Ranking Member Cummings, and members of the committee. I am Arthur Elkins, Inspector General for the EPA and the CSB. Thank you for inviting me to appear today.

While my written statement includes additional detail and broader concerns regarding the CSB, the critical matter that I wish to call to this committee's attention is an OIG investigation that led to the issuance of a seven day letter. Background information will provide a context.

In September 2012, the EPA OIG received a complaint from a CSB employee alleging that a high level Office of Special Counsel employee had disclosed to the CSB official the identities of CSB whistleblowers who had filed confidential complaints with the OSC. The complaint also alleged that the OSC employee had acted to thwart an OSC investigation into the complaints.

Subsequently, the FBI and the EPA OIG conducted an investigation into whether the OSC employee had obstructed justice. The DOJ's Public Integrity Section declined criminal prosecution. However, the criminal investigation had revealed a key administrative issue warranting further investigation into possible violations of the Whistleblower Protection and Privacy Acts.

Because the matter fell outside of the EPA OIG's jurisdiction and the OSC determined it had a conflict of interest, the OSC asked OPM's Office of Inspector General to investigate.

Meanwhile, in February of last year, the EPA OIG received a new complaint alleging that CSB officials were using non-governmental email accounts to conduct official CSB business, and we opened a new investigation.

In May 2013, the OIG requested records of communications for a specified time period pertaining to official CSB matters sent to Chairman Rafael Moure-Eraso via non-governmental email accounts. The only CSB representative who responded to that request was a private attorney hired by the CSB in connection with the whistleblower complaints. The private attorney sent only some of the records, and some of those were heavily redacted. He said that he was withholding other records based on attorney-client privilege and/or attorney work product privilege.

In July and August 2013, the OIG made repeated requests for a full and complete production of the requested records. Although the CSB acknowledged having the records, it still refused to produce them.

The Inspector General Act is clear that offices of inspectors general have unfettered access to agency records. The Act also requires each IG to report to the head of an agency on particularly serious or flagrant problems, abuses, or deficiencies. The mechanism for doing so is commonly referred to as a seven day letter.

On September 5th, 2013, the OIG issued a seven day letter to Chairman Moure-Eraso. To date, the CSB has provided no records, instead, asserting to Congress that the agency is obliged to protect

attorney-client privilege with respect to third parties, which the CSB asserts excuses production to the OIG.

The IG Act does not provide an exception based on privilege. By refusing to provide the requested information, the CSB is preventing the EPA OIG from conducting a complete investigation and, in turn, from providing Congress with a meaningful report on all of the CSB's activities.

In conclusion, the OIG's investigation has been dormant for many months pending the refusal of the CSB to produce the requested documents. The OIG stands ready to carry out its mission; however, without congressional follow-up, our seven day letter is without teeth. We look to Congress to direct the CSB to produce the records.

When the CSB tells its OIG that it will not comply with the OIG's request for information, it is disregarding the Act that Congress wrote for the protection of taxpayers that Congress intended. OIG must be able to obtain access to documents, depend on the cooperation of agencies, and conduct our work without delay.

When we cannot, we fail the American public in several ways: first, repeated attempts to complete an audit or investigation mean that we are not attending to other deserving work; second, inefficiency thrives unchecked and potential wrongdoing evades both notice and consequences; third, potential behind-the-scenes misconduct could change the direction of and/or evidence available; and, finally, public health is at risk. The CSB's mission deals with matters of life and death.

Mr. Chairman, this concludes my prepared statement. My Assistant IG for Investigations, Patrick Sullivan, and I will be pleased to answer any questions you may have.

[Prepared statement of Mr. Elkins follows:]



U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL



**Lack of cooperation by the
U.S. Chemical Safety Board with the
EPA's Office of Inspector General**

**Statement of Arthur A. Elkins Jr.
Inspector General**

**Before the Committee on Oversight and Government Reform
U.S. House of Representatives**

June 19, 2014

**Statement of
Arthur A. Elkins Jr.
Inspector General
Office of Inspector General
U.S. Environmental Protection Agency
Before the
Committee on Oversight and Government Reform
U.S. House of Representatives
June 19, 2014**

Good morning, Chairman Issa, Ranking Member Cummings and members of the committee. I am Arthur Elkins, Inspector General at the U.S. Environmental Protection Agency (EPA). Thank you for inviting me to appear before you today.

Overview of EPA OIG's Responsibilities

It is important to remind everyone present that the Office of Inspector General (OIG) is an independent and objective office. Congress has entrusted the EPA OIG with serving as the Office of Inspector General for both the EPA and the U.S. Chemical Safety and Hazard Investigation Board (CSB).¹ The EPA OIG operates with a separate budget and decision-making authority from both agencies, and senior leaders at the agencies may not prohibit, prevent or obstruct us from conducting our work.

In accordance with the Inspector General (IG) Act of 1978, as amended, the EPA OIG's mission is to: conduct independent and objective audits and investigations related to programs and operations at the EPA and the CSB; prevent and detect waste, fraud and abuse; promote economy, effectiveness and efficiency; review pending legislation and regulations; and keep the agency heads and Congress fully and currently informed. We fulfill our mission primarily by issuing reports that include recommendations for corrective actions, by conducting investigations, and by referring criminal cases to the U.S. Department of Justice for prosecution.

The IG Act is clear in Section 6(a)(1) that Offices of Inspectors General have "access to all records, reports, audits, reviews, documents, papers, recommendations or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act . . ."² As a matter of statutory interpretation, the IG Act is unambiguous that OIGs have access to all agency records without qualification.

Whenever I have the privilege of appearing before this committee, I appreciate the opportunity to express my profound gratitude and respect for the expertise, dedication, diligence and professionalism of the EPA OIG staff who do their best every day to carry out this mission.

¹ See *Consolidated Appropriations Act of 2012, Pub. L. 112-74* ("notwithstanding any other provision of law, the individual appointed to the position of Inspector General of the [EPA] shall, by virtue of such appointment, also hold the position of Inspector General of the [CSB]").

² 5 U.S.C. App. 3, § 6(a)(1)

Turning to the matters at hand, I have been asked to testify about the EPA OIG's recent experiences with regard to the CSB. I will first address the circumstances leading to the rare issuance of a "Seven Day Letter" in an open investigation that has been dormant for months pending the refusal of the CSB to produce requested documents. Then I will speak briefly about our Office of Audit's work with the CSB.

CSB's Refusal to Provide Requested Documents to EPA OIG

In September 2012, the EPA OIG received a written complaint from a CSB employee alleging that a high-level Office of Special Counsel (OSC) employee had disclosed to a CSB official the identities of CSB whistleblowers who previously had filed confidential complaints with the OSC. The complaint also alleged that the same high-level OSC employee had taken actions to thwart an open OSC investigation into the CSB whistleblowers' complaints. A complaint identical to the one received by the EPA OIG had been sent to the OSC, which in turn forwarded it to the Office of Personnel Management (OPM) General Counsel's office to review and investigate.

From October 2012 until May 2013, the Federal Bureau of Investigation and the EPA OIG conducted a criminal investigation into the allegation that a high-level employee at the OSC had obstructed justice and disclosed the identities of confidential OSC whistleblowers.

In November 2012, the OPM General Counsel's office suspended its administrative investigation in response to a request from the FBI and the EPA OIG pending the completion of our criminal investigation.

In May 2013, the FBI and the EPA OIG briefed the U.S. Department of Justice (DOJ) Public Integrity Section on our investigative findings. The DOJ Public Integrity Section declined prosecution at that time, and the FBI closed its criminal case.

Although the case was no longer a criminal matter, that investigation had revealed a key administrative issue warranting further investigation outside of the EPA OIG's jurisdiction: A high-level OSC employee may have disclosed, without authorization, the identities of confidential whistleblowers from the CSB in violation of the Whistleblower Protection Act (5 U.S.C. § 1213h), protecting the confidentiality of whistleblowers' identity) and the Privacy Act of 1974 (5 U.S.C. § 552a). The EPA OIG coordinated with the OSC, which determined that the OPM Office of Inspector General, not the OPM General Counsel's office, should continue the investigation. On October 31, 2013, the EPA OIG provided the OPM OIG with our substantive investigative material from the closed joint criminal investigation with the FBI.

Meanwhile, in February 2013, the EPA OIG received a new complaint alleging that CSB officials were using nongovernmental email accounts to conduct official CSB business. However, the CSB refused, and to this day continues to refuse, to provide the documents the EPA OIG requested and has determined are necessary for this investigation into those CSB activities.

The CSB hired a private attorney, Mr. Peter Broida, to represent the CSB in connection with the whistleblower complaints. In May 2013, the OIG made three separate requests to CSB Chairman Rafael Moure-Eraso, CSB General Counsel Richard Loeb and Mr. Broida for all records of communications pertaining to official CSB matters that were sent by Chairman Rafael Moure-Eraso via a Gmail or any other nongovernmental email account for the time period from January 1, 2012, forward. Those requests specified names and topics that should be included pursuant to our investigation, and were requested to be produced in unredacted, original form.

Mr. Broida provided some of the requested records, some of which were heavily redacted. He stated that he was withholding other responsive records based on the attorney-client privilege and/or attorney-work product privilege. We received no records from Chairman Moure-Eraso or Mr. Loeb.

On July 22, 2013, Deputy Assistant Inspector General for Investigations Michael Daggett sent a letter to CSB Chairman Moure-Eraso requesting a full and complete production from CSB in response to the OIG's pending requests.

On August 7, 2013, Chairman Moure-Eraso sent his response by way of a letter to me stating that the CSB did not intend to comply with the OIG's requests.

The IG Act in Section 5(d) requires each Inspector General to report to the head of the agency "whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses or deficiencies relating to the administration of programs and operations of such [agency]."³ This reporting tool, which is rarely used by the OIG community, is referred to as a "Seven Day Letter" because it requires the agency head to transmit the OIG's letter and the agency's response to appropriate committees or subcommittees of Congress within seven calendar days.

On August 8, 2013, I responded to Chairman Moure-Eraso's letter of the previous day informing him that the EPA OIG would proceed with a Seven Day Letter if the records were not provided by August 23, 2013.

On August 20, 2013, CSB Special Counsel for Investigations Christopher Lyon requested an extension of the deadline. The EPA OIG granted an extension until August 29.

On August 27, Mr. Lyon acknowledged in an email that the CSB had the requested documents.

³ 5 U.S.C. App. 3, § 5(d)

On August 29, Chairman Moure-Eraso sent a letter to me declining to produce the documents, stating:

. . . I have concluded that release of the documents requested by OIG would result in a waiver of the attorney-client privilege of the CSB with respect to certain third-party claimants whose interests are adverse to the CSB and the executive branch. . . . The vast majority of the documents you have requested are communications between CSB personnel and the agency's outside legal counsel. A small number of communications are between me and CSB attorneys. I am concerned that release of these documents to the OIG will waive the agency's attorney-client privilege vis-a-vis third parties adverse to the agency and the executive branch.

On September 5, 2013, the EPA OIG issued a Seven Day Letter to Chairman Moure-Eraso regarding the CSB's refusal to provide requested documents to the OIG as part of an ongoing investigation.

To date, CSB has provided no records, instead asserting to Congress that the agency is obliged to protect attorney-client privilege with respect to third parties, which excuses production to the OIG. In support of its contention, the CSB attached the analysis of a law professor paid by the CSB concluding that the agency would waive privilege if it turned over the documents to the EPA OIG as requested.

The CSB's assertion that production of documents to the EPA OIG would waive the privilege is wrong but also irrelevant to the CSB's obligations to the EPA OIG and this committee. The IG Act provides no exception to an Inspector General's right of unfettered access to agency records based on an assertion of privilege, attorney-client or otherwise.

The IG Act provides the statutory basis for OIG access to all records without qualification. The CSB has a duty to provide the records fully, completely and without delay. Refusal is a particularly serious and flagrant problem requiring the issuance of the EPA OIG's Seven Day Letter. However, without congressional follow-up, the letter is without teeth.

The critical matter that I wish to call to this committee's attention is the substance of the EPA OIG's investigation that led to the Seven Day Letter: The OIG has a legitimate law enforcement purpose for requesting the records at issue in order to pursue allegations of CSB officials, most notably the Chairman, using nongovernmental email to communicate on official CSB matters. By refusing to provide the requested information, the CSB is preventing the EPA OIG from conducting a complete investigation. In turn, we are precluded from providing Congress with a meaningful report on all of the CSB's activities.

CSB's Mission, Timeliness of Reports and Cooperation with EPA OIG

I also was asked to testify about the EPA OIG's audit findings with regard to the CSB's fulfillment of its mission, timeliness in issuing reports and overall cooperation.

The EPA OIG issued its "CSB Management Challenges and Internal Control Weaknesses" letter in September 2013, which revealed that the CSB is not investigating all of the industrial chemical accidents within its legal jurisdiction. Pursuant to the statutory authority provided in the Clean Air Act Amendments of 1990, the 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." Auditors found the CSB has an investigative gap between the number of accidents that it investigates and the number of accidents that fall under its statutory responsibility to investigate. To put that record in more stark terms, with dozens of accidents involving fatalities between 2009 and 2012, the fiscal years covered by our letter, the CSB initiated no more than six investigations in any given year. In 2012, for example, while there were 65 accidents, the CSB initiated only one investigation. That leaves 98 percent of the year's accidents uninvestigated.

An EPA OIG audit of the CSB's investigation process completed in July 2013 yielded similar results. Auditors determined that the CSB had not accomplished its strategic objective to "complete timely, high quality investigations that examine the technical, management systems, organizational and regulatory causes of chemical incidents." They found that, over a 6-year period, the CSB had fallen steadily behind in its goals of completing investigations. After meeting goals in fiscal years 2007 and 2008 at 100 percent, percentages fell to 66.67 in 2009, 50.00 in 2010, 33.33 in 2011 and 25.00 in 2012. Six investigations were open for more than 3 years.

Moreover, several EPA OIG audits going back to 2011 have included recommendations with which the CSB agreed but never implemented, with dates for completion now long past.

Insofar as the CSB, as a small agency, may cite a burden of compliance with the EPA OIG's requests, it is worth noting that our work pertaining to that agency is minimal.

In addition to the single investigation that is a subject of today's hearing, the EPA OIG has two active and four planned audits. Of those, all but one audit are mandated by Congress. A single discretionary audit seeks to determine whether the CSB effectively manages its contracts. The EPA OIG sought to begin that audit in June 2013 but delayed it until September at the request of the CSB, which cited staffing issues. When we notified the CSB of a re-start last November, it requested a second delay until February 2014, citing a heavy workload, competing priorities and vacation conflicts. We granted that delay, as well, noting that it would be the last. The project was re-started on February 10, 2014, and auditors anticipate completion by May 2015.

Conclusions

Through the IG Act, Congress established independent Offices of Inspector General to ensure oversight of Executive Branch agencies of all sizes. When the CSB tells the OIG charged with such responsibility that it will not comply with the OIG's request for information for reasons of its own invention, it is disregarding the law that Congress wrote for the protection of taxpayers that Congress intended.

OIGs must be able to obtain access to documents, depend on the cooperation of agencies, and conduct our work without delay. When we cannot do so, we fail the American public in several ways. First, in these times of tight budgets and scarce resources, the unnecessary hours, days, months and even years required by repeated attempts to complete an audit or investigation mean that we are not attending to other deserving work. Second, when an OIG is faced with obstruction and obfuscation by an agency, inefficiency thrives unchecked, and potential wrongdoing evades both notice and consequences. Third, potential misconduct on behalf of an agency's officials could change the direction of and/or evidence available to the OIG's investigation when it moves forward. Finally, and most significantly, public health is at risk. The CSB's mission is of utmost importance dealing, literally, with matters of life and death.

The EPA OIG stands ready to carry out our mission to the fullest. Although the use of a Seven Day Letter is unusual, we knew that it was warranted in this case. However, having sent the letter more than nine months ago, we are still in the same position and look to Congress to support the EPA OIG by directing that the CSB produce the requested records.

Mr. Chairman, this concludes my prepared statement. I will be pleased to answer any questions you may have.

Chairman ISSA. Thank you.
Ms. Lerner?

STATEMENT OF THE HONORABLE CAROLYN N. LERNER

Ms. LERNER. Thank you, Chairman Issa, Ranking Member Cummings, and members of the committee. Thank you for the opportunity to testify today. This is the third time I have testified before this committee. Most recently, in November 2013, I discussed the OSC's findings on widespread misuse of overtime payments at the Department of Homeland Security. Our work with whistleblowers helped to identify over \$37 million in annual misuse of overtime and provided momentum for bipartisan legislation to address this issue; and I know that Congressman Chaffetz has been very active in helping with that legislation, and I thank you for those efforts.

I appreciate the ongoing partnership with the committee in rooting out waste in Government operations and protecting whistleblowers. I also thank Chairman Issa and Ranking Member Cummings for your successful efforts to modernize and improve the Hatch Act.

OSC is an independent investigative and prosecutorial agency. We protect the merit system for over two million Federal civilian employees in four distinct areas: we protect Federal workers from prohibited personnel practices, primarily retaliation; we provide a safe and secure channel for whistleblowers to report waste, fraud, abuse, health and safety issues; we enforce the Hatch Act, keeping the Federal workforce free from improper partisan politics; and, finally, OSC enforces the Uniform Services Employment and Reemployment Rights act, or USERRA.

With that backdrop, I would like to now discuss OSC's cases involving the Chemical Safety Board, CSB. First I want to describe very briefly OSC's process for investigating retaliation cases generally.

After an initial intake, complaints are referred for investigation. The majority of cases referred for investigation are then screened for mediation by OSC's Alternative Dispute Resolution Unit. If a case is not resolved through mediation, it is then sent to our Investigation and Prosecution Unit.

Investigations routinely involve the following steps at the OSC: first, we interview complainants; second, we issue document requests; third, we interview witnesses; and, finally, we interview subject officials.

After an investigation, agencies frequently agree to informally resolve complaints at OSC's request. When agencies do not agree to informally resolve the complaint, we can prosecute cases before the Merit Systems Protection Board.

This committee has requested information on OSC's investigation into retaliation complaints at CSB. While I can certainly provide background on procedural issues, of course, I can't comment on the substance of pending investigations. Doing so could affect the outcome of the cases and really hurt our office's ability to resolve these cases. Also, as the final decision-maker on these cases, I can't prejudice any future action by OSC or influence the parties' willingness to settle.

With those concerns in mind, the following is a summary of significant procedural and investigative steps that OSC has taken to resolve the claims of whistleblower retaliation at CSB.

In October 2012, several CSB employees filed whistleblower retaliation complaints with OSC. These employees alleged retaliation for whistleblowing and other protected activity, including the filing of earlier OSC complaints in 2011. That 2011 complaint, which was also filed by additional CSB employees, alleged that CSB management engaged in improper hiring practices.

After receiving the retaliation complaints, OSC assigned the cases to an investigator. That investigator reviewed the submissions and scheduled interviews with the complainants, which began October 25th, 2012.

On December 28th, 2012, OSC requested documents from CSB with a deadline for providing the information by January 7th, 2013. In May 2013, CSB responded. They provided a disk with most of the responsive information. But CSB withheld some information based on claims of attorney-client privilege, and to date has not provided this information. CSB has also not provided us with a privilege log or an explanation of the individual documents that were withheld from OSC's review.

In September 2012, OSC attempted to schedule interviews of the subject officials. OSC issued a subpoena to the primary CSB management subject official to ensure that the interview date would not continue to slip and OSC could complete its investigation. Each of the subject officials was interviewed between December 18th, 2013, and January 14th, 2014.

OSC's investigation provided the foundation for resolving one of the retaliation complaints, which recently settled in April 2014. This retaliation complaint was closed pursuant to that settlement. The other cases remain open and are pending in our Investigation and Prosecution Division. We are very actively working to settle those cases.

I thank you again for the opportunity to testify. I would be very happy to answer the committee's questions.

[Prepared statement of Ms. Lerner follows:]

**Testimony of the Honorable Carolyn N. Lerner, Special Counsel
U.S. Office of Special Counsel**

**U.S. House of Representatives
Committee on Oversight and Government Reform**

“Whistleblower Reprisal and Management Failures at the Chemical Safety Board”

June 19, 2014, 10:00 A.M.

Chairman Issa, Ranking Member Cummings, and Members of the Committee:

Thank you for the opportunity to testify today about the U.S. Office of Special Counsel (OSC), and our recent investigations of retaliation at the Chemical Safety Board. This is the third time I have had the opportunity to testify before the Oversight Committee. Most recently, in November 2013, I discussed our findings on widespread misuse of certain overtime payments at the Department of Homeland Security. Our work with whistleblowers helped to identify and address over \$37 million in annual misuse of overtime pay, and provided momentum for bipartisan legislation that may further address these concerns. I appreciate the ongoing partnership with the Chairman and Members of this Committee in rooting out waste in government operations and protecting whistleblowers. I also thank you and Ranking Member Cummings for your successful efforts to modernize and improve the Hatch Act.

OSC is an independent investigative and prosecutorial federal agency. We protect the merit system for over 2.1 million civilian federal employees in four distinct mission areas. OSC protects federal workers from “prohibited personnel practices,” especially retaliation for whistleblowing. We provide a safe and secure channel for whistleblowers to report waste, fraud, abuse, and health and safety issues. We enforce the Hatch Act, keeping the federal workplace free from improper partisan politics. Finally, OSC enforces the Uniformed Services Employment and Reemployment Rights Act (USERRA).

We fulfill these important roles with a staff of approximately 120 employees – and the smallest budget of any federal law enforcement agency. I am pleased to report that our dedicated staff is performing more efficiently and effectively than at any point in OSC’s 35-year history.

The last two fiscal years (FY2012 and FY2013) have been a record-setting period for OSC. By nearly every statistical measure, OSC achieved the most positive results in its history. To illustrate, cases increased by 50% in five years, with the sharpest increase over the last two. During this period, funding levels actually decreased in real terms, considering inflation, automatic pay adjustments, and other mandatory expenses.

In addition to receiving more cases, OSC is processing them more efficiently and effectively. For example, in FY2008, OSC completed a total of 2,875 cases. In FY2013, just five years later, OSC resolved 4,808 cases, nearly doubling our productivity. OSC’s increased efficiency helps us manage the growing caseload and translates into real savings. OSC’s cost to resolve a case

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dropped by 40% in the last 5 years, a decrease of over \$2,640 per case. Stated simply, we're making every dollar count.

Our increased efficiency has not compromised OSC's effectiveness. In fact, when evaluating the most important statistic for OSC – the number of favorable actions on behalf of whistleblowers and the merit system – we are again setting records. We're not just closing cases, we're getting more relief than ever before for whistleblowers. Favorable actions include the relief that OSC secures for employees who are the victims of retaliation, such as back pay, reinstatement, or reassignment to a non-retaliatory environment. They also include disciplinary actions taken against employees who engage in retaliation or other prohibited conduct.

In FY2012, the first full year of my tenure, our staff achieved an 89% increase in favorable actions from the prior fiscal year. This was a 175% increase from five years ago. FY2012's total of 159 favorable actions, or "victories" for whistleblowers and the merit system, exceeded any previous year in the agency's history. We set an extremely high bar in FY2012, and then surpassed it in FY2013. The total number of favorable actions rose again in FY2013 – to 175. This is a remarkable total, considering only 29 favorable actions were achieved in 2007.

Recently, OSC received interim relief for three Department of Veterans Affairs' employees who blew the whistle on improper scheduling procedures and other possible threats to patient care at the VA. OSC is working to expeditiously resolve over 40 additional reprisal claims by VA employees, as well as more than 50 disclosures of health and safety concerns at the VA.

These successes are a testament to the hard work of our dedicated career staff, who have endured furloughs and increased caseloads while managing to improve productivity and outcomes in all measures.

Chemical Safety Board Cases

With that backdrop, I would like to now discuss OSC's cases involving the Chemical Safety Board (CSB). First, I will describe OSC's process for investigating retaliation cases.

After an initial review by our intake office, the Complaints Examining Unit, some complaints are referred for further investigation to the Investigation and Prosecution Division (IPD). The majority of cases referred to the IPD are then screened for possible mediation by OSC's Alternative Dispute Resolution Unit (ADR). Participation in OSC's ADR is voluntary and requires the agreement of both the employee and the agency. If a case is not considered appropriate for ADR, or if ADR is unsuccessful, the case is sent to the IPD.

IPD investigations routinely involve: interviewing complainants, issuing document requests, and interviewing witnesses and subject officials. After an OSC investigation, agencies frequently agree to informally resolve complaints at OSC's request. In cases where there is sufficient evidence for OSC to conclude that a violation has occurred, and where the involved agency has not agreed to provide relief to the complainant, the assigned attorney makes a recommendation on whether OSC should file a "Prohibited Personnel Practice" report with the head of the involved agency. In such cases, if an agency fails to act on OSC's Prohibited Personnel Practice

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report, the staff makes a recommendation to me on petitioning the Merit Systems Protection Board for corrective action. Once I make the final decision, OSC drafts a petition for corrective action.

In cases where there is insufficient evidence to prove a violation or OSC lacks jurisdiction over the claim, OSC sends the employee a preliminary determination letter, which provides the employee an opportunity to respond to OSC's assessment of the case. Additionally, in our letters closing out retaliation complaints, we notify employees of their right to individually seek corrective action from the Merit Systems Protection Board by filing an "Individual Right of Action."

The Committee has requested information on OSC's investigations into retaliation complaints at the CSB. Of course, OSC cannot comment on the details of pending investigations. Any comments I make today may impact the ability of our office to resolve the pending reprisal claims brought by CSB employees. I am the final decision-maker in these cases, and do not want to prejudice any future action by OSC, or influence the parties' willingness to settle, with my statements today. Finally, discussing the content of the allegations in a public forum, including the merits of the claims, could constitute an unwarranted invasion of personal privacy interests and negatively impact OSC's ability to receive information from whistleblowers and witnesses in future cases.

Accordingly, I am severely limited in the type of information I can provide in a public setting at this time. I acknowledge and appreciate the efforts of Committee staff, who I understand have communicated these limitations to the Members of the Committee. With that understanding, and with those concerns in mind, I have attempted to provide as much information as possible to assist the Committee's review of CSB operations. Below is a factual summary of the significant investigative steps OSC has taken to date to resolve claims of whistleblower reprisal at the CSB.

Several CSB employees filed whistleblower retaliation complaints with OSC in October 2012. The CSB employees alleged that personnel actions were taken in retaliation for protected whistleblowing and protected activity. The protected activity included the filing of an earlier OSC complaint in 2011. The 2011 complaint, also filed by several CSB employees, alleged that CSB management engaged in improper hiring practices.

After receiving the retaliation complaints in October 2012, OSC assigned the cases to an investigator. (Because OSC had already initiated an investigation into the 2011 complaints, the initial review stage with the Complaints Examining Unit was bypassed and the cases were immediately referred for further investigation to IPD). The investigator reviewed the submissions and scheduled interviews with the complainants, beginning on October 25, 2012.

After these interviews, OSC requested documents from CSB on December 28, 2012. OSC requested that the information be provided by January 7, 2013. CSB provided a disk with most of the responsive information in May 2013. CSB withheld some information based on claims of attorney-client privilege, and has not provided this information to OSC to date. CSB also has not provided a privilege log, or an explanation of the individual documents that were withheld from OSC's review.

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After reviewing the last set of pre-interview documents, OSC attempted to schedule interviews of the subject officials in September 2013. OSC interviewed the first subject official on December 18, 2013, and the final subject official on January 14, 2014. OSC issued a subpoena to the primary CSB management subject official to ensure that the interview dates would not continue to slip and OSC could complete its investigation.

OSC's investigation provided the foundation for resolving one of the retaliation complaints, which settled in April 2014. OSC closed this retaliation complaint pursuant to the terms of the settlement. The other cases remain pending in OSC's Investigation and Prosecution Division. OSC is actively working to settle these cases.

I thank you again for the opportunity to testify today. With the limitations cited above in mind, I would be happy to answer the Committee's questions.

Chairman ISSA. Thank you.
Dr. Rosenberg.

STATEMENT OF THE HONORABLE BETH ROSENBERG

Ms. ROSENBERG. Thank you, Chairman Issa, Ranking Member Cummings, members of the committee. I was requested to testify today regarding my tenure as board member at the U.S. Chemical Safety Board. I was nominated by President Obama and confirmed by the Senate on January 1st of 2013 for a five-year term. I resigned as of May 31st, 2014, after 17 months. For the previous 16 years, I was a professor at Tufts University School of Medicine, where I taught occupational and environmental health in the public health program.

The mission of the board is unique and important: to investigate the root causes of major incidents in the chemical facilities and oil refineries, and to make recommendations based on the evidence to prevent those incidents from happening again.

The CSB faces certain challenges in fulfilling its mission that are beyond its control. It is intended to be an expert advisory body similar to the National Transportation Safety Board, but it has no means, other than the weight of its evidence, to ensure its recommendations are implemented. With current staffing and resources, it cannot possibly investigate all the incidents and deaths that it should.

But there are four major challenges that are within the control of agency leadership that must be addressed.

One, there is a chilled atmosphere. Staff has been formally discouraged from talking to board members, according to an email from the managing director. Some staff said they were nervous about being seen talking to me, so we met outside of the agency. There are no opportunities for staff and board members to discuss issues openly. Those whose opinions differed from those of senior leadership are marginalized and vilified. At the CSB, disagreement is seen as disloyalty. Criticism is not welcome and staff fear retaliation.

Two, governance is ineffective. Board members are excluded from core policy functions. For example, Board Member Griffon and I learned about the senior management's decision to stonewall documents that were requested by the EPA inspector general and the issuance of a seven day letter in the press. We saw the CSB's response to the IG after it was sent. As part of an executive order on chemical facility safety and security, the President called on the CSB to enter into memorandum of agreement with several agencies. This was spurred by complaints lodged with the White House about interagency conflicts in the course of CSB investigations.

After negotiations with the DOJ were underway, we were briefed, but we had no say in determining the CSB's position. This is troubling, because the DOJ has the discretion to enforce the CSB's subpoenas, and cooperation is essential. Other matters involving interagency relations, such as how to deal with demands for CSB records from EPA or whether a report should be delayed for a few months because another agency is in the midst of a criminal prosecution, were decided without a vote of the board. Board Member Griffon and I did not know about the disposition of these

policy issues until after the fact. Finally, it is the position of CSB's general counsel that senior leadership that the board orders, despite being voted upon and serving as the basis for orderly conduct, have no legal significance, so they are sometimes circumvented, which contributes to agency dysfunction.

Three, there is a lack of accountability both from the staff to the board and the board to the public. The agency has a backlog of investigations partially due to understaffing, but mainly due to lack of planning. There is no comprehensive investigation plan to deal with the backlog. The action plan consists of a list of unfinished investigations, but they are not prioritized, nor is there any discussion of the priorities.

In a public meeting in July of 2013, Mr. Griffon and I made a motion to have a public meeting to get a status report on all open investigations, and to clarify the scope and time line for the reports. With the current governance model, a request by the majority of the board is treated as irrelevant, so still there is no plan. The absence of a plan is a major contributor to low staff morale because staff don't know the priorities and complain about getting yanked from one project to the next as priorities shift.

Our fundamental job as board members is to set high standards for quality of evidence, analysis and recommendations. Yet, when Mr. Griffon and I raised questions about the lack of data supporting a recommendation to restructure safety regulation of the Nation's oil refineries, we were portrayed as delaying the report, disrespecting the investigators, and "siding with the worst and most unfair critics of the CSB."

Fourth, there is a lack of transparency. The board rarely conducts a deliberative public meeting. Almost all votes on agency matters are taken in private through a notation vote. Public meetings are almost exclusively productions choreographed to maximize media coverage, but where public questions and comments are largely ceremonial; they have no impact because the investigation reports are already finalized. Regular Sunshine Act meetings would be a way to interact with, and be accountable to, our stakeholders and other members of the public.

There are obvious ways to deal with all of these problems. Instead, a work improvement group was formed, and facilitators and consultants have been hired. I came to realize that these are hollow gestures intended to deflect criticism while fundamentally changing nothing. The staff of the CSB, and the American people, deserve better.

Thank you for your consideration.

[Prepared statement of Ms. Rosenberg follows:]

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TESTIMONY OF BETH ROSENBERG
BEFORE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

ON

Whistleblower Reprisal and Management Failures at the US Chemical
Safety Board

June 19, 2014

Beth Rosenberg
Former CSB Board member
Beth.rosenberg@tufts.edu

Chairman Issa, Ranking Member Cummings, Members of the Committee. I was requested to testify today regarding my tenure as a Board Member of the U.S. Chemical Safety Board (CSB). I was nominated by President Obama and confirmed by the Senate on Jan. 1, 2013 for a 5 year term. I resigned as of May 31, 2014 after 17 months. For the previous 16 years I was a Professor at Tufts University School of Medicine where I taught occupational and environmental health in the Public Health program.

The mission of the board is unique and important: to investigate the root causes of major incidents in chemical facilities and oil refineries, and to make recommendations based on the evidence to prevent those incidents from happening again.

The CSB faces certain challenges in fulfilling its mission that are beyond its control. It is intended to be an expert advisory body, similar to the National Transportation Safety Board, but it has no means—other than the weight of its evidence—to ensure its recommendations are implemented. With current staffing and resources, it cannot possibly investigate all the incidents and deaths that it should.

But there are 4 major challenges that are within the control of agency leadership that must be addressed.

1. **There is a chilled atmosphere.** Staff has been formally discouraged from talking to board members according to an email from the Managing Director.¹ Some staff said they were nervous about being seen talking to me, so we met outside of the agency. There are no opportunities for staff and board members to discuss issues openly. Those whose opinions differed from those of senior leadership or the Chair are marginalized and vilified. At the CSB, disagreement is seen as disloyalty. Criticism is not welcome and staff fear retaliation.
2. **Governance is ineffective.** Board members are excluded from core policy making functions. For example, Board Member Griffon and I learned about the senior management's decision to stonewall documents that were requested by the EPA Inspector General and the issuance of a "7 day letter" in the press. We saw the CSB's response to the IG after it was sent. As part of an Executive Order on Chemical Facility Safety and Security, the President called on the CSB to enter into Memorandum of Agreement with several agencies. This was spurred by complaints lodged with the White House about interagency conflicts in the course of CSB investigations. After negotiations with the Department of Justice (DOJ) were underway, we were briefed, but had no say in determining the CSB's position. This is troubling, because the

¹ email from Horowitz to the staff, Subject: Communications with the board members Nov. 1, 2011

DOJ has the discretion to enforce the CSB's subpoenas, and cooperation is essential. Other matters involving interagency-relations, such as how to deal with demands for CSB records from EPA, or whether a report should be delayed for a few months because another agency is in the midst of a criminal prosecution were decided without a vote of the Board. Board Member Griffon and I did not know about the disposition of these policy issues until after the fact. Finally, it is the position of the CSB's General Counsel that the Board's Orders, despite being voted upon and serving as the basis for orderly conduct, have no legal significance; they are sometimes circumvented which contributes to agency dysfunction.

3. **There is a lack of accountability** both from the staff to the Board and the Board to the public. The agency has a backlog of investigations partially due to understaffing, but mainly due to lack of planning. There is no comprehensive investigation plan to deal with the backlog. The action plan consists of a list of unfinished investigations, but they are not prioritized, nor is there any discussion of the priorities.

In a public meeting in July of 2013, Mr. Griffon and I made a motion to have a public meeting to get a status report on all open investigations, and to clarify the scope and timeline for the reports. With the current governance model, a request by the majority of the board is treated as irrelevant, so still, there is no plan. The absence of a plan is a major contributor to low staff morale because staff don't know the priorities and complain about getting yanked from one project to the next as priorities shift.

Our fundamental job as board members is to set high standards for quality of evidence, analysis and recommendations. Yet, when Mr. Griffon and I raised questions about the lack of data supporting a recommendation to restructure safety regulation of the nation's oil refineries, we were portrayed as delaying the report, disrespecting the investigators, "and siding with the worst and most unfair critics of the CSB".²

4. **There is a lack of transparency.** The Board rarely conducts a deliberative public meeting. Almost all votes on agency matters are taken in private through a notation vote. Public meetings are almost exclusively productions choreographed to maximize media coverage, but where public questions and comments are largely ceremonial; they have no impact because the investigation reports are already finalized. Regular Sunshine Act meetings would be a way to interact with, and be accountable to, our stakeholders and other members of the public.

² Email from Rafael Moure-Eraso to CSB all Jan. 16, 2014 2:18 pm

There are obvious ways to deal with all of these problems. Instead, a work improvement group was formed, and facilitators and consultants have been hired. I came to realize that these were hollow gestures, intended to deflect criticism while fundamentally changing nothing. The staff of the CSB, and the American people, deserve better.

Thank you for your consideration.

Attachments:

Horowitz – Communication with Board

Moure-Eraso email – Last night vote on CSB Chevron Regulatory report

daniel.horowitz@csb.gov
www.safetyvideos.gov
www.youtube.com/uscsb

From: "Horowitz, Daniel" <Daniel.Horowitz@csb.gov>
Subject: Communications with the board members
Date: November 1, 2011 5:35:26 PM EDT
To: "Banks, Johnnie" <Johnnie.Banks@csb.gov>, "Brown, Anna" <Anna.Brown@csb.gov>, "Cohen, Hillary" <Hillary.Cohen@csb.gov>, "Gomez, Manuel" <Manuel.Gomez@csb.gov>, "Holmstrom, Don" <don.holmstrom@csb.gov>, "Lau, John" <John.Lau@csb.gov>, "MacKenzie, Cheryl" <cheryl.mackenzie@csb.gov>, "McCormick, Amy" <Amy.McCormick@csb.gov>, "Parasram, Vidisha" <Vidisha.Parasram@csb.gov>, "Robinson, Bea" <Bea.Robinson@csb.gov>, "Tillema, Dan" <Dan.Tillema@csb.gov>

All-

One of the advantages of working in a small collegial agency such as the CSB is the ability to directly work across organizational lines with many different people, including board members, on important projects, reports, and documents relating to our investigations and other areas under the Board's jurisdiction. All of our work is important, and the energy, enthusiasm, and innovative thinking brought to projects is one of the things that makes working at the CSB such a privilege.

I appreciate the fact that none of you are reticent about candidly expressing your views among one another relating to our work. However, in some cases, I believe this enthusiasm needs to be tempered by the realization that keeping your supervisors abreast of your communications, particularly with board members, is essential to maintaining a collegial and cooperative spirit within the agency. It is also a common courtesy that should be accorded to your colleagues, particularly within the supervisory chain.

In some cases, I am learning of proposals and recommendations, not from direct reports and their staff, but rather from board members and others outside the regular "chain of command." Although I do not normally like to emphasize these matters - and prefer use of the collegial model - sending proposals and recommendations directly to board members without providing me a chance to review and approve them lacks professionalism and courtesy, and undermines basic principles of sound management and appropriate workplace conduct.

Accordingly, I expect all managers and supervisors to keep me abreast of recommendations and proposals they would like to send to board members, and to seek my input before proceeding to convey these recommendations directly to the Members. This is not an attempt to stifle responsible discussion or debate, but rather to avoid situations where staff appear to be communicating in an uncoordinated manner or ad hoc manner. It is also a matter of professional responsibility and courtesy that we should extend to one another.

Again, I understand that all of you have strongly held views on our work, and for that I am grateful. This enthusiasm, however, cannot substitute for the normal courtesies I expect all of you to extend to your colleagues as well as me when trying to influence the work of the Board. As I evaluate the performance of each of you, I will place a premium on clear and collegial communications, and remind you of your responsibilities to keep each other (and me) abreast of work developments in a professional manner.

Thank you.

DH

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Daniel M. Horowitz, Ph.D.
 Managing Director

From: [Moire-Eraso, Rafael](#)
To: [CSB All](#)
Subject: Last night vote on the CSB Chevron Regulatory Report
Date: Thursday, January 16, 2014 2:18:34 PM

To CSB all:

Yesterday by a 2 to 1 vote the Board postponed a decision to approve the CSB Chevron Regulatory Report. In my view this vote is a serious drawback for the CSB mission. The vote to defer issuance of the report included a request by a majority of the Board to the investigative team to address questions that were not previously presented, and which were introduced at the end the meeting (prior to a vote on the report itself). These additional items include the convening of an "expert panel" to assess certain aspects of the safety case (similar to the Baker Panel that addressed safety management issues after the BP Texas City disaster in 2005). The Board majority has requested that the "expert panel" study approximately a dozen questions related to the recommended Safety Case Regime that have been largely discussed -- some of them in prior drafts of the Chevron Regulatory Report and in the responses of the team to the public comments.

I am concerned about the resources, in terms of both time and money, that consideration of these additional issues will engender for the agency. The Baker Panel cost an estimated \$30 million and was paid for by BP. I do not believe the CSB has the resources to convene a "Baker type" panel even on a "micro scale." Moreover, such an expert panel, when convened by a federal agency is subject to the provisions of the Federal Advisory Committee Act, which entails substantial preparation, compliance and administrative issues -- not to mention the time involved in reaching a consensus among FACA panel members to resolve substantive issues. To have this resolved in 120 days--as stated in the postponed proposal --is an illusion.

The Chevron investigative team has been engaged in researching all aspects of the Safety Case Regime, both nationally and internationally, since 2010. I believe there is no technical and engineering group in the U.S. that can match the expertise on Safety Case that has been accumulated by the CSB staff.

One board member who voted to defer issuance of the final report told the press that the member's intention is "To make the report stronger." Another member stated a reason for deferring issuance of the report is that, "More study is needed" and that, "A little more work will get us there."

My view is that delaying a final vote has very serious consequences for the CSB.

First, I believe that it gives almost no credit to the immense work conducted by the CSB Chevron Investigative team to produce a first class engineering document on the Safety Case Regime and to address innumerable public comments on the Safety Case. It also ignores the cumulative knowledge and expertise developed by the CSB staff, which I believe are second to none in the U.S.

Second, by not approving the report, a majority of the Board are in effect supporting opposition to the safety case concept expressed by the Chevron Company, the America Petroleum Institute, the America Chemistry Council and industry consultants. In effect they are siding with the worst and most unfair critics of the CSB.

Third, after 40 years of practicing in the field of occupational safety and health, including the scientific disciplines that compromise this field, I have often heard the clarion call of the "need for further study and analysis." In my judgment, such calls for "additional study" only delay or impede needed fundamental changes. It is equivalent to "kicking the can" down the road.

I have already spoken with Mayor McLaughlin of Richmond, who expressed to me her profound disappointment in last night's vote. She believes that the Board's decision plays into the hands of those who oppose fundamental changes in safety management and will only further harm the workers and the community she so deeply cares about.

I would like to recognize and commend the excellent work done by the CSB Chevron Investigation

team, and express my disappointment in the vote of the Board, which I believe does not fairly reflect the findings and recommendation contained in their excellent draft final report.

Let's keep up the good work.

Rafael Moure-Eraso, Ph.D., M.S. ChE

Chairman ISSA. Thank you.

Dr. Moure-Eraso, one of the allegations that has permeated the testimony so far, after yours, was a question of retaliation. In your opening statement you said no one had lost pay, nobody had been fired. Was anyone reduced or eliminated, to your knowledge, in any way shape or form, their work duties that may have been construed as retaliation?

Mr. MOURE-ERASO. No, Mr. Chairman. A person was transferred from a position of senior executive to another position of senior executive. That is the issue on that, they are describing as retaliation.

Chairman ISSA. Okay. So they think it is retaliation; you disagree.

Mr. MOURE-ERASO. I definitely disagree, yes.

Chairman ISSA. Were you in a senior level meeting in which any discussion that could be in any way construed as to discourage people from speaking with congressional investigators was discussed, including, but not limited to, statements such as we would prefer you not speak to members of Congress or investigators? Anything along that line?

Mr. MOURE-ERASO. I don't believe so. I might have a conversation with Dr. Rosenberg when I find out that she was going to come, and I discussed with her if she was going to present testimony. But I was not trying in any way to interfere with her coming here.

Ms. ROSENBERG. That is correct.

Chairman ISSA. Okay. Do you know a gentleman named Dan Tilman? Tillema?

Mr. MOURE-ERASO. Dan Tillema? Yes. He is one lead investigator in our Denver office.

Chairman ISSA. It has been alleged, and we have a whistleblower on this, that a senior CSB official recently told a group of CSB investigators not to speak with committee staff. Do you know anything about that?

Mr. MOURE-ERASO. I don't know anything about that, Mr. Chairman.

Chairman ISSA. Okay, let me ask the question one more time very carefully. A whistleblower has informed us that a senior CSB official recently instructed CSB staff not to talk to anyone in Congress. Specifically, the aide's exact words were: "Someone from Congress will be calling you regarding an investigation. We would rather you not speak with them. We can't tell you not to. You can choose to do that if you want, but we'd rather you didn't."

Any lines, any words like that ring any part of your memory, sir?

Mr. MOURE-ERASO. No. I never have said those words, and I am not aware of anybody that has said it to Mr. Tillema.

Chairman ISSA. So if we were to not believe Dan Tillema, then we would believe these words weren't said. If we are to believe him, then do you believe those words were said? Because that is what Dan Tillema has told us.

Mr. MOURE-ERASO. I don't know what Mr. Tillema told you. What I am telling you is that you are asking me if I make any attempts to discourage for him talking—

Chairman ISSA. No, did you have a conversation with Dan Tillema that could have caused him to think that those words were appropriate to say?

Mr. MOURE-ERASO. I absolutely and categorically deny that I ever had a conversation with Mr. Tillema.

Chairman ISSA. Will you agree to speak to Mr. Tillema and make it clear that those kinds of words would rise under 18 U.S.C. as a criminal obstruction of Congress? To discourage from speaking to members of Congress is in fact an obstruction, in this chair's opinion.

Mr. MOURE-ERASO. I don't understand your question. Could you repeat it, please?

Chairman ISSA. Does Dan Tillema work for you?

Mr. MOURE-ERASO. Yes.

Chairman ISSA. A whistleblower has told us that he said that. I want to tell you right now that I believe that is a criminal obstruction of this committee's work in the way that the whistleblower said it was said. Will you agree to inform him of that and speak to him about whether or not he said it and get back to us?

Mr. MOURE-ERASO. I most certainly will discuss with him this issue, yes.

Chairman ISSA. Dr. Rosenberg, you left this board and you had only recently joined it. I would presume that you had intended to and hoped to serve all six years on this board, is that correct?

Ms. ROSENBERG. That is correct.

Chairman ISSA. If the environment were conducive and shared, as boards normally are, would you still be there?

Ms. ROSENBERG. Of course.

Chairman ISSA. We have alleged, I have alleged in my opening statement that we have found a hostile work environment not just for the board, but for employees and investigators. Would you concur with that?

Ms. ROSENBERG. Yes. I think the level of dysfunction reached such a level, and I had no hope of it improving, so I left.

Chairman ISSA. Thank you.

Doctor, I want to go over something very briefly with you, then I am going to go to the ranking member. There will probably be a second round. This committee has received only two seven day letters during my tenure, and only one for my predecessor. It is an extraordinary event. It shouldn't be, we should get more of them, but it is an extraordinary event. IGs view this as no options left. You already have received subpoenas, and apparently not answered to the satisfaction of the investigators. The claim of attorney-client privilege from a Government agency is extremely limited, extremely limited, and Government or Government-related documents that in fact are generated under the work of the Federal Government, paid for during time or with resources of the Federal Government, are not, in the ordinary course, allowed to become attorney-client privilege. The absence of a privilege log is unacceptable anywhere in America.

So I want to very briefly explain something to you. My intention, if it is not resolved by the end of the week, would be to issue my own subpoenas that would mirror all of the subpoenas that are outstanding and not properly responded to. They would have a one-

week deadline. If they are not responded to, we would seek to hold you in contempt and refer it for criminal prosecution. I am not going to speak for the Executive Branch, but I can tell you that that process takes us less than 30 days before we are sitting there with a U.S. attorney on a criminal contempt that, in fact, by statute, says that the U.S. attorney shall prosecute; not may prosecute, shall prosecute. So I would strongly encourage you, at the conclusion of this, to use the time of your board and your time with your attorney to reach a successful conclusion lest I go through a process that I don't want to go through and should not have to go through on behalf of independent investigators who have absolute authority and expectation to receive all appropriate documents. And if there is a limited privilege, that it be clearly explained in a privilege log.

Doctor, do you understand that?

Mr. MOURE-ERASO. I understand that, yes, Mr. Chairman.

Chairman ISSA. Thank you.

We now recognize the ranking member.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

As I was listening to you, Dr. Rosenberg, I want to thank you for being here. I was thinking about management styles. When I hire people, I hire the brightest and I hire people with compassion, and then I let them do their job. I always try to hire people smarter than me. And as I listened to what you were saying, it seems as if I do believe that leadership, in most instances, come from the top. In other words, if you have a dysfunctional leader, everything goes bad.

You made some very strong statements, and I have no reason to believe that—it is hard for you to even come here and do that, and I understand that. But when we are looking at all of this, sometimes I have noticed on staffs you could have one person that kind of messes up the whole staff, but, on the other hand, you may have problems throughout. I mean, when you look at the problems you have stated, are they coming from a few, is it a few people, is it one person? You must have thought about this a lot. Any time you leave a position as early as you did, I am sure you had a lot of conversations about this, even if only in your own mind. Your comments?

Ms. ROSENBERG. I think the senior leadership is the problem. The agency is broken; it needs to be rebuilt. And I think the senior leadership, the combination of ignoring board orders, which provide for board participation in policy matters, and the generally—there is a theme in the agency that disagreement is disloyal, and I come from an academic background where disagreement provides room for debate, and it should be open. And that is one of the reasons I am going back to my academic environment, because that is where you get to the truth, and that is missing in this agency.

Mr. CUMMINGS. Do you know why the staff was afraid of being seen communicating with the board members? Do you know why that was?

Ms. ROSENBERG. Yes. There is a memo from the managing director discouraging staff from doing that. It is attached to my testimony. And it was supposedly to provide more strict order in the agency, but it had a very chilling effect.

Mr. CUMMINGS. And do you believe that the atmosphere you have described had a negative impact on the work products of the agency?

Ms. ROSENBERG. Yes.

Mr. CUMMINGS. No doubt about it?

Ms. ROSENBERG. Because a range of opinions couldn't be considered; it was decided and the staff was supposed to produce a report that would address the concerns of the senior leadership. This is most prominent in the case of the whole safety case regime debate.

Mr. CUMMINGS. Now, Mr. Chairman, Dr. Moure-Eraso, how do you respond to that? You have a board member who gets appointed, and that is no little deal, and folks looking all into her background and everything, having to be vetted and go through all that, and then they don't stick around, she doesn't stick around because of the things she said. What is your response to that? Because I have to tell you the fingers are pointing at you, my brother.

Mr. MOURE-ERASO. Mr. Cummings, I would like to say that probably it is a misunderstanding of former Board Member Rosenberg of how Government agencies function. There are lines of responsibility and there are lines of authority.

Mr. CUMMINGS. But she talked about things happening that were supposed to come under the board, that they were supposed to be board votes, am I right, and that there was an end-around. I mean, come on now.

Mr. MOURE-ERASO. Well, you know, I would like to see what specifics is she talking about. The principal function as a board and for the board members is to examine carefully the technical quality of the product that we put out and to vote on it. Now, the votes that we took during the time that Dr. Rosenberg was there, and the products that we produced, she always voted and said that the reports were alright, that she agreed with the reports, and she voted in the affirmative, with the exception of the one that she is mentioning that we have disagreements on the safety case.

Mr. CUMMINGS. Okay.

Mr. MOURE-ERASO. All the others she voted in favor for. I mean, she had an opportunity, ample opportunity to provide her ideas and to try to change the reports when they are presented to her. This is not imposing to anybody, it is an open process that is very well delineated in our system.

Mr. CUMMINGS. Well, obviously, she doesn't feel that way.

Dr. Rosenberg, very briefly, please.

Ms. ROSENBERG. Indeed, I agree with Dr. Moure-Eraso that I did participate in investigations in that way, but the board, as outlined in the Moss opinion, there have been battles around the role of board members in this agency before. This Moss opinion, written in June of 2000, nearly 14 years ago, addresses the problems and the roles and responsibilities of board members. And what my complaint was is that the board members were marginalized from many decisions, many policy decisions that had huge effects on the board, the functioning of the board. So, yes, I agree, we dealt with investigations together, in a collegial way, but there are other subjects, like interagency relations, where we were completely marginalized.

Mr. CUMMINGS. Doctor, I am running out of time, but let me just ask you this. Former Chairman Waxman made some recommendations; he has been in contact with you all. What have you done with regard to the recommendations? Can you give us a progress report?

Mr. MOURE-ERASO. Yes, I would be very glad, Mr. Cummings. You know, if you look at the list of what Mr. Waxman sent to me as his recommendations, one of the concerns that he had was information that should come from the chair and the staff to the board members. We immediately established a system by which we open weekly meetings in which we requested that the board members participate. In our weekly meetings, every staff member describes the progress of the particular investigation or action that is involved.

Mr. CUMMINGS. He also suggested that you meet with the board members, is that right? Did you do that?

Mr. MOURE-ERASO. Exactly. He suggested that if any of the issues that I identified in those weekly meetings, if a board member would like to discuss additional things privately with me or with any board member or with the staff, that they should be made available for that. That has been established too. One of the problems that we have, Mr. Cummings, is that the board members tend to not spend a lot of time in Washington, DC. It is very hard to really establish systems of communication when the physical presence of the board members is hard to obtain, but that has been established.

We also, in response to Mr. Waxman's concerns about the staff complaints on their morale and their happiness in the agency, as I mentioned before, we established a group, an independent group, freely open group that we call the Work Improvement Committee, that has been chosen among all the staff, that have been meeting since December, and that we have assigned a management consultant. The company is the Cardin Corporation of St. Louis that is helping them to establish processes and systems to improve the quality of work in the agency.

Mr. CUMMINGS. Dr. Erasos, I have run out of time, but I want to thank you, chairman, for your courtesy. But I have to tell you, sitting up here listening, it seems like the fingers are pointing at you. I am just telling you. And some kind of way we have to get passed that; we have to figure that out, exactly how do we get this agency to functioning, because I think several people said it already. When it is not functioning properly, the American people suffer. And part of our job here is to make sure that Government does what Government is supposed to do effectively and efficiently.

Thank you, Mr. Chairman.

Chairman ISSA. I thank you. If I could ask the indulgence of the ranking member, I just want to read something from Dr. Rosenberg's statement. This was produced to us November 1st, 2011, email from Daniel Horowitz, the Managing Director of this organization. And it says, and I think it is important to have it consistent with the ranking member's statement, it says, Accordingly, I expect all managers and supervisors to keep me abreast of recommendations and proposals they would like to send to board members, and

to seek my input before proceeding to convey these recommendations directly to board members.

Dr. Rosenberg, I think the ranking member was trying to get this. Is this the kind of thing that you saw standing in the way of your getting the direct access board members would expect in their oversight and fiduciary role?

Ms. ROSENBERG. Yes, because I think everybody should be able to talk to everybody in an agency. And, mainly, I don't think staff should be intimidated from being seen talking to board members. I had many meetings in the ladies room.

Chairman ISSA. I have few.

[Laughter.]

Chairman ISSA. The last piece of indulgence, I have served on both public and private boards. What we are seeing here today is not unusual to have as a debate. But I can tell you that if we look back to what we did to the boards of Enron and Worldcom and other corporations when their board members did not, in fact, insist on direct access, communication, and, if you will, fact-checking, should remind us all that board members have an independent fiduciary obligation to do just that, to have independent knowledge of everything that they vote on and what the chief executive is doing.

Mr. Mica, thank you for the indulgence, of both the chairman and ranking member of each other.

Mr. MICA. Thank you.

I think everyone on the panel would agree that the U.S. Chemical Safety Board has an important mission and responsibility. Dr. Moure-Eraso, yes? Mr. Elkins?

Mr. ELKINS. Yes.

Mr. MICA. Inspector General of EPA Lerner?

Ms. LERNER. Extremely important.

Mr. MICA. Two of you that have looked at this, Mr. Elkins, Mr. Sullivan, it is also important that we protect whistleblowers and people who come forward with information about misconduct within an agency. Did you see, through your investigation, Mr. Elkins, mishandling of whistleblower identity?

Mr. ELKINS. Let me refer that question to Mr. Sullivan.

Mr. MICA. Okay. Mr. Sullivan?

Mr. SULLIVAN. Mr. Mica, yes, we received a lot of feedback from employees of CSB alleging that they were being retaliated against, and when their information went forward, they were——

Mr. MICA. So not only mishandling, but also retaliation.

Mr. SULLIVAN. Yes. That was the allegation, yes, sir.

Mr. MICA. Okay. And then, Mr. Elkins, I guess there is a tool that is referred to as a seven day letter, which isn't deployed that often. It is an IG tool, inspector general's tool, is that correct?

Mr. SULLIVAN. Yes, that is correct.

Mr. MICA. Okay, so it is rarely done.

In September of 2013, there was a seven day letter informing Congress of the Chemical Safety Board's refusal to cooperate in an investigation and the mishandling of whistleblower identities, is that correct?

Mr. SULLIVAN. That is correct.

Mr. MICA. Okay. Had you ever issued a seven day letter before?

Mr. SULLIVAN. That was the first in my tenure.

Mr. MICA. Okay. Why did you issue a seven day letter in this matter?

Mr. SULLIVAN. Well, sir, we obviously, before we get to—

Mr. MICA. You are hard to hear. Pull it up.

Mr. SULLIVAN. Obviously, before we get to the point of issuing a seven day letter, we want to have discussions and convey to the agency just how serious of a matter it is for us to take that extreme measure. I have personally had conversations with the chair and my investigators had conversations with CSB staff requesting documents, letting them know that we needed those documents in order for us to complete our mission, and we were just stonewalled; it just didn't happen.

Mr. MICA. You were just stonewalled.

Mr. SULLIVAN. Absolutely.

Mr. MICA. Okay. And so, again, the first time you had to issue such a letter. What is the current status of your investigation?

Mr. SULLIVAN. Right now, it is dormant, sir. We don't have the information. We can't go forward until we have the information.

Mr. MICA. Now, the whole thing sounds like a three-ring circus in a very important agency with important responsibilities of oversight. I don't know if the staff can put up the list of the Chemical Safety Board investigations, but I am told that most cases they are supposed to have a majority vote of the board and they should issue a report in a timely manner, usually within six months. It is interesting, some of our staff interviewed some folks in this investigation who had served on the board.

Ms. ROSENBERG. I guess you are off the board; this isn't your quote, but it says, do you feel the pace of investigations has slowed in recent years? And this particular one, not identified, said, Oh, yes, and I think it is certainly the opinion of the outside yes. Not only has the pace of investigation slowed, but what they would call the quality of investigations has deteriorated as well.

Now, this is a former board member. Dr. ROSENBERG, would you agree with that?

Ms. ROSENBERG. I don't know. I was only there for a year and a half, so I don't know if the quality has deteriorated.

Mr. MICA. Okay, well, this is a former member who doesn't want to be identified.

Ms. ROSENBERG. Right. But I do know things are taking longer.

Mr. MICA. Here is a list put up here of, in fact, the investigations. BP investigation still incomplete; Silver Eagle, 5.5 years; Citgo, 5 years, 4.7 pending. The list goes on and on. This is an important responsibility with an important mission, isn't that right?

Ms. ROSENBERG. Yes.

Mr. MICA. And, again, it doesn't seem to me and also to someone else who served on the board who stated in our investigation that, one, that these investigations and reviews are being done in a timely manner and then also the concern about the quality; and, in the meantime, we have a three-ring circus with whistleblowers coming forward, telling Congress that this place is out of control, board members resigning, chaos in one of our most important safety oversight agencies.

Mr. Chairman, this is not acceptable. I will work with you, whatever steps we need to take to try to bring this agency into control, acting responsibly and accountably. I will join you.

And I yield back.

Chairman ISSA. I thank the gentleman.

Dr. Rosenberg, you were trying to say something. No? You are okay.

I think it is Mr. Connolly next. No, it was Mr. Tierney, Ms. Kelly. It is Mr. Connolly.

Mr. CONNOLLY. I thank the chair.

Dr. Moure-Eraso, I have the memo given by staff members, I guess, to CSB board members, called Rebuilding Trust, dated February 10th, 2014. You are familiar with that memo?

Mr. MOURE-ERASO. Yes, I am. January 27, I believe?

Mr. CONNOLLY. February 10th.

Mr. MOURE-ERASO. February 10th.

Mr. CONNOLLY. And you are cc'd on it by name.

Mr. MOURE-ERASO. Yes. Okay, I am aware.

Mr. CONNOLLY. And you have read the memo?

Mr. MOURE-ERASO. I did read the memo, yes.

Mr. CONNOLLY. This memo directs board members, who presumably direct the agency, not the other way around, board members and staff will not speak ill of agency employees; board members must work sincerely and diligently to comprehensively review reports in a timely way; board members must be open and transparent with staff about their views and positions; they should declare their positions and intentions prior to a public meeting, thus nullifying the purpose of a public meeting; and absent some unforeseen circumstances, those views should be consistent with votes cast. Board members must cease and desist from the extreme negative trashing of the agency to the public and stakeholders. The investigative team lead supervisors group requests to meet with the board members.

Who wrote this memo, and did you approve it? Do you approve the sentiments of this memo?

Mr. MOURE-ERASO. That memo, as far as I understand, was written by the staff. I think it has signatories on it. I don't have anything to do with it.

Mr. CONNOLLY. What was your reaction to it? You are the chairman.

Mr. MOURE-ERASO. Well, there is some good points that they made there.

Mr. CONNOLLY. Good points? This is prescriptive. Doctor, this is telling the board to stay in a place and the staff substituting itself for governance. That is what this memo says. I have been in public life for 20 years; I was in the private sector for 20 years. I have never seen a document like this, and a more inappropriate document like this. The public trusts your agency to carry out its mission and you, sir, as the chairman, to manage the agency. Instead, what this memo tells us is they are managing you, sir. What was your reaction to this memo?

Mr. MOURE-ERASO. As I was telling you, I was concerned about letters that were made public from board members in which they say that they were ashamed of the work of the agency and that

they considered our reports cut and paste work, when our reports are recognized in the world of—

Mr. CONNOLLY. So what? So what, a board member is critical?

Mr. MOURE-ERASO. Well, I would say this, that the recommendation that board members don't try to discredit the agency in public was a good recommendation.

Mr. CONNOLLY. Really? Well, this goes far beyond that, sir. This goes far beyond that.

Dr. Rosenberg, your reaction, since you are named in that document?

Ms. ROSENBERG. I was appalled by that, but you must understand that that memo came a couple weeks after the Chevron vote, where it was the only time that two of the board members voted to postpone a vote; not to reject a report, but we asked for more information on the safety case. So there was a lot of hostility in the agency after that and that memo came in response a couple weeks later to that, and it was appalling. And I showed it to Waxman staffers because you know I was a new board member and I thought, first of all, we are supposed to deliberate, we are not supposed to declare our votes before a public meeting. How disrespectful to the public.

Mr. CONNOLLY. I would just say to my chairman, I mean, honestly, there have been public hearings I have come to here thinking I had one set of views and the public hearing has changed my mind; there is new information illuminating something. You are right, that is the purpose of a public hearing, presumably. If we already have made up our minds—and, by the way, this doesn't just say you ought to make up your mind before—it says you must declare your position prior to that public hearing.

Ms. ROSENBERG. Appalling.

Mr. CONNOLLY. Dr. Moure-Eraso, if you think this has some good points, I have a problem with your tenure as chairman of an agency.

Mr. MOURE-ERASO. I hear you, congressman. I would like to make the point that the signatories of those memos, I consider them whistleblowers. They were reporting interference on their work.

Mr. CONNOLLY. That is not what this says.

Mr. MOURE-ERASO. And I consider that they were trying to do the best job that they could have. And again I report I am not the author of that.

Mr. CONNOLLY. If the chair would just allow me to finish.

Chairman ISSA. Of course.

Mr. CONNOLLY. Look, I want to protect whistleblowers too. This is about a staff that is out of control. This is about a dysfunctional culture. This is about lack of leadership at the top, Dr. Moure-Eraso. This is about a board not doing its job and a staff substituting itself for the board, which is supposed to be the governance of the agency; and no wonder the public must have some eroding confidence in your ability to fulfill your mission.

But this is so prescriptive as to be entirely inappropriate. No corporation, no business, no other public sector entity would ever tolerate the sentiments, the prescriptive sentiments that are outlined in this document. It is, to me, a shocking document, and your reac-

tion, sir, since February 10th and today, under oath before this committee, I think raises serious questions about your fitness to hold your job.

I yield back.

Chairman ISSA. Mr. Connolly?

Mr. CONNOLLY. Yes, sir.

Chairman ISSA. If we could enter into a quick colloquy.

Mr. CONNOLLY. Of course.

Chairman ISSA. You are independently elected to this board known as Congress, right?

Mr. CONNOLLY. That is right.

Chairman ISSA. But I was elected chair.

Mr. CONNOLLY. Yes, sir.

Chairman ISSA. I have staff.

Mr. CONNOLLY. You sure do.

Chairman ISSA. Technically, all the staff of the committee technically work for the chairman, even though they are divided.

Mr. CONNOLLY. That is correct.

Chairman ISSA. Could you imagine if we sent a letter out saying that you could not disagree with me and that you could not have an opinion unless you issued it before, for example, today's board meeting?

Mr. CONNOLLY. Sir, I could not. And, furthermore, the idea that staff tells me, by the way, not even you, I have to declare my position a priori before we have the hearing. And unless there are extraordinary circumstances, I am not allowed to change that opinion when I vote. Now, I would say that some of our colleagues certainly do that routinely in this body, not just this committee, but we all reserve the right to change our minds. We all arrogate to ourselves our sovereign right to cast our vote as we see fit, without staff or even our colleagues directing us otherwise; and that is what this document does, Mr. Chairman. I would ask that it be, if it hasn't already been, placed into the record.

Chairman ISSA. Without objection, it will be placed in the record.

Mr. CONNOLLY. I thank the chair.

Chairman ISSA. Doctor, I hope you see how you are being mocked here by people who have the same situation you and Dr. Rosenberg had; independently put on a board, one given the title of chair, but not dictator.

Mr. Turner, you are recognized for five minutes.

Mr. TURNER. Thank you, Mr. Chairman. I want to share all the concerns of the members who have spoken. When you look at an agency that has such incredible importance and the concerns of its becoming dysfunctional, I think lives and certainly many facilities are put at risk. So I am very troubled by the issues that we are seeing today.

I am also very shocked about the revelations about the possible retaliation against whistleblowers and mismanagement of the Chemical Safety Board that appears to have essentially crippled the agency's ability to fulfill its mission, and has not only compromised the ability of employees to report waste, fraud, and mismanagement, but public safety as well; and I want to relate it to an incident that occurred in my district on May 4th, 2009.

An explosion and fire occurred at an environmental services facility in my community. It was known as the Veolia ES Technical Solutions, LLC facility in West Carrollton, Ohio. The incident resulted in four individuals being injured, two of which sustained severe injuries; eight damaged structures of the plant and approximately 20 additional businesses and residences in the area.

Mr. Elkins, you are the EPA inspector general. The CSB is within your jurisdiction and Congress expects the CSB to issue its reports in a timely manner. The case study on the incident that occurred in West Carrollton, Ohio was issued July 21st, 2010. The incident occurred on May 4th, 2009, slightly over a year after the accident occurred.

Mr. Elkins, in your experience, was this the time frame of CSB's work typical prior to Dr. Moure-Eraso's joining the board? The report was issued in about one year.

Mr. ELKINS. Well, what I can do maybe in response to that is give you some idea of investigations that were planned to be completed and when the investigations were actually completed based on reports that we have issued.

Mr. TURNER. Please.

Mr. ELKINS. Over the last six years, from 2007 to 2012, we showed that the CSB investigations were planned to be completed, 53 investigations, and of those only 31 were actually completed, 58 percent.

To address your question specifically, in terms of timing, in 2007, 10 investigations were planned, 10 investigations were completed, 100 percent. 2008, 6 were planned, 6 were completed, 100 percent. Now we get into 2009; 6 were planned, 4 were completed, 66.67 percent. 2010, 8 were planned, 4 were completed, 50 percent. 2011, 15 were planned, 5 were completed, 33 percent. And in 2012 8 were planned and only 2 were completed.

Mr. TURNER. These reports are very important. Not only do they give us an assessment of what occurred, but they give us recommendations for the future.

Dr. Moure-Eraso, could you respond to this? As we look at this, I am shocked to read in your written testimony where you cite all of the accomplishments, but clearly you have to acknowledge that this is an absolute failure. This has been a point where this has become crippling.

Mr. MOURE-ERASO. I disagree with you, Congressman.

Mr. TURNER. Okay, let me back up, then. I thank you for your disagreement. Do you consider a goal for these to be completed?

Mr. MOURE-ERASO. Absolutely.

Mr. TURNER. Okay. Now pause. What is an appropriate time frame that someone could expect performance?

Mr. MOURE-ERASO. It depends on the quality of the report that you would like to have.

Mr. TURNER. Quality also includes the concept of finished. Could you give us the time frame in which someone could expect the work to be completed?

Mr. MOURE-ERASO. It depends, Congressman.

Mr. TURNER. Okay. Well, we are going to move on. I understand that your performance will speak for itself, and your inability to

give us a time frame I think is reflective of the fact as to why they are not being completed.

Now, doctor, you stated in your written testimony, since 2010 I have worked very hard to improve the management and operations of the CSB. Under your leadership, the CSB has lost seasoned investigators that could help the CSB fulfill its mission and performance work in a timely manner. Given that investigations have been significantly delayed under your leadership, and certainly you have no other data that shows that they have not been delayed, how would you rate the success of the CSB in trying to rectify this delay?

Mr. MOURE-ERASO. By the recognition of the quality of the reports that we have produced. For example, the report on Deepwater that we presented last week; the report in Tesoro that took a lot of time but it has had a tremendous impact on the refinery industry; our report in Chevron that changed the way that Cal/OSHA investigated refineries in California. And I could give you a list of the accomplishments that—

Mr. TURNER. I think universally everyone on this congressional committee sees that the loss of employees, your lack of management, and the lack of completing work is a critical failure on the part of your service. Thank you.

Chairman ISSA. Thank you.

We now go to the gentlelady from California, Ms. Speier.

Ms. SPEIER. Thank you, Mr. Chairman, and thank you to our witnesses who have appeared.

Chairman Moure-Eraso, you are aware that there was a serious fire at the Chevron refinery in Richmond, California that sent 15,000, 15,000 people to the hospital. Could you tell me who the chairman was of CSB at the time the investigators were sent to the refinery?

Mr. MOURE-ERASO. That investigation was in charge of the Winston office that is directed by Mr. Holstrom.

Ms. SPEIER. No, who was chairman.

Mr. MOURE-ERASO. I was the chairman. I was the chairman when that investigation was deployed to Chevron in Richmond in 2012.

Ms. SPEIER. When was Mr. Bresland chair?

Mr. MOURE-ERASO. Mr. Bresland was chair until 2010. He was a board member when we deployed on that place, but he wasn't the chair; I was the chair.

Ms. SPEIER. You were the chair.

Mr. MOURE-ERASO. He was a board member.

Ms. SPEIER. Is it true that Mr. Bresland resurfaced as a paid consultant to Chevron, criticizing the very investigation that he was involved in starting?

Mr. MOURE-ERASO. Yes, it is true. He presented testimony criticizing the findings of the report in the public meeting that we had in Richmond in January this year.

Ms. SPEIER. And he started consulting with Chevron how long after he left the board?

Mr. MOURE-ERASO. I believe he testified one year and a half after he left the board.

Ms. SPEIER. No, when did he start consulting?

Mr. MOURE-ERASO. I don't know when he started consulting. But when he identified himself as a consultant for Chevron during the hearing was one year and a half after he had left the agency.

Ms. SPEIER. So do you have a revolving door policy?

Mr. MOURE-ERASO. Absolutely not. I think there are regulations about that.

Ms. SPEIER. Well, revolving door policy would mean that you do have regulations. I think you are getting assistance here.

Mr. MOURE-ERASO. I am sorry, yes, yes. I misunderstood the question. Yes, of course. We have to fulfill the Federal regulations on this.

Ms. SPEIER. So did he violate that?

Mr. MOURE-ERASO. It is not for me to——

Ms. SPEIER. But you would have to——

Mr. MOURE-ERASO. Well, I lodged a complaint with Mr. Elkins, with the IG, and asked him if he considered that this was a violation.

Ms. SPEIER. What interaction did Mr. Bresland have with board members or staff after he became a consultant for Chevron?

Mr. MOURE-ERASO. I really don't know. I only know about the testimony that he presented in which he identified as a consultant for Chevron.

Ms. SPEIER. Do you believe that there was a conflict of interest there?

Mr. MOURE-ERASO. I do believe it is a conflict of interest, yes.

Ms. SPEIER. And what steps have you taken to address it?

Mr. MOURE-ERASO. I called on the IG to investigate the situation.

Ms. SPEIER. And has the IG investigated it, Mr. Elkins?

Mr. MOURE-ERASO. I haven't heard from them since I made the complaint.

Ms. SPEIER. Mr. Elkins, can you respond to that?

Mr. ELKINS. Yes, I can. We did receive the complaint; it is in process. Let me refer to Patrick Sullivan here, who is my head of investigations, to give you more detail.

Mr. SULLIVAN. Yes. It is in my queue. It is scheduled to be investigated; we have not yet opened that or start to begin that investigation, but we will be looking into that matter.

Ms. SPEIER. So where are we in terms of the Chevron investigation?

Mr. MOURE-ERASO. Madam Congresswoman, the investigation we have divided into three chapters——

Ms. SPEIER. Just tell me where you are in it. This happened in August of——

Mr. MOURE-ERASO. We finished the first part and we voted on it and it was approved by the board. We presented the second part in which we are in a public meeting, and that was the one that was referred here that was delayed, and we are in the process of going to editing of the third part for the final report. But one is finished, one is waiting for a postponement of the vote, and the other is in a draft form.

Ms. SPEIER. Let me just put this into perspective. The National Transportation Safety Board is an organization similar, larger than yours, with similar responsibilities. I think it is a first rate operation. There was a gas explosion in my district in 2010, killed eight

people, destroyed 50 homes, and the NTSB took the pipe, carted it here to DC, did the investigation, had a complete and comprehensive report done in one year, with a series of hearings open to the public previous to that.

This happened in 2012. It is almost two years and you are nowhere near completing your work. I would suggest that that shows a lack of ability to do the job.

I yield back.

Mr. CHAFFETZ. [Presiding] Thank you.

I now recognize myself for five minutes.

Ms. Lerner, you have played such a critical role in our Government. We appreciate what you do and how you do it. I know you can't speak specifically to what is happening here within the CSB, but can you give us an idea of the scope? For instance, how many complaints are you looking into at this point?

Ms. LERNER. It is a little tough for you to give me that information.

Mr. CHAFFETZ. I don't want you to step over any lines, but I am trying to get an idea of how many and what types of complaints you are looking into.

Ms. LERNER. I am very happy to tell you the types of complaints. They are all retaliation complaints. And there are at least several that are still unresolved. One settled a couple months ago. We are actively trying to resolve the remaining retaliation complaints.

Mr. CHAFFETZ. Is it typical that Government officials need to be subpoenaed in order to secure their testimony in your job and what you need to do?

Ms. LERNER. It is rare that OSC would have to issue a subpoena.

Mr. CHAFFETZ. Why did you feel the need to have to issue a subpoena in this case?

Ms. LERNER. We felt it was necessary to subpoena the CSB management official because, quite frankly, in light of the time that it was taking to produce documents and schedule the interviews in the case, the investigation was taking too long.

Mr. CHAFFETZ. Okay. Thank you.

Mr. Moure-Eraso, have you ever used your personal email for official business or communication?

Mr. MOURE-ERASO. Well, yes, out of ignorance. At the beginning of my tenure, I used to write drafts of positions before I would put it as—

Mr. CHAFFETZ. When is the most recent time that you used your personal email?

Mr. MOURE-ERASO. We stopped that practice about a year and a half ago because we realized how problematic it was.

Mr. CHAFFETZ. So you had been in that position for more than two years before you realized that it was inappropriate.

Mr. MOURE-ERASO. The board was telling me that I couldn't use my private—

Mr. CHAFFETZ. Okay, thank you. Thank you. Can you tell me about Chris Warner? Who is Chris Warner?

Mr. MOURE-ERASO. Chris Warner is the former general counsel of the Office of the Chemical Safety Board.

Mr. CHAFFETZ. And did he remain as the general counsel?

Mr. MOURE-ERASO. He retired.

Mr. CHAFFETZ. Did he have to take on a different responsibility under your tenure?

Mr. MOURE-ERASO. Yes. He was transferred to a position of senior advisor to the chairperson.

Mr. CHAFFETZ. Do you consider that a promotion or a demotion?

Mr. MOURE-ERASO. It was a lateral change, I would consider it.

Mr. CHAFFETZ. Why did you make that lateral change?

Mr. MOURE-ERASO. I would be very glad to discuss this with you in a private manner.

Mr. CHAFFETZ. No, we are going to do this in the public. We are not going to issue memos before we have—we are going to do this in public.

Mr. MOURE-ERASO. The agreement that we have with the counsel for Mr. Warner is that I am not to discuss the issues of his settlement, and my own counsel tells me that I would be very glad to discuss all the details of his case, but not in public. I want to protect the privacy of Mr. Warner.

Mr. CHAFFETZ. You suggest in your testimony that you are not aware of anybody who may have lost their job, grade, or pay, anything like that, and yet this case I would like to specifically know more about, and we will continue to pursue that.

Mr. Sullivan, are you familiar with the situation with Mr. Warner?

Mr. SULLIVAN. Yes, sir, I am.

Mr. CHAFFETZ. How would you characterize it?

Mr. SULLIVAN. Mr. Warner made a complaint to the Inspector General's office and we investigated it, and part of his complaints are still part of our investigation. And as Mr. Elkins testified, we cannot resolve Mr. Warner's complaints until we get access to the documents we requested.

Mr. CHAFFETZ. When did you request those documents, and have you received those documents?

Mr. SULLIVAN. No, sir. We requested them over a year ago and they were the subject of the seven day letter Mr. Elkins testified about.

Mr. CHAFFETZ. Why have you not produced the documents requested?

Mr. MOURE-ERASO. Well, under advice of counsel, they have—

Mr. CHAFFETZ. Whose counsel?

Mr. MOURE-ERASO. The counsel of the Chemical Safety Board that we hired. Let me explain to you the situation. We have been requested by the IG, by the inspector general, a number of information, documents and information for this particular case. We have provided thousands of emails from board members to him. And there are 20 emails that is the agency correspondence with an outside lawyer that is representing the agency in this personnel matter, and under the advice of counsel they are claiming that turning over those 20 emails will compromise the attorney-client privilege of the agency and potentially create future liabilities for the Federal Government

Mr. CHAFFETZ. How much money do you spend on outside counsel?

Mr. MOURE-ERASO. On that outside counsel? I would have to get back to you; I cannot tell you. I don't have the figure.

Mr. CHAFFETZ. And you will get that information to me by when?

Mr. MOURE-ERASO. Whenever I can.

Mr. CHAFFETZ. I know. I want a date.

Mr. MOURE-ERASO. In a week?

Mr. CHAFFETZ. Fair enough.

My time has expired. I am going to continue with the second round and further explore this, but in deference of time here we will now recognize the gentleman from Arizona, Mr. Gosar, for five minutes.

Mr. GOSAR. Thank you very much, Mr. Chairman.

Dr. Eraso, did you agree with Ranking Member Cummings' conversation with Ms. Rosenberg about how he hires people? He always hires up, makes him look good, empowers people to make decisions? Do you agree with that management philosophy?

Mr. MOURE-ERASO. Yes, I do.

Mr. GOSAR. Well, I find it odd, because you have had a number of board members and employees come forward that are marginalized when they disagree with you and senior staff. How do you think that affects the work ethic in that board?

Mr. MOURE-ERASO. I disagree with staff members have been marginalized.

Mr. GOSAR. I have been on a number of boards that this has occurred, that we have had senior staff trying to marginalize board members, and, to be honest with you, in three for three cases it has failed; it got them booted, by the way, senior staff. You know, when everybody else is wrong and there is one person that is constantly the part of the problem, don't you think that person is the problem?

Mr. MOURE-ERASO. It might be, yes.

Mr. GOSAR. If you were sitting outside this room, watching this conversation, I keep hearing that there are constant employees and board members that constantly have the same criticism of senior staff and you, the chairman. Wouldn't you start to be retrospective and introspective about how you do your job?

Mr. MOURE-ERASO. Yes. I mean, I don't claim that the operations of the board are perfect. We do have problems, we do have issues that require study and remedy, and we are engaged in trying to improve our working environment. I am not claiming that the situation on the board is absolutely perfect. We have problems and we are addressing them.

Mr. GOSAR. So when you address those problems, do you address them from your viewpoint or do you take a retrospective aspect and ask the opinions of others, particularly at different levels?

Mr. MOURE-ERASO. I absolutely ask for the opinions of others. As a matter of fact, we organized a committee that is freely chosen among the staff, they chose themselves, that is called the Work Improvement Committee. As I said, a management consultant was assigned to them to diagnose the problems that we have on agency communications and management, and to propose solutions to deal with the situation.

Mr. GOSAR. Well, a good start is humility from a chairman or senior staff. I mean, humility is something phenomenal. You made mention that you are human. Did you actively engage, from your chairmanship, with staff and with board members trying to solicit solutions from their standpoint and how you could better that?

Mr. MOURE-ERASO. Absolutely we have. I mean, at this moment, that is the process that is taking place.

Mr. GOSAR. Did you actively listen? I mean, I am a dentist by trade, by profession, so I can start pulling teeth without talking to the patient. I could probably get the right tooth right, but I could streamline the process if I ask what hurts, how can I help you, and start a fundamental diagnosis. It is called active listening. Do you entertain that?

Mr. MOURE-ERASO. Absolutely. As a matter of fact, we did with the help of a mediator. I met separate with the board, we called it like a marriage counselor, to try to help us to find ways of improving our communication and our way of working. We have a couple of meetings to that and we still have this person engaged, as well as separately with the staff with this Work Improvement Committee in which we basically listen how did they diagnose what are the problems and try to—

Mr. GOSAR. I am short on time here. Looking at all the questions that both sides of the aisle have actually entertained with you and the conversation I am having with you, do you think you are kind of the problem here?

Mr. MOURE-ERASO. I think that we have problems in the agency and I think we are working on them.

Mr. GOSAR. I know we. It starts with I.

Mr. MOURE-ERASO. Well, I am not perfect. I am not claiming that I am perfect. I am basically fulfilling my responsibilities the best I can and I think—

Mr. GOSAR. Well, it seems like you are not, because you have an inspector general that—seven day letters are kind of an unusual aspect. I mean, you get that point, right?

Mr. MOURE-ERASO. Yes.

Mr. GOSAR. Seven day letters are not the usual thing here.

Mr. MOURE-ERASO. I would like to note that that seven day letter doesn't have anything to do with the mission of the agency, an obscure legal point that is being discussed that IG and the lawyers could deal with.

Mr. GOSAR. Well, it is part of your performance, sir. I mean, you are the chairman and you have oversight of not only the board, but of staff to comply with the rule of law. Are you above the law?

Mr. MOURE-ERASO. Absolutely not. And I am doing my best to—

Mr. GOSAR. Then why don't you comply?

Mr. MOURE-ERASO. I am following the advice of counsel that is trying to resolve this problem in the best interest of the agency and the Federal Government.

Mr. GOSAR. You also have the due diligence to understand the law. Maybe you are getting very bad legal advice. I mean, it goes about in Washington, DC. We have a lot of problems with legal advice.

I will yield back. Thank you, Mr. Chairman.

Mr. CHAFFETZ. I thank the gentleman from Arizona.

I now recognize the ranking member, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I hope we can all agree that the Chemical Safety Board plays a very important role in investigating chemical accidents and helping to prevent

similar accidents from harming workers, the public, and the environment; and this discussion certainly should cause all of us to be concerned as to whether this is being done to the maximum extent possible under the circumstances.

I understand that in order to accomplish this important mission the Chemical Safety Board relies on the hard work and dedication of a small staff of just over 40 personnel, including engineers, industry safety experts, and other specialists. I am, therefore, very concerned to hear reports that the Chemical Safety Board has experienced some departures of its investigation staff reportedly over the last couple years. For instance, Board Member Mark Griffin, who could not be here with us today, states in his written remarks that "In the last three and a half years, many experienced investigators have left the agency."

Dr. Rosenberg, recognizing that you were a board member for nearly one and a half years, did you also observe that experienced investigators were leaving the agency?

Ms. ROSENBERG. One just left three days ago. But before then I wasn't there when the exodus was happening.

Mr. CUMMINGS. All right. Were you finished?

Ms. ROSENBERG. But I just know that a senior investigator left three days ago.

Mr. CUMMINGS. The staff report released by the committee majority states that, "The attrition at CSB began in 2011, shortly after Chair Moure-Eraso took over as chairman." I want to explore this statement because I understand that this committee heard from former investigators that turnover was a challenge even before Dr. Moure-Eraso became chairman in 2012.

Inspector General Elkins, your agency looked into the issue of staff retention at the Chemical Safety Board and issued a report in July 2013, is that correct?

Mr. ELKINS. Yes, sir, that is correct.

Mr. CUMMINGS. In fact, your report found that the investigator turnover rate was 19 percent in fiscal year 2008 and 20 percent in fiscal year 2009, is that correct?

Mr. ELKINS. That is also correct, sir.

Mr. CUMMINGS. Well, let me ask you this, Mr. Elkins. Does that seem high or average? Do you have any idea?

Mr. ELKINS. No, sir, I really don't have any idea. I can tell you that over the five year period that we looked at, the average turnover rate was 15 percent.

Mr. CUMMINGS. Okay.

Chairman Moure-Eraso, regardless of whether it preceded you or not, if the turnover is still a challenge, it should be addressed. In the July 2013 report, Inspector General Elkins recommended that the Chemical Safety Board "develop and implement a succession or retention policy to help with any future effects of the turnover rate on CSB's mission." Mr. Chairman, have you implemented this recommendation?

Mr. MOURE-ERASO. Yes, Mr. Cummings, we have programs to educate employees, especially investigators, when they are coming into the agency. We assign senior investigators to work with junior investigators so that they can understand and can work together. We have programs of training in which we bring people from the

outside to work with our staff, and we have open lines of communication between the head investigators and the investigators when they start doing their work. So we have addressed that.

I also would like to add that we disagree with the figures of attrition of the IG, and in our report, when we respond to that report that you are reading, we have a different number and rate of attrition that is comparable to any rate of attrition of any other Government agency.

Mr. CUMMINGS. Do you have any comment on that, Mr. Elkins?

Mr. ELKINS. Yes, sir, I do. The work that we do is done under strict standards. We take a look at the facts, we take a look at the data. We don't try to rush to judgment. The facts that we have support the data that I presented to you, so I disagree with the chair's assertions.

Mr. CUMMINGS. Just one last question. Mr. Chairman, Board Member Griffin recommends in his written testimony that the board "develop a long-term hiring plan." Do you intend to follow this recommendation? If not, why not?

Mr. MOURE-ERASO. Mr. Cummings, we are waiting for the work of our management consultant in all these issues. This is one of the issues that we are considering, is how to project for the future and how to have long-term solutions to problems that have been identified during the years.

Mr. CUMMINGS. All right, thank you very much.

Mr. CHAFFETZ. Thank you.

We will now recognize Chairman Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. Elkins, you have a little gray hair.

Mr. ELKINS. Yes, sir, I do.

Mr. ISSA. This is the only time you have pulled a seven day rip cord?

Mr. ELKINS. In my tenure, yes, sir.

Mr. ISSA. So have you ever been stymied like this in an investigation, stonewalled in the way that you have been stonewalled here before?

Mr. ELKINS. No, sir, I can't say that I have. You know, we have instances in the past where we have run into some obstacles, but we have been able to dialogue and work through those obstacles short of issuing a seven day letter. But this is the first time that we have been stonewalled to the point where this was our only option.

Mr. ISSA. Now, the use of words like stonewall very typically indicate that, in your opinion, these are not just or valid objections or withholdings, is that correct?

Mr. ELKINS. That is absolutely correct.

Mr. ISSA. Mr. Sullivan, you do a lot of investigations; you are good at what you do. Have you seen anything like this before?

Mr. SULLIVAN. No, sir. This is my first experience where there has been an absolute complete refusal to provide requested documents.

Mr. ISSA. Ms. Lerner, you are from an office that the entire public is always clamoring about special this, special that. I recently have been asking for special prosecutors in a number of areas and so on. But you are a sustaining organization that does these kinds

of investigations, rarely on Government, if you look at the size of Government. Have you ever seen anything quite like this before?

Ms. LERNER. It is very rare for an agency to assert attorney-client privilege to protect documents from the Office of Special Counsel, another Federal agency. And for context I can tell you that it is also very rare for OSC to have to subpoena a subject official in order to secure testimony. In the three years that I have been head of the Office of Special Counsel, this is the first time.

Mr. ISSA. Well, let me follow up on that a little bit. You are an attorney. You are very familiar with privilege logs. Is there anything in your experience that can be so privileged as to not have a privilege log?

Ms. LERNER. Not that I am aware of. I have never heard of not getting a privilege log.

Mr. ISSA. So the claim of privilege falls completely apart if you are not willing to cite, document-by-document or at least catalog-by-catalog, what the privilege is, is that correct?

Ms. LERNER. In private litigation a court would never allow an assertion of attorney-client privilege without a privilege log, and it is very important for agencies like mine to get that information. If an agency can assert attorney-client privilege to protect the basis, for example, of removing someone, we are not able to get a full picture and determine if there was animus for whistleblowing, what the true factors really were for taking an action against an employee. If we ask why a decision was made and the answer is I can't tell you because I asked my lawyer or outside counsel about it, then that is just not very helpful to us.

Mr. ISSA. Now, the agency employs outside counsel even though they have an in-house counsel, is that correct?

Ms. LERNER. I am aware that they have hired outside counsel.

Mr. ISSA. And in-house counsel does not have an expectation, normally, of attorney-privilege, isn't that; they are Government workers working for a Government entity and they don't normally have attorney-client privilege from the Government. I just want to say that rather confusing thing to hopefully get a yes.

Ms. LERNER. Yes. I will just also add that it does occasionally happen, and we have actually, as an agency, provided language to the Senate Governmental Affairs Committee on this very specific issue. We thought it was necessary to clarify the Office of Special Counsel's right to receive information because it really does impact our ability to conduct impartial investigations. And this case was sort of the impetus for asking for that language.

Mr. ISSA. Now, from my time in the outside world in both civil and criminal cases, when the privilege is claimed, an in camera review is often the case; in other words, the judge shall decide whether or not the privilege claimed is appropriate, is that right?

Ms. LERNER. Yes, that is right.

Mr. ISSA. Where do you go to get that kind of justice in this case?

Ms. LERNER. Well, it is tough as an administrative agency. Technically, I suppose we could go to the Department of Justice to ask them to enforce a subpoena for information for us, but it is rare, and it is my approach to try and resolve things informally and to find a way to resolve matters like this without having to go to those extremes.

Mr. ISSA. I just have two quick last questions, Mr. Chairman.

What is the first date in which you believe that this was asserted? In other words, how long have you been trying to resolve this with the chairman?

Ms. LERNER. I am sorry, that was addressed to me?

Mr. ISSA. Yes. It can also be addressed to Mr. Elkins, too.

Ms. LERNER. I don't know the exact amount of time. I think as my testimony mentioned, we have been trying for a long time to get these documents. We still haven't gotten either a privilege log or the documents, and we don't know what we don't have.

Mr. ISSA. Right. And I guess I will ask it this way. Any time you go more than a few weeks in negotiations, as Mr. Elkins said earlier, you have stonewalling; you are not really progressing, you simply have a party that is intransigent and isn't going to provide that which they are ordinarily supposed to do in their role on behalf of the taxpayers.

Ms. LERNER. I would generally agree with what you just said.

Mr. ISSA. And you have reached that point, haven't you?

Ms. LERNER. Pretty much.

Mr. ISSA. Mr. Elkins, you have reached that point?

Mr. ELKINS. Absolutely.

Ms. LERNER. My counsel has just reminded me that this isn't the only subpoena that we have issued, but it is certainly one of only maybe a couple inside Special Counsel.

Mr. ISSA. Dr. Rosenberg, I know you are no longer there, but are these the kinds of documents that you would routinely be allowed to see if you asked to see them?

Dr. ROSENBERG. We didn't even know this was happening until we learned about it in the press, so, no, I am sure——

Mr. ISSA. So the board wasn't consulted?

Dr. ROSENBERG. About what to do.

Mr. ISSA. Right. And the board would not have been normally provided with documents that allow you to understand the legitimacy of the action.

Dr. ROSENBERG. We were marginalized from the whole affair, and I don't know what would have happened had we asked to see the documents.

Mr. ISSA. Doctor, I am going to close very simply. I believe there has been a strong case made in our investigation, a strong case made here today, and I think Mr. Connolly made a strong case in his discussion with you. You have failed in your requirement to be a chief executive. You failed in your requirement to be a board leader. You failed in your requirement to hire people who faithfully do the job in the way expected of an independent agency.

You have failed to deliver the kind of results in the way of timely resolution of your basic charter, which is to do these investigations and bring them to conclusion in a way in which industry and the American people know that the changes, so it doesn't happen again, are continuing. Six and a half years to close something out, four years to close something out, that is four years of vulnerability on whatever caused these horrific incidents to occur.

Therefore, I personally will do something I don't do. I don't do it with cabinet officers, I don't do it regularly. But I really believe

it is time you go, that you really need to ask whether or not, in your last year, you can actually undo the damage of your first five.

I thank the chairman and ranking member for their indulgence and yield back.

Mr. CHAFFETZ. I thank the chairman.

I will now recognize myself for five minutes.

Mr. MOURE-ERASO, how many people work for you?

Mr. MOURE-ERASO. I think the agency right now has 40 people.

Mr. CHAFFETZ. And do you recall during that time how many people have left or been asked to leave or departed?

Mr. MOURE-ERASO. Nobody has been asked to leave. Some people have transferred out and they have been replaced with new hires.

Mr. CHAFFETZ. Did you ever have a conversation with Chris Warner and ask him to leave?

Mr. MOURE-ERASO. I did. I—

Mr. CHAFFETZ. You did or did not?

Mr. MOURE-ERASO. One year after I started my chairmanship, I had a discussion with him to that effect.

Mr. CHAFFETZ. So you just testified that you never asked anybody to leave, and I asked you about Chris Warner and you did ask him to leave.

Mr. MOURE-ERASO. Yeah, and he said that he will not leave, so I accepted it.

Mr. CHAFFETZ. Then why did you just tell me that you have never asked anybody to leave?

Mr. MOURE-ERASO. Well, I did have this conversation with Mr. Warner at the beginning. We had a lot of differences on the way that the agency should be run and we were not able to see eye-to-eye on how he could be my general counsel, and I thought I asked him to resign, and he said that he wasn't going to resign, and that was the end of the matter.

Mr. CHAFFETZ. Why did you just tell me that you never asked anybody to leave?

Mr. MOURE-ERASO. Probably I misspoke. Yes, we had that interchange with Mr. Warner.

Mr. CHAFFETZ. How convenient. We see a lot of that. So what did you do with him? You changed his job, didn't you?

Mr. MOURE-ERASO. No.

Mr. CHAFFETZ. You didn't change his job?

Mr. MOURE-ERASO. I tried to do my best to see if we were able to work together and—

Mr. CHAFFETZ. Did you or did you not change his job?

Mr. MOURE-ERASO. Eventually I did, when we were unsuccessful to work together.

Mr. CHAFFETZ. Well, why did you just tell me you didn't change his job? I just asked you did you change his job, and you said no. And then I asked you again and you now say yes.

Mr. MOURE-ERASO. I transferred him from one position to another, yes.

Mr. CHAFFETZ. What is that new position?

Mr. MOURE-ERASO. I told you before—

Mr. CHAFFETZ. Was it a demotion?

Mr. MOURE-ERASO. It wasn't, it was a lateral transfer.

Mr. CHAFFETZ. What was he doing, was he working on FOIA requests?

Mr. MOURE-ERASO. Not only that, he was an ethics officer, which is a very important position in the agency.

Mr. CHAFFETZ. So he went from general counsel to working on FOIA and ethics, and you think that is a lateral move?

Mr. MOURE-ERASO. And any other issues of senior legal interest that I could require from him.

Mr. CHAFFETZ. So anything at your discretion. But he is no longer general counsel. How can you possibly justify that as a lateral move?

Mr. MOURE-ERASO. He didn't lose his title or his status—

Mr. CHAFFETZ. Yes he did lose—

Mr. MOURE-ERASO.—or his salary.

Mr. CHAFFETZ. You are saying that he did not lose his title? He was still called the general counsel?

Mr. MOURE-ERASO. No. He started as SES.

Mr. CHAFFETZ. Sir, every time I have asked you a question, you have changed your answer when I ask you a second time.

Mr. MOURE-ERASO. What I am referring to is his character of SES didn't change.

Mr. CHAFFETZ. His what?

Mr. MOURE-ERASO. SES. He was a Senior Executive Service of the Government. He remained as a Senior Executive Service of the Government.

Mr. CHAFFETZ. But you did change his title. You did ask somebody to leave. You did do all of those things.

Mr. MOURE-ERASO. According to the U.S. Code, I have the right to transfer people in the Senior Executive Service from one position to another.

Mr. CHAFFETZ. Mr. Elkins, Mr. Sullivan, can you add or illuminate anything to this discussion that we have had over the last four minutes?

Mr. SULLIVAN. Mr. Warner has made numerous complaints about his treatment and we have spoken to Mr. Warner many, many times; and it is part of our ongoing investigation and we are very hopeful to be able to get the documents that will shed a lot more light on this issue.

Mr. CHAFFETZ. Why, again, are you holding back those documents, Mr. Chairman? They have the law on their side, the authority to see these documents. Why will you not share those documents with them?

Mr. MOURE-ERASO. I have shared thousands of documents.

Mr. CHAFFETZ. No, I want all of them. It is a percentage. What percent—

Mr. MOURE-ERASO. The only ones that we are not sharing is the ones dealing with this attorney-client privilege that have been mentioned by my—

Mr. CHAFFETZ. Because you went and spent taxpayer money to get an outside counsel. You already had inside counsel; you didn't have to use that. This is something we will bring you back up here again if we need to. The chairman has already said if he has to issue subpoenas, we will do that. It is just absolutely stunning to

me, because every single time we ask you a question we get a different answer. Do you think you have done anything wrong?

Mr. MOURE-ERASO. I regret that I did some things the way I did. I don't think that I have done everything perfect.

Mr. CHAFFETZ. What would you do differently?

Mr. MOURE-ERASO. Probably I would have tried to get my own team from the very beginning and make it clear that it was not possible to work with people that wanted, in my experience, to make more difficult the functions of the board and to work to accomplish the mission of the board.

Mr. CHAFFETZ. How many recommendations has the inspector general given you?

Mr. MOURE-ERASO. Probably hundreds.

Mr. CHAFFETZ. Hundreds?

Mr. MOURE-ERASO. Yes.

Mr. CHAFFETZ. You have a department of 40 people, and under your tenure they have given you hundreds of recommendations? How many have you implemented?

Mr. MOURE-ERASO. My counsel says that there are a few that—I am sorry, I misspoke.

Mr. CHAFFETZ. And you lead this organization.

Mr. MOURE-ERASO. Yes, I do.

Mr. CHAFFETZ. How many of them have you actually implemented?

Mr. MOURE-ERASO. We have responded to each one of them and we have told the inspector general how we plan to, when we agree with their recommendation, how we plan to act on them and how—

Mr. CHAFFETZ. Okay, so how many do you agree with and how many do you disagree with?

Mr. MOURE-ERASO. I cannot give you a figure right now.

Mr. CHAFFETZ. Well, that is obvious.

Mr. ELKINS, shed some light on the reality from your perspective.

Mr. ELKINS. Yes, sir. I would be glad to. During the administration of Dr. Moure-Eraso, we have issued 19 recommendations. My records show that 11 are open, 4 remain unresolved, so what we have is 15 out of 19 with no corrective actions being taken. Not only that, but OMB has issued a 50 guidance in terms of what happens when you cannot reach agreement; it goes to what is called audit resolution. There is no audit resolution process within the CSB, so, therefore, when we get to a point of impasse, with CSB there is no where to go.

Mr. CHAFFETZ. Why is there no audit resolution process, chairman?

Mr. MOURE-ERASO. I don't know the answer to that question.

Mr. CHAFFETZ. And you lead this organization.

Mr. MOURE-ERASO. Yes, I do.

Mr. CHAFFETZ. Your inability to manage what is a relatively small group of people to deal with—the amount of money and time and expertise that the inspector general comes in and offers should be viewed as a benefit; and yet you very cavalierly have no idea how many they have done, you have no plans to implement them, the majority of them you haven't implemented, there is no resolution in order to solve those problems. And if you are going to need

Congress to come in and legislate how you are going to do this, you are not going to like the result.

Mr. MOURE-ERASO. I would like to say that we have responded to each and every one of the recommendations and we have agreed with some and we have disagreed with others.

Mr. CHAFFETZ. In your budget request, what did you do with the oversight function, did you zero it out?

Mr. MOURE-ERASO. I have to review that. I cannot tell you from the top of my head what did I do with some item in my budget.

Mr. CHAFFETZ. Let's do this as we wrap up.

Dr. Gosar, do you have an additional set of questions?

Let's do this, let's recognize Dr. Gosar for five minutes.

Mr. GOSAR. Thank you.

Dr. Rosenberg, with your background, you sat on a number of boards, I take it?

Ms. ROSENBERG. Actually not.

Mr. GOSAR. Really?

Ms. ROSENBERG. No.

Mr. GOSAR. But have you sat on anything privately as well?

Ms. ROSENBERG. No. I have actually just been an academic and I have been to many conferences and am a member of the IPHA, but I have never worked on a board before.

Mr. GOSAR. How do you run your classroom? You go to training where you gather with colleagues, right?

Ms. ROSENBERG. Mm-hmm.

Mr. GOSAR. And do you discuss new theories and technical aspects?

Ms. ROSENBERG. I have been a member of the faculty at my department at Tufts for 16 years, and I will go back there in September.

Mr. GOSAR. So you have been aware of inner jurisdictional aspects, working with multidiscipline aspects.

Ms. ROSENBERG. Yes.

Mr. GOSAR. Have you not?

Ms. ROSENBERG. Yes.

Mr. GOSAR. Let's take that comparison and compare it to what you saw on this board. Mr. Cummings made a comment to always hire up, empower people to be part of the solution process, and one of the mission statements of this board is to look at these chemical spills, right?

Ms. ROSENBERG. Right.

Mr. GOSAR. And there seems to be a problem of long and long and long and long to just not resolving any of these things, taking longer and longer. Would you agree?

Ms. ROSENBERG. Yes.

Mr. GOSAR. As a board member, were you made aware of all the different things that were being presented to your safety board to be reviewed?

Ms. ROSENBERG. Yes.

Mr. GOSAR. Was there a plan to orchestrate that?

Ms. ROSENBERG. We were presented with investigations, but we weren't presented with a plan to complete the investigation.

Mr. GOSAR. It seems to me, in logical aspects here, I don't think you have to sit on many boards to understand that when you are

given a jurisdiction, here is the task that we are at and we are trying to accomplish these; and the plan should be that we get a proper jurisdiction, but empowering people to be part of that solution so that we can get through that. Would that be agreement?

Ms. ROSENBERG. Yes.

Mr. GOSAR. So you come with a different set of skill sets. Board members are all not clones, right?

Ms. ROSENBERG. Right.

Mr. GOSAR. Okay, so you would like to have that free flow. You had made the comment the free flow of information, right? And that is also a good free flow of information from staff, right?

Ms. ROSENBERG. Yes.

Mr. GOSAR. Did you have conversations with staff that felt that they were impugned or restricted in the free flow of information?

Ms. ROSENBERG. Yes.

Mr. GOSAR. And did they fear retaliation?

Ms. ROSENBERG. Yes. They were told, yes. Many staff members said they felt very fearful about disagreeing with their supervisors for fear of retaliation.

Mr. GOSAR. So if we were to work out a plan to look at all the resources that the board has, don't you think that could expediate some of the resolution of some of these issues that we have, the backlog? Do you think we could speed up the backlog if we empowered people to be part of the solution and they didn't fear retaliation?

Ms. ROSENBERG. I think, yes, the return of trust is necessary in order to rebuild the board, and part of that would be respecting the board orders as outlined in the Moss opinion. But also the culture of the place has to change, and that is a more difficult thing to do.

Mr. GOSAR. Well, but you serve the general public, right?

Ms. ROSENBERG. Yes.

Mr. GOSAR. I am a health professional, so you want to be on top of these so you don't repeat a historical disaster, right?

Ms. ROSENBERG. Right.

Mr. GOSAR. So a normal person that is in leadership would reprioritize, right?

Ms. ROSENBERG. I just must add Dr. Moure-Eraso is completely committed to worker safety and health, and actually everyone in the agency is. So it is not about commitment to the mission.

Mr. GOSAR. No, no, no, no.

Ms. ROSENBERG. It is about management styles that—

Mr. GOSAR. Well, and that is what the point is. The chairman has brought up over and over again some people are good at leadership, some people are not. Some people can acknowledge their weaknesses, some cannot. We seem to be having this problem in this hearing today; somebody not looking at I instead of we. It is I. I agree with the chairman, it is time for the chairman to go. We have a service to the public to expediate the claims, to uphold the rule of law, and to make sure that we have an open dialogue so we don't repeat the historical problems from the past, and I think that takes multiple eyesights.

This isn't just focused just right here. I have been on a number of boards, as I said earlier, where I was trying to be marginalized. I didn't go away. So I am glad you are back here speaking, okay,

because that is how we make a difference. And I think there were laws put in place for whistleblowers to come forward and to have those protections, and those are serious offenses when we do not protect whistleblowers, because we are seeing that type of debilitating aspect not just in this board, but throughout our justice system here. So I want to compliment you for coming forward. And I would hope that those employees would still stay with it. We need to make sure that the public is protected and that there are solutions at the table. So thank you very much for your willingness to come forward.

Thank you, I yield back.

Mr. CHAFFETZ. I thank the gentleman from Arizona. He has true passion and caring for this, so I appreciate his being here and participating with us.

Chairman, you said you disagree with the IG about the turnover numbers. Could you share with us those numbers and why you disagree with them? I am asking you as a follow-up, not right here.

Mr. MOURE-ERASO. Yes. I could provide you with a document in response.

Mr. CHAFFETZ. When could you provide that?

Mr. MOURE-ERASO. Tomorrow, if you want to. To give you an idea of the situation, we disagree with Mr. Elkins' evaluation. He counted as one of the persons part of the people we lost one of our investigations that died on the job, and he considered that that person has left the agency, as one of the persons that has left the agency voluntarily, and we disagree with him on that.

Mr. CHAFFETZ. Well, I want you to just articulate that out. Take a week. I appreciate the quick response. If you could provide to the committee, we would appreciate it.

Mr. MOURE-ERASO. I would like to add that there is a documentation. Mr. Elkins published his recommendations with our responses one-to-one, and all the responses are there, and I would be very glad to provide you with that document.

Mr. CHAFFETZ. That would be great. If you have additional information, we would love to receive it.

I would like to go from my left to right, starting with you, chairman. The question is what do you think is wrong and what do we need to do to fix it. And I am going to ask each of you to please comment on that.

Go ahead.

Mr. MOURE-ERASO. I think that the principal problem with the Chemical Safety Board is that we are a very small agency that is given an incredible amount of work to do. We have really very little resources for the mission that has been given to us; we have a very small staff for the mission. But in spite of that we have produced top-notch, landmark issues in our reports and our recommendations that we have done to the chemical industry.

I do recognize that our operation is not perfect and that we are having some problems of management in the agency, and I read very carefully the recommendations of Congressman Waxman that has looked at the situation and has made some specific recommendations to us, and we are working on those recommendations to improve the situation on the board.

Mr. CHAFFETZ. Mr. Elkins.

Mr. ELKINS. Yes, thank you. My observation is this: in our direct dealings with this seven day letter and the issues underlying that, the message that comes across is that the CSB's leadership is above the law. They do not feel that they have to comply, in my particular case, with the IG Act. To allow that to go on takes the IG Act and turns it on its head. To allow an agency to decide, well, we will comply with this piece, but we won't comply with that piece totally undermines the IG Act. That, obviously, cannot stand.

Also what we have here is they seem to be doing this as a rules on the fly sort of method. You know, they kind of make things up. It is attorney-client privilege today; it is something else tomorrow. That just cannot stand.

So those are my observations.

Mr. CHAFFETZ. Thank you.

Mr. Sullivan?

Mr. SULLIVAN. Yes, Mr. Chairman. The overriding feedback we have received is fear from the employees; fear of what is going on in the agency, concern. And from my perspective of my investigators, we have been stymied, we have been stonewalled, we have not received the documents we need. We can't rush to judgment. Everyone is considered innocent unless and until proven guilty, and these documents that we are requesting we absolutely have to be able to analyze them and examine them ourselves, because they will give us the way ahead.

Mr. CHAFFETZ. Thank you.

Ms. Lerner?

Ms. LERNER. The Office of Special Counsel encourages all agencies to send a message from the very top about embracing whistleblowers. Let me give you an example of one agency that is doing what needs to be done. Acting Secretary Gibson at the VA, in response to our letting him know about the high number of retaliation complaints that we were getting from VA employees, he sent a letter to all of the workforce, all VA employees, making clear that whistleblowers are valued, that they are important for the VA to find out what the problems are, and that retaliation against whistleblowers will not be tolerated. That was sent from the head of the department to every employee at the VA. That is a model response to complaints of retaliation.

The Whistleblower Protection Act requires agencies to educate its employees about their rights to disclose information about waste, fraud, and abuse, or health or safety issues; they are supposed to let employees know that they can come to the Office of Special Counsel, they can go to the IG, they can come to Congress without any fear of retaliation.

If I were going to counsel anyone about how to improve an agency, it would be to take the steps that are outlined under the Whistleblower Protection Enhancement Act. Also my agency has a certification program that agencies can follow; it is a very simple program that includes informing employees about their rights and taking very simple steps like putting a link to our agency on their website. So that would be my advice.

Mr. CHAFFETZ. Thank you.

Dr. Rosenberg?

Ms. ROSENBERG. I have a number of things. I so appreciated Mr. Waxman's efforts and the efforts of his wonderful staff to give us recommendations on how to improve the agency. I think his recommendations are very good, but they don't go far enough. They mostly recommended trying to establish a more collegial environment and to keep board members in the loop. But I think that needs to be codified so that board members can't be marginalized.

I think we need a way to resolve professional disputes. We need the chair to recognize the authority of the board by recognizing board orders. We need public business meetings to be accountable to the public, deliberative Sunshine Act meetings. We can't have the chair have the ability to calendar or table a matter of importance to put a matter that he doesn't feel like dealing with on the table indefinitely. That is a legislative change that we need because it produces some autocratic behavior.

And I think the culture of the agency needs to be changed. I think the agency needs to be rebuilt. I think senior leadership needs either retraining or I am going to let you decide what needs to be done. And I think that the agency needs to heal and that restoring trust memo that was released to the press three days ago shows that—I don't think there is a sincere interest in doing that.

Mr. CHAFFETZ. Well, thank you. I appreciate it. Dr. Rosenberg, thank you for your service. I know that that service was a bit sour, but for whatever reason your participation here, your willingness to speak publicly about this is very much appreciated; it is part of solving the problem. I frequently say what differentiates the United States of America from most countries is we are self-critical, and you do that in the spirit of making things better. So I appreciate your willingness. I know it is not necessarily the most pleasant thing to do, but it is part of the process to fix what is clearly wrong and going the wrong direction.

We will continue to pursue this. I appreciate the tenacity of Chairman Issa on this and Mr. Cummings to get to the bottom of this. This is not the end of this; there will be much more to come, and it is unfortunate.

I think to the Obama Administration I would suggest there is a way to solve this; if they would show some leadership and get their fingernails dirty and get in the middle of what is clearly a management problem. I think several people have cited that most of that management problem resides in one particular situation.

To the men and women who are serving, they serve their Nation, they have families, they have loved ones. I am sure they are all patriotic. They do important work that is critical to our Country. Bear with us. Hang in there. Things may be difficult, but I hope this is a sign that things will be rooted out, truth will surface; maybe the hard way, but truth is going to surface and we will help solve this problem. I think we can do it in conjunction with the White House if the White House will show some leadership, too, on this issue. But the Congress will continue to pursue this. But we could dismiss this sooner, rather than later, if we do it hand-in-glove with the White house.

Again, to those men and women who have gone through tough things, they may have left that agency, they may be there now, I

thank them for their service to their Country, the tough work that they do. We want to get to the truth and we want to make it right. With that, this committee stands adjourned.
[Whereupon, at 12:20 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
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June 18, 2014

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
2471 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa and Ranking Member Cummings:

I understand that the Committee on Oversight and Government Reform is holding a hearing tomorrow to examine management challenges at the U.S. Chemical Safety Board (CSB). As you prepare for this hearing, I thought it could be helpful to share with you the work I have done over the last several months to understand these challenges and identify solutions to improve the management of this important agency.

In 1990, I helped establish the CSB as part of the reauthorization of the Clean Air Act, and I have long supported its critical mission: to conduct independent investigations into the root causes of the most serious chemical accidents in the United States. I believe that when the CSB functions well, the nation benefits by understanding the causes of chemical accidents and how to prevent them.

Last fall, I became concerned that governance issues at the agency could threaten this important mission. The 2013 federal employee viewpoint survey for the CSB showed a remarkable decline in employee morale and confidence in CSB's senior management. I also learned that the CSB had had a series of conflicts with several other federal agencies, including the Environmental Protection Agency, the Justice Department, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives. These conflicts generally involved gaining access to information.

In order to better understand the challenges facing the CSB, I sent a letter in November 2013 to Chairman Rafael Moure-Eraso and the two sitting Board Members at the time, Mark Griffon and Beth Rosenberg, asking questions about decision-making, investigative planning,

The Honorable Darrell Issa
The Honorable Elijah Cummings
June 18, 2014
Page 2

and communication within the agency. Each responded separately and identified areas they would like to see improved.

Over the course of the next several months, my staff engaged in a dialogue with the Chairman and Board Members to forge a productive path forward. My staff also spoke with several senior managers at the CSB. As a result of this investigation, it became clear that fostering open communication between the Chairman and Board Members would be an essential step in improving agency governance.

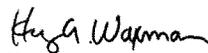
Accordingly, I made recommendations in seven areas where the Chairman and Board Members should try to communicate openly and deliberate jointly for the benefit of the agency. Those recommendations are attached. They include recommendations to schedule regular briefings for the Board Members on CSB investigations and for the Chairman to consult with the Board Members on matters that affect CSB's core mission, such as negotiations with other federal agencies on information-sharing. I also recommended that the Chairman and Board Members work together to prioritize outstanding investigations and develop a formal investigations protocol for the agency.

My staff shared drafts of these recommendations with the Chairman and the Board Members before they were finalized to provide them an opportunity to comment. The Chairman and Board Members offered comments, which influenced the final recommendations. My goal was to foster better communication through concrete steps, which would allow the Board to take even bigger strides in the coming months.

Since I began this oversight process several months ago, there are signs of progress at the CSB. One Board Member resigned, which is regrettable, but the President has nominated two new Members. The agency has voted to finalize the reports for two major investigations, the Deepwater Horizon explosion and the Tesoro refinery fire in Washington. The Deepwater Horizon report in particular breaks new ground in its understanding of one of the causes of the massive Gulf oil spill. Going forward, I am hopeful that the CSB will implement my recommendations and that this will contribute to a turnaround at the agency.

I believe that the best oversight makes constructive recommendations to improve agency performance. That is what I have tried to do through my oversight of the CSB, and I hope you will take a similar approach. Your hearing will serve a valuable purpose if it provides an opportunity to discuss constructive ideas for improving CSB's internal management and operations so that the agency can focus on its core mission and investigative work.

Sincerely,



Henry A. Waxman
Ranking Member

**Recommendations from Rep. Henry A. Waxman to
The Chemical Safety Board**

May 2, 2014

Regular Briefings and Meetings: The Chairperson should provide, and board members should attend, a weekly leadership meeting. At these meetings, senior CSB staff should provide an update on the status of major projects. The Chairperson should ask the board members prior to the leadership meeting whether there are topics they would like addressed and should ensure they are covered in the meeting.

The board members should request additional nondeliberative briefings if they believe there are issues that were not adequately addressed at the weekly leadership meetings. The Chairperson should facilitate prompt scheduling of any requested briefings.

In addition, the Chairperson should meet individually with each board member at least once a month.

Other Agencies: The Chairperson should inform the board members when another federal agency makes a nonroutine request for documents, information, or action from the CSB (unless the request relates to an internal investigation of the CSB and the investigating body has requested confidentiality). Any decision to challenge or reject a request should be elevated to the board for consideration.

MOU: The Chairperson should consult with the board members to develop a consensus approach to the interagency negotiations going forward (under EO 13650) to develop a Memorandum of Understanding. The Chairman should ensure the board members are briefed monthly on the status of the MOU negotiations and keep them apprised when major developments occur. The final MOU should be brought before the board for approval.

Chevron Investigation: The Chairperson (or a mutually agreed senior staff person) should meet individually with the board members to resolve concerns about the Chevron investigation report and to develop a proposal that could be brought before the board and adopted by consensus. If consensus cannot be reached on all matters, the Board should act on the items for which agreement exists. This proposal should be developed in time to be brought before the board for action as soon as feasible but no later than May 30, 2014.

Investigations Plan: The Chairperson should consult with the board members to establish a mutually agreed investigations plan for the agency. This plan should be established as expeditiously as possible but no later than July 31, 2014.

Investigation Protocol: The Chairperson should consult with the board members to establish a mutually agreed process for updating the agency's investigation protocol. This process should be started as expeditiously as possible but no later than July 31, 2014.

Board Order 28: There is a debate over the powers of the Chairperson and the board members under Board Order 28, which has the potential to interfere with implementing these recommendations. If there is a vacancy in the senior staff that would be subject to Board Order 28, the Chairperson and board members should seek consensus on the appointment as a matter of comity, thereby avoiding a need to resolve disputes about the application of the board order to appointments and the respective rights of the Chairperson and board members on this matter.

STAFF REPORT



**WHISTLEBLOWER REPRISAL AND MANAGEMENT FAILURES
AT THE U.S. CHEMICAL SAFETY BOARD**

PREPARED FOR
CHAIRMAN DARRELL E. ISSA
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
AND
CHAIRMAN LAMAR SMITH
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

U.S. HOUSE OF REPRESENTATIVES
113TH CONGRESS
JUNE 19, 2014

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I. Executive Summary

The U.S. Chemical Safety and Hazard Investigation Board (CSB) is an independent agency charged with investigating chemical accidents. In the fall of 2012, the EPA Inspector General began investigating allegations that CSB General Counsel Richard Loeb learned the identities of several CSB whistleblowers who filed complaints with the U.S. Office of Special Counsel (OSC). The whistleblowers—all of whom worked in the Office of General Counsel—had been exposed to retaliation by virtue of the leak. In fact, because of the likelihood that managers may retaliate against whistleblowers who file complaints with OSC, federal law requires OSC to protect the identities of complainants.

In light of the seriousness of the allegations against Loeb, and the OSC employee who leaked information to him, it was imperative that Loeb and CSB Chairman Dr. Rafael Moure-Eraso fully cooperated with the IG's investigation. They did not. Instead, Loeb—with Moure-Eraso's consent—refused to provide key documents to the Inspector General, citing attorney-client privilege. The EPA IG discovered that CSB leadership used personal e-mail accounts to conduct official business to avoid scrutiny from investigators. Loeb's novel—and mistaken—application of attorney-client privilege to documents that may have implicated him in the leak, and his and his colleagues' use of personal e-mail accounts to avoid scrutiny, caused the IG to eventually bring the matter to the attention of Congress.

On September 5, 2013, EPA Inspector General Arthur A. Elkins, Jr. sent a “seven-day letter” to Congress regarding CSB's refusal to cooperate with his leak investigation. Section 5(d) of the Inspector General Act, as amended, requires IGs to report immediately to the agency head whenever the IG becomes aware of “particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs or operations.”¹ Reports made pursuant to Section 5(d) of the IG Act are commonly referred to as “seven-day letters.”² Because IGs typically reserve the use of a seven-day letter for only the most urgent matters, Congress—and the House Committee on Oversight and Government Reform specifically—takes these matters very seriously.

In response to the seven-day letter, the Committee sought more information regarding CSB's unwillingness to cooperate with the EPA IG's leak investigation. According to the EPA IG, the documents that are being withheld would reveal how Loeb came to know the identities of the CSB whistleblowers. Loeb, in turn, claimed that the documents he is withholding are protected by attorney-client privilege. He argued that if CSB turns over these documents to the IG, CSB would waive the attorney-client privilege with regard to the documents, thereby allowing third-party complainants to obtain the documents in litigation. This position is, unsurprisingly, not supported by case law, and is contrary to the clear and unambiguous language of the Inspector General Act of 1978, which guarantees that all IGs have complete and unfettered access to any documents and information relevant to any audit or investigation. Loeb's and More-Eraso's posture towards the IG investigation created the appearance that CSB leadership

¹ Inspector General Act of 1978, as amended, Pub. L. 110-409 [hereinafter IG Act].

² *Id.*

was attempting to cover up the leak. At the very least, their position with respect to the documents being sought by the IG indicated that they feared a lawsuit from the whistleblowers whose identities had been revealed. At the very least, this was a red flag that CSB was suffering from mismanagement.

Once the Committee began its investigation of the seven-day letter allegations, it became clear there were in fact serious management deficiencies at the CSB. The Committee conducted ten transcribed interviews of current and former CSB employees, received several briefings, and reviewed several hundred documents produced by the EPA OIG, the OSC, and the CSB. To date, it is unclear whether CSB has provided the Committee with a complete production of relevant documents, given its lack of full cooperation with the Committee's investigation. The deficiencies uncovered during the course of the investigation and outlined in this report led the Committee to conclude that CSB is failing to fulfill its mission under Chairman Moure-Eraso's leadership.

Dr. Rafael Moure-Eraso was nominated to the CSB by President Obama in March 2010 and confirmed by the Senate in June 2010. Chairman Moure-Eraso's term will expire in 2015 as CSB Board Members serve fixed terms of five years. Since Dr. Moure-Eraso took over as Chairman in June 2010, at least nine employees—investigators and attorneys—have left the agency, which has approximately 40 employees in total. Current and former CSB employees informed the Committee that under Moure-Eraso's "bullying" and "abusive" leadership, the current work environment is "toxic." Employees fear retaliation for any action perceived as questioning the chairman or assisting other Board Members. Many employees believe they have faced retaliation, including being stripped of their responsibilities.

In February 2011, Chairman Moure-Eraso—without Board approval—unilaterally hired Richard Loeb to a newly created position, Counsel to the Chairman of the Board. The manner in which Moure-Eraso hired Loeb, as well as his treatment of then-General Counsel Chris Warner—discussed in detail in Sections VIII and IX—foreshadowed Moure-Eraso's contempt for both his fellow Board members and for opinions that differed from his own.

The attrition of experienced investigators has stalled major investigations involving fatalities for years. For example, in April 2010, a fire and explosion at a Tesoro refinery in Anacortes, Washington killed seven people. Then-CSB investigator Rob Hall traveled to the site, began investigating, and completed a draft report on the causes of the incident. When he left CSB in March 2011 because of the toxic work environment, the CSB restarted the investigation from square one. Apparently, there was no one at CSB who could pick up where Hall left off. Waste, redundancy, and lack of continuity are telltale signs of mismanagement. Now, four years later, the Tesoro investigation is finally closed. On May 1, 2014, CSB released the final report on the Tesoro tragedy.

The delay in the issuance of a final report on Tesoro is directly related to the lack of collegiality among Board members. The CSB is made up of five board members. Presently, the Board has only two members, with Moure-Eraso serving as Chairman. The other member is Mark Griffon. The three remaining seats are vacant. Dr. Beth Rosenberg resigned from the

Board on May 31, 2014, after serving just over a year. Upon her departure, Dr. Rosenberg told *Bloomberg BNA*:

I feel I can do more good from outside the agency than within it . . . [a]s a board member, I expected the opportunities to influence the workings and priorities of the agency to be greater than they were. The ill-defined role of board members in relation to the chair, as well as in relation to the staff, made it difficult to have any meaningful influence. . . . I'm looking forward to going back to an academic environment where open debate is valued.³

In line with Dr. Rosenberg's sentiment, current and former CSB employees made it clear to Committee investigators that Moure-Eraso's heavy-handed tactics have led to the deterioration of collegiality among CSB Board Members.

Apart from witness testimony received by the Committee, press reports relating again to the Tesoro investigation show the contentious nature of the situation among the Board Members. The Board was scheduled to vote on the final report on January 30, 2014, but Chairman Moure-Eraso and CSB Managing Director Daniel Horowitz unilaterally decided to postpone the vote, choosing instead to hold a "listening session." Both Congressman Rick Larsen (WA-02) and U.S. Senator Patty Murray (WA) were critical of the delay.

Additional factors in the CSB's failure to fulfill its mission were the financial and personnel costs of the Deepwater Horizon investigation. After initially determining that CSB did not have the expertise to investigate the explosion and resulting oil spill that occurred in the Gulf of Mexico in April 2010, CSB leadership initiated an investigation in response to a request from then-House Energy and Commerce Committee Chairman Henry Waxman. Now, four years later, the CSB released just two volumes of its anticipated four volume series on May 1, 2014. The agency has spent millions on outside experts, expenses related to litigation with the company that owned the oil rig, and personnel resources. Yet, inexplicably, the investigation continues.

The Committee's investigation found that the toxic work environment created by Chairman Moure-Eraso caused attrition, which in turn set back CSB's investigations of various chemical accidents across the country. CSB's inability to issue timely recommendations in the wake of often-deadly chemical accidents puts public safety at risk. Former CSB Board Members and staff testified that the toxic work environment arose shortly after Dr. Rafael Moure-Eraso became the Chairman. As Chairman, Moure-Eraso rarely interacted with CSB staff or fellow Board members. And when he did, he was dismissive and disrespectful causing the previously collegial atmosphere at the agency—which had been a key to the Board's effectiveness since its inception—to deteriorate.

Chairman Moure-Eraso acted primarily through Managing Director Daniel Horowitz and General Counsel Richard Loeb. The three worked closely to enforce their own collective view

³ Robert Iafolla, *CSB Member Resigns in Frustration: Chair Expects Vacancies to Be Filled Soon*, *Bloomberg BNA*, (May 27, 2014).

of how the CSB should operate, often in spite of the relevant statutes, regulations, and Board orders governing the CSB. For example, in 2000, the U.S. Department of Justice Office of Legal Counsel (OLC) issued the “Moss Opinion,” which effectively dictated that when the agenda of the Chairman is at odds with the agenda of the Board, the Board’s decisions control. The CSB subsequently passed what became known as “Board Order 28,” which resolved that Board Members are entitled to a say in substantive policy decisions and certain administrative functions. Board Order 28 effectively resolved that the Chairman cannot exceed his or her intended role as “chief among equals.” According to witnesses—and their own testimony—Moure-Eraso, Horowitz, and Loeb applied Board Order 28 and others selectively and relegated the Board’s role to merely approving investigative reports. In fact, during his transcribed interview with the Committee, Loeb questioned the validity of many Board Orders.

The mission of CSB is to investigate chemical accidents, make recommendations to prevent future accidents, and ensure that its recommendations are implemented. Moure-Eraso’s leadership style—which includes an utter disregard for the collegial tradition of the Board—drove away all the experienced investigators, effectively rendering the CSB unable to issue any recommendations and fulfill its mission. Therefore, it is imperative that a change in leadership take place to allow this struggling agency to regain focus on safety issues and provide necessary guidance to industry.

II. Table of Names

Chemical Safety Board

Rafael Moure-Eraso

Chairman, Chemical Safety Board

Dr. Rafael Moure-Eraso was nominated to the CSB by President Obama in March 2010 and confirmed by the Senate in June 2010. Prior to his appointment to the CSB, Dr. Moure-Eraso served as a Professor and Graduate Coordinator for the Department of Work Environment in the School of Health and Environment at the University of Massachusetts Lowell where he has been a member of the faculty for 22 years and Chair of the department for the last five years. He has been a Certified Industrial Hygienist for Comprehensive Practice (CIH) since 1985. Prior to joining the University, Dr. Moure-Eraso served for 15 years (1973-1988) as an Industrial Hygienist Engineer with the national offices of two international unions: the Oil Chemical and Atomic Workers (OCAW) and the United Automobile Workers (UAW). In 1994-95, he held an Intergovernmental Personnel Assignment at the U.S. Department of Labor as a special senior advisor on the prevention of chemical exposures to the Assistant Secretary for Occupational Safety and Health (OSHA).

The CSB has declined under Chairman Moure-Eraso's leadership. During his tenure as Chairman, the Board has experienced a marked slowdown in the release of accident reports. Chairman Moure-Eraso's term will expire in 2015 as CSB Board Members serve fixed terms of five years.

Daniel Horowitz

Managing Director, Chemical Safety Board

As Managing Director of the Chemical Safety Board, Daniel Horowitz oversees agency staff involved with investigations, recommendations, public affairs, incident selection, and screening. Prior to being named Managing Director of CSB he served as CSB's Director of Congressional, Public and Board Affairs and as a Special Assistant to the Board. Prior to joining CSB, Horowitz was a research scientist at Metabolix from 1995-2000, and served as an American Chemical Society Congressional Fellow from 1994-1995.

Dr. Horowitz, along with Dr. Moure-Eraso and Mr. Loeb, has micromanaged the agency's investigations.

Richard Loeb

General Counsel, Chemical Safety Board

Richard Loeb was originally hired by Chairman Moure-Eraso to be the Chairman's counsel in March 2011, but soon replaced Christopher Warner as General Counsel in October 2012. Prior to joining CSB, Loeb served as the Executive Director of the Occupational Safety and Health Review Commission from 2005-2011, and Executive Secretary and Counsel in the Executive Office of the President, Office of Management and Budget from 1987-2005.

The Board attempted to block Loeb's initial hiring at CSB in February 2011 via a Board order, to which Moure-Eraso objected.

Christopher Warner

Senior Adviser to the Chairman, Chemical Safety Board

Christopher Warner previously served as the agency's General Counsel under multiple chairpersons. Dr. Moure-Eraso attempted to fire Mr. Warner unilaterally, and after the Board blocked him, Moure-Eraso later demoted him. Warner retired from the CSB in May 2014.

John Vorderbrueggen

Former Investigation Supervisor, Chemical Safety Board

During his tenure as an investigation supervisor at the CSB, John Vorderbrueggen oversaw investigations into a number of high-profile industrial accidents. Mr. Vorderbrueggen left CSB for a position at another safety agency because he believed that Dr. Moure-Eraso, Dr. Horowitz, and Mr. Loeb were micromanaging his investigations.

Rob Hall

Former Investigator, Chemical Safety Board

During his time with the agency, Hall investigated several high-profile industrial accidents, including the Tesoro refinery explosion in Anacortes, Washington. Mr. Hall left the agency in 2011, also citing a toxic work environment during Dr. Moure-Eraso's tenure as Chairman.

Jeff Wanko

Former Investigator, Chemical Safety Board

Jeff Wanko rose to be an unofficial supervisor due to agency attrition under Dr. Moure-Eraso's tenure. Mr. Wanko left the agency in 2011 for a position with OSHA, citing the toxic work environment created by Dr. Moure-Eraso and Dr. Horowitz.

Employee A, Employee N, and Former Board Member X

Two CSB employees and one former Board Member requested to remain anonymous because they fear retaliation from the Chairman and his closest advisors, Richard Loeb and Daniel Horowitz. These three individuals will be referred to as Employee A, Employee N, and Former Board Member X.

III. Findings

- The CSB has failed to cooperate with the EPA Inspector General's investigation.
- Moure-Eraso and Horowitz created a toxic work environment that resulted in the departure of at least nine experienced employees from the CSB. Because experienced employees left CSB, investigations dragged on for years.
- Moure-Eraso and Horowitz have mismanaged investigations to the detriment of public safety in certain industries. This gross mismanagement resulted in the waste of taxpayer dollars.
- The broken relationship between Chairman Moure-Eraso and the other Board Members has delayed the release of important investigative reports.
- Current and former CSB employees agree that Chairman Moure-Eraso retaliated against whistleblowers. As a result, all employees fear retaliation at the hands of the Chairman.
- Chairman Moure-Eraso's disregard for the proper Board governance processes caused CSB employees and fellow Board Members consternation, leading to an unproductive work environment.

IV. Background on the Chemical Safety Board

The Chemical Safety and Hazard Investigation Board is an independent agency charged with investigating chemical safety accidents.⁴ The CSB was authorized under the Clean Air Act Amendments of 1990, and it became operational in January 1998.⁵ Congress did not intend CSB to be a regulatory agency, but instead to serve as the Federal Government's chemical safety expert. Essentially, Congress created CSB to provide input and recommendations to stakeholders and to investigate accidents involving hazardous chemicals. The Senate Report that accompanied the Clean Air Act amendments stated:

The Board is not a regulatory agency, but is to function as a source of expertise at the center of the chemical accident prevention and response programs of the Federal Government. It will investigate serious accidents and handling of extremely hazardous substances and will make recommendations with respect to accident prevention measures which may be promulgated by the agencies with regulatory authority. The Board may also serve as a point of communication among the various Federal agencies to improve the effectiveness of accident prevention programs and reduce the burden of duplicative requirements on regulated entities.⁶

The Senate stressed that the purpose of the CSB was "to investigate accidents to determine the conditions and circumstances which led up to the event and to identify the cause and or causes so that similar events might be prevented."⁷

To fulfill its mission, the CSB provides recommendations and issues investigative reports. These reports are fundamental to the CSB's mission. Congress expects the CSB to issue these reports in a timely manner. The Senate Report accompanying the legislation that created the CSB stated:

The Board is required to issue a report on each investigation it conducts which will describe the event and identify the cause or probable cause. **These reports are a statement of the Board (not staff) and are to be issued on a majority vote of the Board and should be issued in a timely manner, usually within 6 months of the accident** unless a prolonged investigation of contributing causes is necessary.⁸

⁴ U.S. Chemical Safety & Hazard Investigation Board (CSB), Mission, <http://www.csb.gov/about-the-csb/mission/> (last visited May 2, 2014).

⁵ *Id.*

⁶ S. REP. NO. 101-228, at 207-208 (Dec. 20, 1989).

⁷ *Id.*

⁸ *Id.*

In March 2010, President Obama nominated Rafael Moure-Eraso to be Chairman of the CSB, and the Senate confirmed his nomination in June 2010.⁹ Prior to his nomination, Moure-Eraso spent 22 years as a professor at the University of Massachusetts Lowell. Moure-Eraso also served for 15 years as an Industrial Hygienist Engineer with two international unions, the Oil, Chemical and Atomic Workers Union and the United Automobile Workers.

V. Background on the Committee's Investigation of CSB

Section 5(d) of the Inspector General Act, as amended, requires IGs to report immediately to the agency head whenever the IG becomes aware of “particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs or operations.”¹⁰ The agency head, in turn, is to transmit the IG’s report, with the agency head’s comments, to the appropriate congressional committees within seven calendar days. Reports made pursuant to Section 5(d) of the IG Act are commonly referred to as “seven-day letters.”¹¹ Because IGs typically reserve the use of a seven-day letter for only the most urgent matters, Congress—and the House Committee on Oversight and Government Reform specifically—takes these matters very seriously.

On September 5, 2013, EPA Inspector General Arthur A. Elkins, Jr. sent a seven-day letter to Congress. Elkins raised concerns about the CSB’s cooperation with the EPA OIG’s ongoing investigation into whether an OSC employee improperly revealed the names of several CSB whistleblowers to CSB’s general counsel.

If true, because agency management had become aware of their identities, whistleblowers had become exposed to reprisal. The seven-day letter and a subsequent briefing by the EPA OIG’s office caused the Committee to initiate its own investigation into the disclosure of the identity of agency whistleblowers and related document access issues. Over the course of the investigation, documents and testimony obtained by the Committee showed serious management deficiencies at CSB. The sections below will set forth the relevant history of the CSB in order to give context to the Committee’s investigation.

A. CSB Leadership Mishandled the Revelation of the Identity of an Office of Special Counsel Whistleblower

On September 5, 2013, EPA IG Arthur A. Elkins Jr. transmitted a seven-day letter to Chairman Moure-Eraso.¹² Elkins drafted a seven-day letter because of CSB’s “refusal to provide records to the Office of Inspector General.”¹³ The OIG had been seeking documents related to

⁹ CSB, About the CSB, Chairman Rafael Moure-Eraso, <http://www.csb.gov/about-the-csb/chairman-rafael-moure-eraso/> (last visited May 1, 2014).

¹⁰ Inspector General Act of 1978, as amended, Pub. L. 110-409 [hereinafter IG Act].

¹¹ *Id.*

¹² Letter from Hon. Arthur A. Elkins Jr., Inspector General, EPA, to Hon. Rafael Moure-Eraso, Chairman, CSB (Sept. 5, 2013) [hereinafter Elkins Letter, Sept. 5, 2013].

¹³ *Id.*

its investigation of certain CSB operations for at least three months. In fact, the EPA OIG was investigating an allegation that someone had leaked the identity of a CSB employee, who was communicating with OSC, to CSB management. Disclosure of the identity of an OSC complainant or whistleblower violates federal law.¹⁴ CSB refused to provide the requested documents to the OIG, citing attorney-client privilege.¹⁵ The EPA IG subsequently transmitted the seven-day letter to Congress pursuant to Section 5(d) of the IG Act.

1. EPA OIG's Investigation of the Unlawful Disclosure of a Whistleblower's Identity

On September 18, 2013, the EPA OIG briefed Committee staff on several issues related to the CSB. According to OIG staff, OIG received an anonymous statement that prompted the leak investigation. In this anonymous statement, dated September 24, 2012, a CSB employee described a conversation that occurred during a meeting between Richard Loeb, CSB General Counsel, Chairman Moure-Eraso, and possibly two other individuals.¹⁶ The anonymous CSB employee stated:

Mr. Loeb also reported that [a senior OSC attorney] provided him with numerous details about complaints filed at OSC against Chairman Moure Eraso. According to Mr. Loeb, [the senior OSC attorney] told him that virtually the entire CSB Office of General Counsel (OGC) had filed complaints. Mr. Loeb elaborated that the filers were all of the attorneys in OGC, except for [CSB attorney]. According to Mr. Loeb, [the senior OSC attorney] also told him about the contents of the OSC complaints filed by the OGC attorneys. . . . Mr. Loeb also said that [the senior OSC attorney] had told him not to 'lose any sleep over' the CSB complaints to OSC, because they are just going to sit and the investigation of them isn't going anywhere soon. According to Mr. Loeb, [the senior OSC attorney] told him that [the OSC investigator assigned to evaluate the complaints] had been given a lot of other work to keep him busy.¹⁷

The allegations—that Loeb became aware of the identities of CSB whistleblowers and that this senior OSC attorney advised Loeb that OSC was not taking any meaningful action—prompted the EPA OIG to investigate an apparent violation of OSC's statutory obligation to maintain whistleblower confidentiality.

Allegations of such cavalier treatment of whistleblower identities required further examination by the Committee. Loeb testified that no one at OSC revealed the identities of OSC complainants to him. He stated:

¹⁴ 5 U.S.C. 1213(h) states, in pertinent part: "The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without such individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law."

¹⁵ *Id.*

¹⁶ Statement by Anonymous Employee, CSB, to Office of Inspector Gen., EPA (Sept. 24, 2012).

¹⁷ *Id.*

- Q. [D]id you ever have a conversation with anyone working at OSC where he or she told you the name of an OSC complainant?
- A. No, no one from OSC, **no OSC employee has ever disclosed to me the names of the seven original complainants.** I don't want to say that no one has ever disclosed the names of the other three since they sent pieces of paper to me with their names on it, but no one has ever told me verbally or in any other manner, semaphore, any system, the names of the OSC complainants, except through the document request process that occurred sometime, I'm guessing, after October of 2012.¹⁸

2. CSB Leadership Fails to Cooperate with the EPA OIG's Investigation

FINDING: The CSB has failed to cooperate with the EPA Inspector General's investigation.

In the course of his investigation into the unlawful disclosure of the identities of CSB whistleblowers, EPA IG Elkins requested records and communications "in furtherance of an OIG law enforcement investigation."¹⁹ CSB management refused to turn over a tranche of key documents, claiming they were privileged attorney-client communications. In a cover letter attached to the seven-day letter when the CSB provided it to Congress, Chairman Moure-Eraso defended that position. He stated:

The CSB believes that the IG is not entitled to CSB communications with its attorneys concerning a live dispute, which are covered by the attorney-client privilege.

* * *

There is also an additional problem presented by the IG's demands for communications protected by the attorney-client privilege, which is that if the CSB turns attorney-client privileged communications over to the IG, the CSB will likely lose the privilege vis-à-vis third party litigants including the allegedly aggrieved CSB staff members who are litigating against the CSB over the same subject matter.²⁰

The CSB's position, as highlighted above, is unprecedented. Executive Branch departments and agencies generally require employees to comply with ongoing OIG investigations. For example, an April memorandum from Interior Secretary Sally Jewell advised Interior Department

¹⁸ Transcribed Interview of Richard Loeb, at 18 (Jan. 27, 2014) [hereinafter Loeb Tr.].

¹⁹ Elkins Letter, Sept. 5, 2013.

²⁰ Letter from Raphael Moure-Eraso, Chairman, CSB, to Rep. Darrell Issa Chairman, H. Comm. on Oversight & Gov't Reform, et al. (Sept. 12, 2013).

employees to cooperate with OIG investigations, even with regards to information “that may be privileged, confidential or otherwise exempt from disclosure.”²¹

That the EPA IG has jurisdiction to investigate the CSB is undisputed. Annual appropriations bills include language that makes clear “the individual appointed to the position of Inspector General of the Environmental Protection Agency shall, by virtue of such appointment, also hold the position of Inspector General of the [Chemical Safety] Board.”²²

In her memo to Interior Department employees, Secretary Jewell cited the IG Act as the basis for her position that the IG was entitled to otherwise-privileged communications.²³ The language in the IG Act is clear and unambiguous. The IG Act states that inspectors have “access to all records, reports, audits, reviews, documents, papers, recommendations or other material available to the applicable establishments which relate to programs and operations with respect to which that Inspector General has responsibilities.”²⁴ There is no exception for the agency to withhold attorney-client communications or to cite any other common law privileges in withholding documents.

EPA IG Elkins correctly pointed out in his seven-day letter that allowing agencies to withhold information based on a claim of privilege “could effectively preclude OIGs from fulfilling the very watchdog mission that Congress provided for with this authority.”²⁵ Furthermore, Moure-Eraso’s claim that producing the documents in question to the IG would be considered a waiver of the attorney-client privilege is mistaken because a court would be unlikely to consider a disclosure to the IG to amount to a waiver of the privilege. The IG is technically part of the agency, and therefore any disclosure to the IG would not waive the privilege.

CSB’s top officials did not back off of their position, despite an effort to resolve the dispute internally. According to the OIG, CSB’s refusal to hand over the documents, requested as part of an OIG law enforcement investigation, “interferes with the ability of the OIG to carry out its statutory responsibilities.”²⁶ For this reason, the Committee took an interest in the dispute. It quickly became clear that the CSB—under the leadership of Raphael Moure-Eraso—is suffering from management deficiencies that undermine the purpose for which Congress created the Board.

²¹ Memorandum from Hon. Sally Jewell, Sec’y, U.S. Dep’t of the Interior, to Deputy Sec’y, et al., re: Cooperation with the Office of Inspector General (Apr. 25, 2013) [hereinafter Jewell Memorandum].

²² Pub. L. No. 112-74, 125, Stat. 786 (2011).

²³ Jewell Memorandum.

²⁴ IG Act.

²⁵ Elkins Letter, Sept. 5, 2013.

²⁶ *Id.*

VI. The Committee's Investigation Uncovers Management Deficiencies at the Board

FINDING: Moure-Eraso and Horowitz created a toxic work environment that resulted in the departure of at least nine experienced employees from the CSB. Because experienced employees left CSB, investigations dragged on for years.

Congress created the CSB to "investigate accidents to determine the conditions and circumstances which led up to the event and to identify the cause and or causes so that similar events might be prevented."²⁷ Given the critical importance of this mission, weaknesses at the CSB negatively affect public safety. Unfortunately, the leadership of Chairman Moure-Eraso and his top managers is diminishing the CSB's effectiveness.

A. The Quality of CSB Investigations Has Suffered Under Moure-Eraso's Leadership

The quality and pace of CSB investigations and related reports have deteriorated under Chairman Moure-Eraso. Specifically, Moure-Eraso's mismanagement is causing investigations to take longer and cost more than they did under previous leadership. Jeff Wanko, a former CSB investigator who now works for the Occupational Safety and Health Administration, testified that the failure to release investigative reports undermines CSB's mission. He stated:

- Q. So the failure to get these reports out and to get the story out is basically the failing to fulfill the mission of the CSB?
- A. Yes, absolutely, 100 percent.²⁸

The sluggish production of CSB reports and resulting increase in associated costs show how Moure-Eraso's leadership has negatively affected the CSB's overall mission and purpose.

1. Moure-Eraso and His Top Lieutenants Created a "Toxic" Work Environment

The CSB was established as an agency headed by a collegial body composed of five members, with a staff consisting of investigators, technical experts, and other advisors positioned to provide input to the Board Members. Before Moure-Eraso became Chairman, the Board functioned as intended.²⁹ There were open communications between staff, the Board, and the Chairmen at the CSB. The environment drastically changed under Moure-Eraso.

²⁷ S. REP. NO. 101-228, at 207-208 (Dec. 20, 1989).

²⁸ Transcribed Interview of Jeff Wanko, at 15 (Dec. 18, 2013) [hereinafter Wanko Tr.].

²⁹ Transcribed Interview of Former Board Member X, at 14 (Dec. 12, 2013) [hereinafter Former Board Member X Tr.].

According to witnesses interviewed by the Committee, Moure-Eraso alienated the agency's investigators by ignoring them. The witnesses testified that Chairman Moure-Eraso only communicates with General Counsel Richard Loeb and Managing Director Dr. Daniel Horowitz. Witnesses also testified that Moure-Eraso has only minimal, if any interaction with his fellow Board Members.

Former Board Member X told Committee investigators that Moure-Eraso's communication with his colleagues was poor. He/She said Board Members questioned the staff attrition at CSB, but Moure-Eraso never provided them with any information. Moure-Eraso ran the Board by communicating only with Loeb and Horowitz. Former Board Member X stated:

Q. And how would you characterize Chairman Moure-Eraso, based on your interactions with him?

A. He's kind of a dual personality in a way. He can be friendly on a one- one- basis if you're in an informal situation, but he can be very secretive in a business sense in terms of -- in my two and a half years with him, working in the office next door to him, he probably came into my office no more than five times to discuss something with me. So he'll come in, he'll close the door and he would interact with -- basically, with Dr. Horowitz and Richard Loeb and with -- **and little or no interaction with the board members, which was very frustrating because you would wonder what was going on and you see people leaving because they're not happy with the management.**³⁰

CSB employees raised questions about various aspects of the agency's investigations with management. According to witnesses, their questions were not well received. Management's reaction to questions from CSB employees led senior investigators to look for new jobs. According to Rob Hall, a former CSB investigator and now a director at National Transportation Safety Board (NTSB), several seasoned engineers left CSB during Moure-Eraso's chairmanship. The defection of this vast amount of institutional knowledge and memory made it difficult to complete investigations. Hall testified:

Q. And because of all the abuse and the toxic nature and the, just the totality of the circumstances, there [have] been quite a few [instances] of attrition is that fair to say?

A. Oh, yes.

Q. Okay.

A. There, in a couple of months, there was . . . well over 100 years of experience that walked out the door with myself, John

³⁰ Former Board Member X Tr. at 111-112 (Dec. 12, 2013) (emphasis added).

Vorderbrueggen and Jeffrey Wanko, and there are three senior investigators that walked out the door.³¹

Moure-Eraso also alienated career CSB employees in other ways. Rob Hall told Committee investigators that Moure-Eraso and managing director Daniel Horowitz inappropriately questioned the credentials of senior engineers. Hall testified:

- Q. Okay. And you said you left the CSB in March of 2011. **Why did you leave the CSB?**
- A. **The work atmosphere had become very toxic. There were a number of things that I was working on, as well as other investigators were working on, that became sidelined. There were what I considered inappropriate questioning of the credentials of the investigators through Dr. Horowitz and Dr. Moure-Eraso. The investigators internally were questioned as to their competence to do the job where they were putting faith in unfounded outside statements about certain accident investigations that just were not scientifically supportable.**³²

The management style and criticisms levied by Moure-Eraso and Horowitz ultimately led many CSB investigators to seek new employment.

2. CSB's Toxic Work Environment Caused an Exodus of Highly Skilled Investigators

Witnesses repeatedly told the Committee that Moure-Eraso created a dysfunctional and toxic work environment, leading to attrition of experienced engineers and investigators. Since Moure-Eraso took over the chairmanship of CSB, at least nine investigators and employees resigned or requested to be transferred from the Washington, D.C. office. The roster of 11 investigators in June 2010 dwindled to three by early 2013.³³ Those who departed during this time included two supervisors with more than 16 years of experience.³⁴

Employee A described the CSB as a “ghost town” because so many employees have left the agency for other jobs. He/She stated:

When Moure took over, we had a full three floors at the CSB coming up with activity. It's a ghost town now. People have left. People have transferred out to Denver. Several people work at home. A couple in Houston, one in New York, one in Boston. Like if I were to take you all

³¹ Transcribed Interview of Robert J. Hall, at 79-80 (Dec. 2, 2013) (emphasis added) [hereinafter Hall Tr.].

³² Hall Tr. at 8 (emphasis added).

³³ Memorandum from Mark Griffon, Board Member, CSB (January 2, 2013).

³⁴ *Id.*

back to our office right now, it's still a working hour, you would be lucky to see two or three people in the whole place.³⁵

The attrition at CSB began in 2011, shortly after Moure-Eraso took over as Chairman. Jeff Wanko, an engineer and former CSB investigator, testified:

Q. [T]he **most recent exodus being the folks that left in the first half of 2011**[?]

A. Right. Okay.

Q. [B]ecause that is when Rob Hall left, correct, and John?

A. John, me, [REDACTED], Jim . . . Yeah, us four [left the CSB].³⁶

Other employees followed. Experienced investigators left the CSB in droves. Current and former CSB employees stated that the Chairman's management style was the reason for the exodus of highly skilled employees. As a result, productivity plummeted. Investigations were restarted from scratch, and others languished for years. Employee A testified:

Q. **And why is it that the investigations take longer, or the reports take longer?**

A. **Mismanagement is one reason. I think Moure's style caused a lot of people to just leave the agency, and that has left many investigations languishing for years**, including Tesoro, which is a refinery accident in Washington that killed eight people; including an incident at Citgo in Houston involving the release of hydrofluoric acid, which is one of the most dangerous chemicals there is.

When investigators leave, then it is like a start-over. I don't know how many have been dropped since Moure started, but you can go down the list, and **I think by any measure the productivity is much worse.**³⁷

A number of former employees told Committee staff they left the CSB because of the toxic work environment under Chairman Moure-Eraso. John Vorderbrueggen, another former senior investigator at CSB and now a section chief again at NTSB, told the Committee that several "top notch" engineers left CSB because of the toxic work atmosphere created by Moure-Eraso. Specifically, he stated:

Q. **Have a lot of people left?**

³⁵ Transcribed Interview of Employee A, at 103 (Dec. 13, 2013) (emphasis added) [hereinafter Employee A Tr.].

³⁶ Wanko Tr. at 75.

³⁷ Employee A Tr. at 21-22.

- A. **Oh, absolutely.** And that's the sad thing. ...
- Q. So at one point CSB found it important to have people who had experience in the industry and that were engineers?
- A. Absolutely.
- Q. As investigators? They needed that experience?
- A. Absolutely. And if you look at the early reports, there was no understanding of the process of making products in an industrial application.
- Q. Do you feel -- well, let me ask you this: **Have a lot of these people left because of the work environment?**
- A. **Pretty much exclusively.**³⁸

Former CSB investigator Hall also told Committee investigators he was desperate to leave his job at the CSB. He was so desperate to leave that he took a pay cut and a demotion to find a new job. Hall also told Committee investigators it was his impression that his colleagues left the CSB for the same reasons. He stated:

- Q. **And you mentioned that there were several investigators that left. Was that due to the largely to the toxic work environment?**
- A. **That was primarily the toxic work environment. As for myself, it got to the point that I was unable to find another GS 15 position, so, at the time, I took a GS 14 position as a downgrade, cut in pay, just to get out of the CSB.**³⁹
- Q. So, John Vorderbrueggen [also] left the CSB. Are you -- do you know why he left?
- A. For the same reasons I left. **It became a toxic work environment, which is also why Jeffrey Wanko left, [REDACTED] left. We had a number of people that -- that all left at the same time or roughly the same time.**⁴⁰

³⁸ Transcribed Interview of John Vorderbrueggen, at 83-85 (Jan. 8, 2014) (emphasis added) [hereinafter Vorderbrueggen Tr.].

³⁹ Hall Tr. at 25 (emphasis added).

⁴⁰ *Id.* at 21 (emphasis added).

Along with the investigators, CSB attorneys also left because of the untenable work environment. According to Hall, an advisor attorney, left after he observed the manner in which senior CSB officials treated his colleagues. Hall testified:

A. [REDACTED], who was an advisor attorney. Those were part of his [Chris Warner's] staff. [REDACTED] **eventually left the CSB, as well.**

Q. And in your opinion --

A. Some 2 years after I left, so but he **eventually got so bad that he had to get out of there.**⁴¹

The loss of this much institutional knowledge crippled CSB's viability, putting its mission in jeopardy. Former Board Member X testified about the effects of attrition:

And as a result . . . what we talked about is people were leaving, people did leave. And then that builds upon itself because you got fewer people to do the investigations, so you finish up with this issue of investigations taking a long time to be completed.⁴²

After investigators left, there were simply not enough skilled investigators remaining to clear the backlog or start new investigations. According to Chris Warner, former CSB General Counsel: "[CSB] had so many departures that **all of a sudden there's no one around who actually knows what's going on.**"⁴³

Warner told the Committee that Horowitz treated senior investigators very poorly, making them want to leave the agency. In turn, their subordinates sought new jobs. As a result, reports remained unfinished. Specifically, Warner stated:

I don't know the agenda. . . . **Daniel is incredibly smart and knows that and [he] went after both [Rob] Hall and [John] Vorderbrueggen, lead investigators with 30 years experience, and basically treated them like they were first-year investigators that had -- didn't know what they were doing. And they became so incensed on how they are being treated or second-guessed that they just said, "We're not putting up with it. We're leaving." And of course the investigators under them followed.**

Now, why [Daniel Horowitz] picked a fight with them I can't tell you. But certainly why we haven't gotten stuff go, **you can't have that many**

⁴¹ *Id.* at 77 (emphasis added).

⁴² Former Board Member X Tr. at 40-41.

⁴³ Transcribed Interview of Christopher W. Warner, at 127-128 (Dec. 4, 2013) (emphasis added) [hereinafter Warner Tr.].

people -- investigators leave with that ability and think that you're going to ever get your mission accomplished.⁴⁴

Warner further observed that the investigators left because they did not want to work for Moure-Eraso and Horowitz. Reports languished in their absence. According to Warner:

- Q. How long is the average investigation at the Chemical Safety Board, a well-run investigation from start to completion?
- A. It -- it's differed whether it's a case study, whether it's a full investigation with a long report. ... **The cases have languished for a variety of reasons, most notably because most of the senior investigators and middle managers and some of our younger investigators have been run off by -- or have left because they did not want to work with Horowitz or Moure. And when you lose that many key people, all the investigations they had ongoing have no one available to carry out that work.**⁴⁵

3. The Exodus of Experienced Staff Has Stalled CSB Investigations

FINDING: Moure-Eraso and Horowitz have mismanaged investigations to the detriment of public safety in certain industries. This gross mismanagement resulted in the waste of taxpayer dollars.

Since Moure-Eraso became CSB Chairman in June 2010, investigations have stalled, languished, or ceased due to inactivity.⁴⁶ Former Board Member X testified:

- Q. [D]o you feel like the pace of investigations has slowed in recent years?
- A. Oh, yes. Yes. And I think that's certainly the opinion on the outside also. **Not only has the pace of investigations slowed, but what they would call the quality of investigations has deteriorated as well.**⁴⁷

Former CSB investigator Hall testified that “[u]nder the current chairman . . . I saw multiple activities, including investigations, stalled and things just stopped.”⁴⁸ Former General Counsel Warner stated that the CSB’s productivity “has dropped significantly in the last three or four years.”⁴⁹

⁴⁴ *Id.* at 102-103 (emphasis added).

⁴⁵ Warner Tr. at 19-20 (emphasis added).

⁴⁶ Vorderbrueggen Tr. at 96-97.

⁴⁷ Former Board Member X Tr., at 66.

⁴⁸ Hall Tr. at 40-41.

⁴⁹ Warner Tr. at 24.

Prior to Moure-Eraso's chairmanship, the Board's goal was to complete an investigation within a year to a year and a half.⁵⁰ Former CSB investigator John Vorderbrueggen testified: "[u]nder all prior leadership, there was a push to make sure we got things out in a timely manner."⁵¹ Another witness stated: "I think we talked earlier that we [CSB] are just no longer producing timely investigations. **It used to be that having an investigation open for 2 years was unacceptable.**"⁵²

For example, the CSB investigation of a 2005 explosion at the BP Texas City refinery, in which 15 workers were killed and 180 others were injured, was completed in approximately two years given its complexity.⁵³ Former CSB investigator Hall testified that "there was this enormous pressure from the chairman to complete that investigation."⁵⁴ Another current CSB employee, Employee N, stated:

So we all set a goal of trying to get [CSB investigations] under a year. That wasn't quite realistic, but that was our goal and rarely did we have one exceed 2 years, including we did a big investigation of BP, Texas City, 2005 that killed, I think, 12 people. It was a massive investigation, and that one we completed in 2 years. **Today, I think our average investigation is 3 or 4 years old.**⁵⁵

4. Some CSB Investigations Had To Restart from Square One

Under Moure-Eraso's tenure, when an investigator in charge left the CSB for another job opportunity, the investigation restarted from square one in many cases. The poor management of the CSB caseload has been detrimental to the agency. To ensure continuity, CSB management should have ensured that more than one investigator was assigned to each case. Employee A testified:

- Q. Now, when investigators leave the CSB, is it typical that an investigation that they were working on would start over, or is that something new under Moure Eraso?
- A. That can vary, but, certainly, **I think that is a hallmark of mismanagement. Typically, you should have somebody -- more than one person on a case that can pick up and handle it. Apparently, they hadn't taken that precaution.** But then again, you don't drive people off. In my opinion, that is what he has done.⁵⁶

⁵⁰ Former Board Member X Tr. at 46.

⁵¹ Vorderbrueggen Tr. at 97.

⁵² Transcribed Interview of Employee N, at 22 (Jan. 30, 2014) [hereinafter Employee N Tr.].

⁵³ *Id.*

⁵⁴ Hall Tr. at 39.

⁵⁵ Employee N Tr. at 22-23.

⁵⁶ Employee A Tr. at 22 (emphasis added).

Chemical accidents involving fatalities leave grieving families and co-workers with many questions as to what went wrong. The slow pace of CSB investigations and the “restarts” due to attrition, left the families of the deceased without a resolution or explanation. Unfortunately, the experienced CSB investigators who could provide answers were, under Moure-Eraso’s leadership, leaving the agency. Hiring new people does not immediately improve the situation, as it takes time to replace the experience and expertise lost through attrition. Warner testified:

Q. Have they -- **has the CSB attempted to fill these vacancies with investigators to move these investigations along?**

A. They have tried, but **we've lost so many people and it's very hard redoing the investigations.** And when you lose the type of seasoned people that we've lost, when you bring on a person who's never worked in a plant it's night and day in what they can produce.⁵⁷

One witness testified that this loss of experienced personnel under Moure-Eraso’s tenure has “greatly impaired” the agency’s future, asking, “How many more people can you lose? How many experienced people can you lose?”⁵⁸

The current managing director, Horowitz, confirmed the attrition and acknowledged the toll it has taken on the agency’s productivity. He testified:

Q. You mentioned attrition in the D.C. office. Could you elaborate on that a little bit? How many folks?

A. Sure. I don't know the exact count. **When the new chairman came in there was a bit of an exodus of certain of the investigators.** It is all voluntary. And that left us with fewer. Some people requested transfer out of D.C. to Denver. **So that also had an impact [on the productivity].**

Q. What is your understanding of why there was an exodus of investigators when the new chairman took over?

A. Well, I can't speak for others, necessarily, but there were certainly some differences of philosophy about how the investigations should be done or what they should focus on. **And . . . there were frictions at that time.** I don't think, from my perspective as the managing director -- this was an agency that didn't have a managing director for a number of years. . . . And actually, my philosophy of investigations was a little bit different as well. But

⁵⁷ Warner 20-21 (emphasis added).

⁵⁸ Employee A Tr. at 103.

they just decided they preferred to work in other agencies or do other things.

* * *

Q. -- a number of folks had left in a short amount of time frame, shortly after [Moure-Eraso became Chairman] --

A. That's been a significant challenge for the agency because in our experience once a team has started a case, and they are the ones who have been out to the site, seen the arrangement of the equipment, the damage, actually conducted the witness interviews, it can be difficult and very much more time consuming for other teams to reconstruct that. **And so there was these departures there were these departures in 2011 -- and that set back some of the cases that those team leads had been leading.**⁵⁹

Throughout the Committee's investigation, witnesses who left the agency and current employees repeatedly observed that overbearing management practices under Moure-Eraso and Horowitz accounted for the exodus. Questioning credentials, failing to communicate, and creating a toxic work environment led to the mass attrition at CSB and slowed the pace of investigations dramatically. Essentially, the actions of Moure-Eraso and Horowitz have left the CSB with low employee morale, low head count, and a failed mission to the detriment of public safety.

5. Stalled CSB Investigations Have a Negative Effect on Industry Safety

According to CSB's mission statement, safety recommendations "are the Board's principal tool for achieving positive change."⁶⁰ Several witnesses testified that the CSB has not been fulfilling its mission since Moure-Eraso became Chairman because the release of safety recommendations has not been a priority. Jeff Wanko, former CSB investigator, told the Committee that the CSB focuses on the media coverage surrounding a deployment to an incident site, but lacks follow-through on the investigation.⁶¹ Another witness testified that the CSB would "overcommit the resources that were available to get out there and get the press, but then had little interest in completing on the rear end because there wasn't the interest in the investigation."⁶²

Managing Director Horowitz testified that there are currently 13-14 "open" investigations at the CSB.⁶³ He expected some to be completed, while observing that others "have died off

⁵⁹ Transcribed Interview of Daniel M. Horowitz, at 24-25, 35 (Jan. 22, 2014) (emphasis added) [hereinafter Horowitz Tr.].

⁶⁰ CSB, Mission, available at <http://www.csb.gov/about-the-csb/mission/> (last visited Mar. 26, 2014).

⁶¹ Wanko Tr. at 9-10.

⁶² Hall Tr. at 37.

⁶³ Horowitz Tr. at 28.

through inactivity.”⁶⁴ CSB’s habit of delaying the issuance of investigative reports during Moure-Eraso’s chairmanship has compromised public safety at factories and chemical plants. The industry needs prompt action in order to make meaningful changes. Investigative findings and recommendations released years after an accident may be moot due to improvements in process and technology.

The CSB’s investigation of the April 2010 fatal explosion and fire at the Tesoro refinery in Anacortes, Washington is illustrative. In that case, CSB did not release any recommendations until May 1, 2014, over four years after the accident.⁶⁵ Former CSB investigator Rob Hall, who ran the Tesoro investigation, testified:

But the fact that the [Tesoro] investigation has failed to yield a product at [the time of the testimony], . . . the window is closed on doing anything. **Had there been a more timely investigation, something that got out . . . within the first year or year and a half, it might have had some impact.** But not at this point in time.⁶⁶

Vorderbrueggen testified that a significant lapse in time results in a loss of interest in CSB recommendations among industry stakeholders. He also testified that observers of the CSB’s work have lost faith in the agency’s ability to execute its mission. Specifically, he stated:

Q. What are the repercussions of the delay in completing these investigations?

A. Well, as time goes by, **you lose industry interest partly.** You know, to write about something that occurred 5 years ago and to say it occurred because they didn't have proper hot work permits, for example, it loses credibility. **I mean, you've got to strike while the iron is hot. The industry won't respond when the iron is [not] hot.** They don't respond -- they just, Okay, here comes another CSB report, and somebody, those people that get recommendations are going to have to deal with them, and everybody else goes on their way, and their credibility in industry, I've heard -- **and again it's anecdotal for all intents and purposes, but the industry just has lost all faith [in the CSB].** I mean, they love the videos, but they're seeing nothing happening, and they just -- oh my gosh, **CSB, they're not going to get anything done, we've lost value.**

Q. **Is it fair to say that has a negative impact on public safety?**

⁶⁴ *Id.*

⁶⁵ CSB, Press Release (Jan. 29, 2014), available at <http://www.csb.gov/csb-investigation-finds-2010-tesoro-refinery-fatal-explosion-resulted-from-high-temperature-hydrogen-attack-damage-to-heat-exchanger/>.

⁶⁶ Hall Tr. at 81 (emphasis added).

- A. **Oh, absolutely** because there are certain things in here I'm sure that would be critical lessons learned, and they should have been issued, they absolutely should have been issued.⁶⁷

The CSB's ability to bring about industry change diminishes over time. Shortly after an accident occurs and an investigation commences, the entire industry—from fertilizer manufacturers to sugar refineries—is interested in the results and recommendations from CSB experts. Hall, now with NTSB, testified:

[W]hen you have an incident, there is a lot of interest. There is a lot of interest for new laws, there is a lot of interest for regulations, there is a lot of interest in the industry. You know, other companies that do the same thing really want to know because they want to fix it.

* * *

Also, part of the problem with the languishing investigations is **we really have a window of opportunity, when we have an incident, to effect change, and that window of opportunity shrinks as time passes.** And once you go beyond a year or 2 years, your ability to effect change is really limited.⁶⁸

B. CSB's Stalled Investigations of Tesoro and Hoeganaes

In the view of many CSB employees, two specific CSB investigations—Tesoro and Hoeganaes—have taken twice as long as necessary. In fact, on May 1, 2014, over four years after the accident, CSB issued the report on the Tesoro investigation.⁶⁹ These investigations document the inefficiency that has plagued CSB since Chairman Moure-Eraso's tenure began. Moure-Eraso's inability to build a consensus amongst the Board has crippled the agency's productivity.

1. The CSB Investigation of the Tesoro Refinery in Anacortes, Washington

Shortly after midnight on April 2, 2010, a catastrophic rupture of a heat exchanger at the Tesoro Refining and Marketing Company's petroleum refinery in Anacortes, Washington caused an explosion and fire that fatally injured five workers at the scene and left two others badly burned.⁷⁰ Those who died and were injured had worked together as a team at the refinery before the accident. Specifically, three Tesoro workers died at the scene: Daniel J. Aldridge, 50;

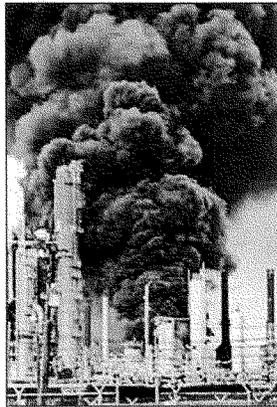
⁶⁷ Vorderbrueggen Tr. at 96-97 (emphasis added).

⁶⁸ Hall Tr. at 37 (emphasis added).

⁶⁹ U.S. Chemical Safety and Hazard Investigation Board, *Investigation Report, Catastrophic Rupture of Heat Exchanger (Seven Fatalities)*, (May 2014), available at www.csb.gov/assets/1/7/Tesoro_Anacortes_2014-May-01.pdf.

⁷⁰ Jack Broom & Sara Jean Green, *Five dead in Anacortes refinery explosion and fire*, SEATTLE TIMES, Apr. 2, 2010.

Matthew C. Bowen, 31; and Darrin J. Hoines, 43.⁷¹ Four more workers were flown to the hospital, where two died: Kathryn Powell, 28; and Donna Van Dreumel, 36.⁷² The remaining two victims, both initially hospitalized in critical condition with extensive burns, were Matt Gumbel, 34; and Lew Janz, 41. Both later died from their injuries. Despite the severity of the explosion and the injuries, it took CSB over four years to issue a final report.



Smoke and fire caused by the Tesoro explosion (photo credit: zestco.com)

More than four years later, the investigation is only recently complete, even though then-investigator-in-charge Rob Hall had completed a draft report by the time he left CSB in early 2011. Former CSB investigator Wanko cited Tesoro as a prime example of incomplete investigations at CSB. He stated, "Rob Hall, I mean, he, the team and Rob nailed that investigation, and it's still . . . nowhere near finished."⁷³ CSB witnesses further testified that the root cause of delays in the Tesoro investigation and final report are the actions of Chairman Moure-Eraso's and Managing Director Horowitz.

In the early stages of the Tesoro investigation, Hall believed that the CSB should issue urgent recommendations to the Tesoro Refinery to be implemented immediately while the full investigation was underway.⁷⁴ CSB occasionally used urgent recommendations to put facilities on notice and to force them to take interim steps to improve the immediate safety of their workers in the wake of an accident.⁷⁵ Moure-Eraso, however, chastised Hall for sending an e-mail with his draft work to all the Board Members. Hall testified:

And I was discussing that we were moving towards issuing urgent recommendations and a safety advisory. We had a meeting on the urgent recommendations, which included the -- most of the staff. There was a -- it was called an ISP review meeting, which is the -- ISP was Investigation and Safety Programs, but it was basically a peer review meeting of the developed product, where you resolve comments. During that meeting, myself and my team resolved comments on the urgent recommendations, and it was decided that a safety advisory should be issued.

Due to the looming timeframe, it was discussed in the meeting that it would be developed and sent to the board members, all board members for review. This was clearly articulated in the meeting as my practice in these

⁷¹ *Id.*

⁷² *Id.*

⁷³ Wanko Tr. at 10.

⁷⁴ Hall Tr. at 9.

⁷⁵ *Id.*

meetings was to summarize action items at the end of the meetings, and it was summarized.

A couple of days later, I had the completed draft safety advisory as well as the revised urgent recommendations and sent it to all the board members, **at which point I received a chastising e-mail, which is in this package that I will provide you from Dr. Moure Eraso, indicating that he had to approve it first before it could go to the full board.**⁷⁶

In an e-mail to Hall, Moure-Eraso wrote, “I was surprised you decided to send your last draft of the Tesoro Urgent Recommendation and Safety Alert for Board review before I had a chance to look at the results of our last discussion on September 2nd.”⁷⁷

⁷⁶ Hall Tr. at 9-10 (emphasis added).

⁷⁷ E-mail from Rafael Moure-Eraso to Rob Hall, et al. (Sep. 8, 2010).

Hall Robert

From: Moure-Eraso, Rafael
Sent: Wednesday, September 08, 2010 8:31 PM
To: Hall, Rob; Bresland, John; Griffon, Mark; Horowitz, Daniel; Wark, William; Wright, William
Cc: Vorderbrueggen, John; Holmstrom, Don; Gomez, Manuel; Soderberg, Melody; Wanko, Jeffrey; Evans, Roger; Warner, Chris; Morgan, Christina
Subject: RE: Tesoro Urgent Recommendation and Safety Advisory

Follow Up Flag: Follow up
Flag Status: Completed

Dear Rob:

I was surprised you decided to send your last draft of the Tesoro Urgent Recommendation and Safety Alert for Board review before I had a chance to look at the results of our last discussion on September 2nd. My understanding of our process is that the Chair sends a draft of a report for board consideration, not the Investigation Supervisor. I understand the pressures of time on this issue but we need to have an orderly procedure of the transmittal of documents to the board.

Rafael

Rafael Moure-Eraso, PhD, CIH
 Chairperson and CEO
 U.S. Chemical Safety Board
 2175 K Street NW, Suite 400
 Washington DC, 20037

Telephone: 202 261 7600

From: Hall, Rob
Sent: Wednesday, September 08, 2010 11:12 AM
To: Bresland, John; Griffon, Mark; Horowitz, Daniel; Moure-Eraso, Rafael; Wark, William; Wright, William
Cc: Vorderbrueggen, John; Holmstrom, Don; Gomez, Manuel; Soderberg, Melody; Wanko, Jeffrey; Evans, Roger; Warner, Chris; Morgan, Christina
Subject: Tesoro Urgent Recommendation and Safety Advisory

All,

Attached please find the Tesoro draft urgent recommendation and Safety Alert for first Board review. Please feel free to contact me with any questions. We would appreciate your comments as soon as possible so that we can send it to the company for CBI next week and share it with the USW Local, Washington DOSH, and OSHA and still issue by the end of the month. Our goal is to have this issued before Tesoro restarts the refinery in October. DOSH expects to issue their citations on September 28, 2010.

Chairman Moure-Eraso's insistence on maintaining tight control on all information provided to his colleagues on the Board delayed the final report. It also demonstrated his desire to shut investigators out of the report approval process. Hall testified:

- A. The chain that I sent, I wanted to be sure to provide . . . a complete picture, so it includes multiple copies of like a safety advisory and the urgent recs because it was sent to each of the board members who then in fact replied. There were only minor comments from the board members, but after Dr. Moure Erasos's e-mail, he refused to move it forward.

Q. After what e-mail?

A. The one where I was chastised for sending it to the full board. It [the urgent recs and investigative report on Tesoro] just died. He didn't move it forward. It was not issued. [At the time of testimony], the CSB has not issued anything on the Tesoro investigation, any public document.⁷⁸

Moure-Eraso's distrust of the investigative staff fostered a poor working environment in which seasoned investigative staff were subject to Horowitz's micromanaging and second-guessing. Former CSB Investigator John Vorderbrueggen testified:

A. Rob was the IIC [investigator in charge] on Tesoro, that's in Washington State, and this was after the draft report had been developed, had been peer reviewed, I had peer reviewed it, and it involved six or seven fatalities at the refinery, and the issue was what was the failure mechanism of the pipe, why did the pipe rupture when it did, and as I mentioned early in the summary of my career, I've been involved in piping system design, pressure systems design, hazardous material work . . . for, back then it was 30 plus years, and Rob the same. I hired Rob in 1987, and Rob and I have been working together almost ever since then, either he was my direct report and now I am his direct report over at NTSB, but Rob and his team had developed a comprehensive report with probable cause for Tesoro. It had been peer reviewed, I had reviewed it, others had reviewed it, and I have no idea why but Daniel rejected it. He decided that he wanted an outside third party review of this report, which would have delayed it because we were ready, it was ready to go to the board, and Rob said, Daniel, we don't understand why you're rejecting . . . highly skilled technical analysis of the accident, and basically Daniel said because, he says, I don't accept your answer.

Q. He didn't give any firm reason?

A. He really didn't, as I recall . . . I kind of -- it was really Rob and Daniel in this situation, but I was there, and I was as disgusted, but **Daniel was really--Daniel was directing everything, all of his criticisms directly at Rob and basically saying, I reject your expertise, I don't care if you're a registered professional engineer, I don't care if you've got 30 plus years of experience, I don't accept your answer,** I want an outside third party independent review of your answers, and it was partly on how Daniel approached it as well as it was just the flat out accusations

⁷⁸ Hall Tr. at 11 (emphasis added).

that he didn't consider any of Rob's technical expertise credible, and that was the first time that had ever come up.

I mean, . . . Daniel and I would have disagreements on conclusions and on how things should be stated on maybe a recommendation, and sometimes they were heated, but in the end we would all reach consensus, but it never was in, you don't know what the hell you are talking about . . . he never did that, but for some reason on Tesoro, all of a sudden he just--Daniel just rejected outright the whole technical conclusions of the report, and basically accused Rob and indirectly accused me because I had peer reviewed it, and we said, Daniel, how dare you tell us we don't know what we are talking about. We consider ourselves essentially, I think we consider ourselves reasonable experts or highly knowledgeable in the field, and Daniel said I don't care; I want the report sent out for outside review. I don't accept your conclusions. Rob ultimately got up and left, and I sat there, and I'm going, now what do I do.

Q. So do you recall how long that delayed the report by?

A. Years.⁷⁹

2. Moure-Eraso and Horowitz Delayed the CSB Vote on the Tesoro Investigative Report

FINDING: The broken relationship between Chairman Moure-Eraso and the other Board Members has delayed the release of important investigative reports.

The CSB Board was scheduled to vote on the long-awaited final report addressing the Tesoro incident on January 30, 2014. Instead, Chairman Moure-Eraso and Managing Director Horowitz decided to hold a "listening session," to delay the vote. In response to this holdup, Representative Larsen wrote a letter to Moure-Eraso condemning the additional delay:

I am exasperated to hear about the U.S. Chemical Safety Board's (CSB) sudden change to the previously scheduled January 30 meeting in Anacortes to investigate the April 2010 explosion at the Tesoro refinery. Yesterday, the CSB put notice in the Federal Register canceling the public board meeting to consider the report on the accident, and in its place scheduled a "listening session." My understanding is that CSB will provide no advance copies of the draft report on the accident to the public until the meeting occurs. Additionally, the notice indicates that CSB will limit public input at the session. . . . I urge you to do at least the bare

⁷⁹ Vorderbrueggen Tr. at 76-78 (emphasis added).

minimum to meet your agency's mandate: issue the draft report quickly and schedule a public meeting in Anacortes after enough time has passed for the public to consider the report's recommendations.⁸⁰

Additionally, Senator Murray also criticized the CSB's continued delays on Tesoro, as the CSB's failure to fulfill its mission directly affects her constituents. The families of the deceased and injured workers are left without answers. Senator Murray issued a press release on the matter, stating:

The draft report released today is an important step in the process of avoiding another tragedy, but I am extremely frustrated that after nearly four years, the Chemical Safety Board has still failed to produce a final report. **This delay is emblematic of poor leadership at CSB, which continues to be a disservice to workers, companies, and the economy. Without dramatically improved performance, substantial leadership changes at CSB will be necessary.**⁸¹

The CSB report was finally issued over four years after the tragic explosion.

3. Investigation of the Hoeganaes Plant in Gallatin, Tennessee

In early 2011, CSB launched an investigation into a flash fire at the Hoeganaes plant in Gallatin, Tennessee. John Vorderbrueggen was appointed CSB investigator in charge (IIC) because of his experience with prior combustible dust incidents similar to what occurred at Hoeganaes. Despite Vorderbrueggen's experience and senior position, Managing Director Daniel Horowitz began micromanaging the investigation from his Washington, D.C. office. Former CSB investigation supervisor Rob Hall testified:

There was a second investigation just -- just after this occurred with John Vorderbrueggen . . . Vorderbrueggen was investigating a fire that occurred at a plant in -- Tennessee. It was Hoeganaes . . . During that investigation, Daniel Horowitz, very uncharacteristically, began micromanaging the investigation. John Vorderbrueggen was an investigation supervisor, -- as I was, had been at the CSB about 2 years longer than I was, extremely competent investigator, one of the most productive that they had. [Horowitz] began uncharacteristically micromanaging them. He consulted outside consultants without the knowledge of the [investigator-in-charge] and in violation of policies within the CSB as to not share investigative information with nondisclosure agreement. We also looked to have agreements to put in place that there was no conflict of interest. One of the parties that he shared information with--subsequently, we found, had a conflict of interest, but he was sharing this information--with these parties,

⁸⁰ Letter from Rep. Rick Larsen to Rafael Moure-Eraso, Chairman, CSB (Jan. 24, 2014).

⁸¹ U.S. Senator Patty Murray, Press Release, Murray Statement on Safety Board Report on Anacortes-Tesoro Tragedy (Jan. 30, 2014), <http://www.murray.senate.gov/public/index.cfm/2014/1/murray-statement-on-safety-board-report-on-anacortes-tesoro-tragedy> (emphasis added).

kind of doing his own investigation at the desk, at his desk back in Washington.⁸²

While it was typical in any investigation to provide brief daily updates, Horowitz conducted phone calls with the Hoeganaes team lasting two to three hours. Vorderbrueggen testified:

But when we got to Hoeganaes for whatever reason -- and I had no problem with a daily discussion and giving Daniel, I mean he was my boss. I have no problem I had no problem, and to this day I don't have a problem telling my boss here is what we did, here is our plan, do you have any general comments, and getting feedback. But the real problem was these were 2 and 3 hour marathon sessions and they were second guessing every last thing that we did. And this was after working 12, 14 hours and Daniel sent an e-mail we need to do it at 5 o'clock or whatever time it may be.⁸³

Even though Horowitz lacked the technical expertise and had never visited the accident site, he continued to second-guess and critique Vorderbrueggen's investigation. Vorderbrueggen testified:

Q. What qualified Daniel Horowitz to critique all of this the way he did?

A. In my humble opinion, nothing.

Q. How much experience does he have?

A. Daniel -- and, again, I haven't read his resume in many years, but Daniel is a Ph.D. chemist. Now, granted, we were the Chemical Safety Board. That's a misnomer, totally a misnomer. We are the industrial accident safety board; that's really what the Chemical Safety Board did.

* * *

Daniel's experience in understanding chemical accidents and industrial accidents didn't occur until he joined the Chemical Safety Board, and he joined probably -- I joined in 2002. I think he joined in 1999 or 2000. So he had a couple more years on me, I'll give him that, but he was not an accident investigator. He was congressional and public affairs director; that was his title, and he

⁸² Hall Tr. at 14-15.

⁸³ Vorderbrueggen Tr. at 51.

did a great job at that...So he didn't have the background to tell us that this was a better way to do an investigation.⁸⁴

Horowitz asserted himself in matters for which he lacked formal knowledge and created superfluous work for the investigation team, prolonging the investigation. Vorderbrueggen testified:

Q. Was there any disagreement about potential causes of the incident?

A. Oh, yeah. Again, Daniel is sitting in Washington, D.C., with no information other than what we tell him over the telephone and he is trying to tell us--he is trying to say oh, I think the cause is probably this, the cause is probably that, and I said, Daniel, you are not here. You don't know...**and then the other thing is after I got done--after we finished this marathon--like I said, one of those conference calls lasted 2 hours--I then had to summarize everything that we had just discussed in an e-mail.** So I spent another hour or so just taking my handwritten notes that I was scribbling down and saying okay, here is what we did, here is what we didn't do, here is why we didn't do it, here is what we are going to do.⁸⁵

C. The Labor Union Conflict

Ultimately, in a meeting with Vorderbrueggen, Horowitz removed him from the Hoeganaes investigation as the IIC.⁸⁶ Witnesses struggled to understand the reasons for the removal. One possible reason is that Horowitz replaced Vorderbrueggen with union-friendly investigators, including former United Steel Workers Union member Johnnie Banks.⁸⁷ Just prior to the accident at Hoeganaes, the plant had successfully thwarted an attempt to unionize the facility. Rob Hall testified:

Q. Okay. What was the reason Mr. Horowitz gave for removing Mr. Vorderbrueggen?

A. He didn't think that he was focusing on the right things in the investigation, but you know, an early investigation is fact gathering, and you gather all the facts that are pertinent to the investigation. There was also some question that came up, and this will be detailed in these documents. The Hoeganaes plant had recently -- there was an attempt to unionize the plant, and they had recently not -- had recently defeated that unionization effort.

⁸⁴ Vorderbrueggen Tr. at 29-33.

⁸⁵ *Id.* at 54-55.

⁸⁶ See *infra* Section VIII(A)(3) at 64.

⁸⁷ See Vorderbrueggen Tr. at 122-123.

When John Vorderbrueggen was replaced, he was replaced with a member from the CSB that was a former member of the USW and came out of the chemical workers that were absorbed by the USW.

Q. USW is what?

A. United Steel Workers. As well as the other investigation supervisor, Donald Holmstrom, who used to be a USW organizer, both went, and it just looked highly -- it -- from an ethics standpoint, it did not look proper that you would send two union folks in to do the investigation at a plant that had just defeated an organization effort. I don't know what the motivation was, you know. I wasn't part of those decisions. I just think from the -- from the outside looking in, it just did not appear -- did not have the appearance of being above board.⁸⁸

After removing Vorderbrueggen, Horowitz hired an outside investigator to redo Vorderbrueggen's work. As a result, CSB failed to produce a timely final report with adequate safety recommendations related to the Hoeganaes fire. Vorderbrueggen testified:

A. [Jim, an outside expert] went, and he looked at the standard, and the standard said you should have 4 feet of separation between item A and item B. And [Jim] says, Oh, there's only 3 foot 6, so he did a very specific go/no go check sheet type of inspection against a standard that had nothing to do with why the accident occurred, but yet Daniel -- and I have a copy of that, and that is part of that, but it was like a 30 page -- they probably paid \$30,000 for it. And it gave them nothing, and that's what I kept trying to tell Daniel. I don't need [Jim] here now. I would rather wait and use [Jim] to help analyze for most importantly why didn't this accident become an engulfed building, collapsed fire with 20 or 30 people because that's what it had the potential.

But, like I say, it was kind of ironic that Daniel sent Jim into this deadly hazardous facility that he accused me of doing. He sent five or six CSB investigators into this building to do things that he had said I had done unsafely. That's all part of that.

Q. You said that he essentially started the investigation over.

A. **They essentially started it over.**

Q. So how long did it actually take to complete?

⁸⁸ Hall Tr. at 15.

* * *

- A. It was well over a year past that. And the other interesting thing and very sad thing about this is they never addressed the real opportunity to improve safety at that facility. One of the early things that Marc and I had observed was the condition of the uniforms that the workers were wearing. They were uniforms provided by a uniform service. They were fire resistant uniforms because they did work around molten steel and hydrogen gas and all kinds of things, and the condition of the uniforms to me looked like could these really provide the flame resistance? And they're only good -- fire retardant clothing is only good for a very short period of time.

* * *

And Daniel blew it off in every discussion I had with him, both on site and when we returned, and they never pursued it. So that element of that investigation was not pursued, and in fact, if you look at the recommendations that were ultimately done on that, they're pretty weak.

They don't really cover the real opportunities to improve worker safety.⁸⁹

Former CSB investigator Jeff Wanko confirmed that the quality of the Hoeganaes investigation deteriorated after Horowitz interfered and removed Vorderbrueggen. Wanko testified:

- Q Do you have any other examples of products where you have seen the quality fallen off or deteriorated?

- A I mean, I read them as necessary. Certainly one that I'm heavily involved in from OSHA's response is on the Hoeganaes steel dust or iron dust incident or incidents. The issues that the CSB brought out during that investigation are not the ones that we or the industry really considers helpful. There were deaths where gentlemen were wearing fire retardant clothing, yet the CSB did not explore why they died of burns but were wearing fire retardant clothing. What was it about their fire retardant clothing that did not protect them in this case? And there was a second case, a subsequent flash fire where an engineer was also wearing fire retardant clothing and he lived, and the CSB completely ignored the issue.⁹⁰

⁸⁹ Vorderbrueggen Tr. at 29-31 (emphasis added).

⁹⁰ Wanko Tr. at 84-85.

D. The Long and Costly Deepwater Horizon Investigation Negatively Affected Other CSB Investigations

The CSB's investigation of the April 2010 Deepwater Horizon oil spill has expended a massive amount of manpower and money, diverting these resources from other critical CSB investigations. CSB issued preliminary findings on July 24, 2012⁹¹ and on May 1, 2014, issued the first two volumes of a four volume series.⁹² CSB asserts the remaining two volumes will be issued later in 2014.

Shortly after the Deepwater Horizon oil spill occurred in April 2010, CSB assessed whether it would conduct an investigation. On June 8, 2010, House Energy and Commerce Committee Chairman Henry Waxman sent a letter to CSB requesting the agency to investigate Deepwater Horizon.⁹³ On June 18, 2010, CSB responded that it will proceed with an investigation into the accident.⁹⁴

Nearly four years have passed, however, since CSB began its investigation into Deepwater Horizon. Despite this length of time and the fact that millions of dollars have been spent on the investigation, the CSB has only just released two volumes of a four volume final report. Moreover, the massive amount of resources CSB has dedicated to the Deepwater Horizon investigation has contributed to a backlog in other CSB investigations and limited the CSB's capacity to begin new investigations. CSB itself acknowledges this fact in its FY 2015 Budget Request, which states:

[T]he burden of the ongoing Deepwater Horizon investigation, a backlog of older cases, and the substantial use of resources associated with several large deployments during 2013 have further strained the CSB's ability to initiate investigations.⁹⁵

The CSB Budget Request blames CSB's involvement in the Deepwater Investigation, and the subsequent consequences, on Congress. The Budget request further states:

⁹¹ See CSB, Press Release, CSB Investigation: At the Time of 2010 Gulf Blowout, Transocean, BP, Industry Associations, and Government Offshore Regulators Had Not Effectively Learned Critical Lessons from 2005 BP Refinery Explosion in Implementing Safety Performance Indicators (July 24, 2012), <http://www.csb.gov/csb-investigation-at-the-time-of-2010-gulf-blowout-transocean-bp-industry-associations-and-government-offshore-regulators-had-not-effectively-learned-critical-lessons-from-2005-bp-refinery-explosion-in-implementing-safety-performance-indicators/>.

⁹² See CSB, press Release, Statement by CSB Chairperson Rafael Moure-Eraso on Fourth Anniversary of Deepwater Horizon Tragedy in Gulf of Mexico; CSB Investigation Reports to be Released at June 5th Public Meeting in Houston, Texas (April 2014), <http://www.csb.gov/statement-by-csb-chairperson-rafael-moure-eraso-on-fourth-anniversary-of-deepwater-horizon-tragedy-in-gulf-of-mexico-csb-investigation-reports-to-be-released-at-june-5th-public-meeting-in-houston-texas/>.

⁹³ Letter to John Bresland, Chairman, U.S. Chemical Safety Board from Henry Waxman, Chairman, H. Comm. on Energy and Commerce, and Bart Stupak, Chairman, Subcomm. on Oversight and Investigations (June 8, 2010).

⁹⁴ Letter to Henry Waxman, Chairman, H. Comm. on Energy and Commerce and Bart Stupak, Chairman, Subcomm. on Oversight and Investigations, from John Bresland, Chairman, U.S. Chemical Safety Board (June 18, 2010).

⁹⁵ CSB, Budget Justification, Fiscal Year 2015, at 4, http://www.csb.gov/assets/1/7/FY_2015_Budget_Justification_-_FINAL.pdf.

Congress requested the CSB undertake the Deepwater Horizon investigation because of its unique position to address needed improvements to offshore major accident prevention. . . . When the CSB received this request, the agency indicated that an investigation of this scale and complexity is beyond anything the CSB has previously conducted, and is beyond current resources. However, additional funds to complete this investigation were never received.⁹⁶

As of December 2013, CSB's Deepwater Horizon investigation has cost \$4.25 million.⁹⁷ This is an extraordinary amount considering that CSB's entire FY 2014 budget was \$11 million.⁹⁸ Former CSB General Counsel Christopher Warner testified that the investigation "has just been a black hole for money and resources."⁹⁹ Former CSB investigator Wanko testified that the Deepwater Horizon investigation stands out both in terms of time and money. Wanko stated:

- Q. Do you know when you looked at those financials approximately how much money was being drained on a monthly or quarterly basis in Deepwater Horizon?
- A. The numbers were reported monthly, and **it was over \$100,000 a month being spent on Deepwater Horizon.**
- Q. How does that compare to other investigations?
- A. Mark Bogdan, who was one of the accountants there, had done sort of a[n] . . . average full investigation, average cost of a full investigation, average cost of a case study, average cost of a safety bulletin. **The average cost of a full investigation, I believe, was around \$400,000 maybe. So we are talking four times -- I mean, just it is hard to even grasp how you could spend \$100,000 in a month on that.** And . . . the average timeframe of an investigation was about 18 months. So you figure 18 months, \$400,000, versus \$100,000 a month for Deepwater Horizon, quite a bit greater being spent on that.¹⁰⁰

CSB Members have questioned the duration and cost of the Deepwater Horizon investigation, especially given its effect on other CSB work. The investigation has led to a rift in the Board. Wanko testified that at least one Board Member, Mr. Wright, wrote to CSB Managing Director Horowitz asking for specific information related to the Deepwater investigation. Wanko testified:

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 12.

⁹⁸ *Id.* at 4.

⁹⁹ Warner Tr. at 128.

¹⁰⁰ Wanko Tr. at 11-12 (emphasis added).

- A. Then there was certainly some rumblings from the Board . . . Mr. Wright especially, that he was very concerned with -- I think he'll term it **bankrupting the agency on that single investigation. He was concerned with the amount of money that was being spent, with the fact that there were really no plans on how to staff and finish up that investigation.** And so that's when things started to seemingly sour amongst the Board, and they got to a point where they weren't speaking. Dr. Moure was not speaking to Mr. Wright and Mr. Wark. So yes, so governance was an issue quite a bit.

There was a point where Mr. Wright wrote a very pointed memo to Dr. Horowitz asking him a number of things about the Deepwater investigation budget, plans for completion, what was the purpose of it . . . just all of those things. . . . And Dr. Moure instructed Dr. Horowitz not to answer his questions. And so those questions went unanswered. They were very good questions, though.

- Q. **Who instructed who not to answer?**

- A. **Dr. Moure instructed Dr. Horowitz to not answer Mr. Wright's questions.** And . . . it was public, and Bill sent it to everybody. So that was as public as possible. And those questions never got answered. So that really started souring things as far as I can tell with the Board.¹⁰¹

E. While the Deepwater Investigation Drags On, CSB's Investigations Backlog Grows

The Board realizes that its focus on the Deepwater Horizon investigation came at the expense of other investigations.¹⁰² A January 2, 2013, memorandum written by Board Member Mark Griffon to a U.S. Senate staffer set forth numerous concerns with CSB's current management, including the resulting backlog of investigations. The memo stated:

I am raising these issues due to my concern on the effect these issues are having on the agency's very important mission. **The identified issues are affecting the ability for the agency to complete investigations in a timely manner, the ability to produce quality, in-depth investigations and the ability to push forward on important safety improvements at major hazard facilities across the United States.**¹⁰³

¹⁰¹ *Id.* at 25-26.

¹⁰² *See, e.g.,* Warner Tr. at 145-146 ("And then the board as we went along got really cold feet on what was going on and the cost and what it was doing to all our investigations. . . .").

¹⁰³ Memorandum from Mark Griffon, Board Member, U.S. Chem. Safety & Hazard Investigation Bd., to Prof'l Staff Member, S. Comm. on Health, Educ., Labor, & Pensions (Jan. 2, 2013).

CSB Managing Director Horowitz, who was in favor of the Deepwater investigation, has acknowledged that it has adversely effected other CSB investigations. Horowitz testified:

Q. So it seems that the Deepwater Horizon investigation has definitely impacted the status of other investigations?

A. **That's absolutely true.**¹⁰⁴

Because the CSB investigation began nearly four years ago, the impending partial release of the CSB final report, diminishes the impact of any of its findings. Former Board Member X testified:

So in the meantime, **there were probably five or six other organizations, agencies that were doing an investigation of the Deepwater Horizon incident, and all -- as far as I know, all of those were completed and relatively quickly, maybe within a year.** So now the Chemical Safety Board, three and a half years, maybe four years later, is coming out with an investigation now and I -- **I don't know how it will be received,** what -- what people will think about it, or will it just sort of be a -- it'll just be interesting to see what the response is to it.¹⁰⁵

Former investigator Hall told the Committee that any report CSB issues related to Deepwater will likely be ineffectual because the accident has faded from public focus. Hall testified:

[I]f the CSB were to finally complete their Deepwater investigation today, I doubt they would affect much change. You know, everybody else has moved on from Deepwater except the CSB. And so . . . from that standpoint, there is a problem.¹⁰⁶

Former investigator Vorderbrueggen also noted that the CSB is lagging behind its federal counterparts in issuing its findings related to Deepwater Horizon. He testified:

Deepwater Horizon, **they've spent millions of dollars on that accident, and it's not issued yet [at the time of testimony], and yet there's been dozens of Federal reports issued. It's unbelievable that [CSB's] report's not out.**¹⁰⁷

Given the problems that have plagued CSB as a result of the Deepwater Horizon investigation, CSB would have been better off if it had stuck to its original decision not to investigate. Former Board Member X stated:

¹⁰⁴ Horowitz Tr. at 33 (emphasis added).

¹⁰⁵ Former Board Member X Tr. at 43 (emphasis added).

¹⁰⁶ Hall Tr. at 37 (emphasis added).

¹⁰⁷ Vorderbrueggen Tr. at 90-91 (emphasis added).

Well, in hindsight, looking back on it three and a half years and with all of the resources that have been taken up and all of the issues that have come up and the fact that four or five other agencies have done investigations and have completed those investigations, **I think it would have been resources better spent not doing the investigation.** But that's a personal opinion.¹⁰⁸

VII. Governance Problems at the Chemical Safety Board

Former CSB Board Members and staff testified that governance problems arose shortly after Dr. Rafael Moure-Eraso became the Chairman. Interaction between the Chairman and CSB staff declined significantly, and the collegial atmosphere of the agency, a key characteristic since the Board's inception, rapidly deteriorated. Upon her resignation from the Board on May 31, 2014, Dr. Beth Rosenberg declared, "I'm looking forward to going back to an academic environment where open debate is valued."¹⁰⁹ Considering Dr. Rosenberg's connection to Chairman Moure-Eraso began at the University of Massachusetts-Lowell, before she joined the Board, her sentiment speaks volumes about Chairman Moure-Eraso's heavy-handed and cloistered management style. Chairman Moure-Eraso acted primarily through Managing Director Daniel Horowitz and General Counsel Richard Loeb. The three worked closely to enforce their own collective view of how the CSB should operate, often in spite of the relevant statutes, regulations, and Board orders governing the CSB. Consequently, the CSB experienced many management problems under the current leadership.

A. CSB Management Ignores the Moss Opinion and Board Orders

In 2000, CSB sought clarification from the U.S. Department of Justice Office of Legal Counsel (OLC) on the proper roles of and relationship between the Chairman and the Board. OLC responded with what is referred to as the "Moss Opinion," which specified how boards relate to chairmen and the responsibilities of each.¹¹⁰ A later opinion reiterated the guidance in 2002. Former CSB General Counsel Chris Warner testified:

We as the Board agreed to be bound by the Moss opinion, and it basically had three parts as I look at it. It validated legislative history and the provisions of the act, it looked at general board commission law and said consistent with all of this the majority rules, and that the board itself has

¹⁰⁸ Former Board Member X Tr. at 75.

¹⁰⁹ Iafolla, *supra* note 1 (emphasis added).

¹¹⁰ Memorandum from Randolph D. Moss, Acting Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, Division of Power & Responsibilities Between the Chairperson of the Chemical Safety & Hazard Investigation Board & the Board as a Whole (June 26, 2000), available at <http://www.justice.gov/olc/chemsafetyboardopinionfinal.htm> [hereinafter Moss Opinion].

great ability and the chair, although he's the chief executive, carries out that at the will of the board.¹¹¹

Through the Moss Opinion, OLC delineated the roles of the Chairman and CSB Board Members and validated the authority vested in the Board as a whole. The opinion stated:

We believe that, under the [Clean Air] Act and general principles governing the operation of boards, the day-to-day administration of Board matters and execution of Board policies are the responsibilities of the chairperson, subject to Board oversight, while **substantive policymaking and regulatory authority is vested in the Board as a whole. In disputes over the allocation of authority in specific instances, the Board's decision controls**, as long as it is not arbitrary or unreasonable.¹¹²

The Moss Opinion dictates that when in doubt, the Board's decisions control.

1. Board Order 28

Pursuant to the Moss Opinion, CSB drafted and approved "Board Order 28," establishing procedures for Board operations.¹¹³ Specifically, it established the manner in which the Board would exercise its executive and administrative functions through the chairperson. Based on the Clean Air Act Amendments of 1990,¹¹⁴ Board Order 28 is consistent with OLC's ruling on the proper governing structure of the CSB.

The Chairman is the Board's chief executive, but the Chairman's authority has limitations. The statute, as interpreted by the Moss Opinion, gives the Board policymaking and regulatory authority. The ability of CSB Board Members to set Board policy through Board orders ensures that the Chairman does not exceed his or her intended role as "chief among equals." Board Order 28 provides that Board Members are entitled to a say in substantive policy decisions and certain administrative functions.¹¹⁵

The Chairman usurps the Board's statutory authority when he or she declines to execute Board orders. Witnesses testified that the Board operated smoothly and followed the Moss Opinion until 2010, when Chairman Moure-Eraso took over. Former CSB General Counsel Chris Warner stated:

After the Moss opinion came out the [B]oard adopted a variety of [B]oard orders. The act provides for the [B]oard to establish their own rules. And

¹¹¹ Warner Tr. at 11.

¹¹² Moss Opinion, at 2.

¹¹³ CSB, Board Order 28, Exec. & Admin. Functions of the Board, *available at* http://www.csb.gov/assets/Record/BO_28.pdf (Aug. 5, 2002) [hereinafter Board Order 28]. The Order was amended on August 8, 2006.

¹¹⁴ 42 U.S.C. §7412(r)(6)(B) and (N).

¹¹⁵ Board Order 28.

recommendations and indeed the IG over the last 14 years has -- maybe 50 to 60 percent of all their recommendations have been on implementing board procedures and rules, et cetera.

For -- up until 2010, the [B]oard followed that opinion and it wasn't really until 2011 when Loeb was hired that the [B]oard started -- **Moure just dismissed the board orders, and [he dismissed] [B]oard [O]rder 28 that specifically delineated what the board's responsibilities and what his responsibilities were.**¹¹⁶

2. Horowitz and Loeb Unilaterally Deemed CSB Board Orders Invalid

CSB Managing Director Horowitz and General Counsel Loeb developed their own interpretation of the statute, seeking to relegate the Board's role to merely approving investigative reports. They both acknowledged in their testimony that the Board has the ability to set its own policy, but denied the validity of certain Board orders—in particular, Board Order 28. In fact, under Moure-Eraso's tenure the CSB has only adhered to Board Order 28 selectively. Horowitz testified:

Q. So does the Board follow [Board Order 28] now?

A. I would say they follow some of it.

Q. What does that mean?

A. I mean, we've tried, I think, and I think the Chairman has tried as a matter of comity, to try to get Board approval on larger contracts, things like that. **I don't know that it's been followed on all personnel matters; for example, on the appointment of the general counsel.** I think it was followed when I was appointed managing director, I guess.

Q. How many times would you say has it not been followed? More than 50?

A. I don't know.

Q. Did the repudiation of this begin with Chairman Eraso's tenure?

A. No. I don't think that's quite correct, but I don't -- I mean, different chairmen have exercised varying amounts of personnel authority. They have consulted to different degrees with the Board. I don't think there is a hard and fast rule. **But I think my observation is that he [Chairman Moure-Eraso] does not believe he should**

¹¹⁶ Warner Tr. at 12 (emphasis added).

follow all aspects of it and that he has some inherent personnel authorities as chairperson. That's my perception of what he's done.¹¹⁷

Chairman Moure-Eraso's refusal to acknowledge the Board's authority to set policy in the form of Board Orders stands in stark contrast to the Clean Air Act and the Moss Opinion. The most egregious instance of this recalcitrance was Chairman Moure-Eraso's unilateral decision to hire General Counsel Loeb. The Chairman acted in direct violation of the Board Order 28 provision that requires a Board vote on any action to fill a senior executive service (SES) position.¹¹⁸

Current CSB leadership insists that the validity of Board orders is tenuous because many of them are outdated. Loeb testified:

Q. There are Board orders, is that correct?

A. There are something called Board orders, yes.

Q. And does the Board follow those generally?

A. It's a mixed bag. Many of the Board orders are outdated. They make reference to statutes and regulations that are—don't exist any longer or were long ago modified. So those . . . we do not follow those. We allow the superseding statutes or regulatory provisions to govern. In other cases, some of the Board Orders, at least in my judgment, are somewhat questionable as to their validity.¹¹⁹

The statute and the Moss Opinion make clear that Board orders are not left to the Chairman's discretion. The Chairman has the authority to submit changes to Board orders for a Board vote, but he cannot simply ignore them. Despite the issues CSB leadership has with some of the Board orders and particularly adherence to Board Order 28, the Chairman has never made any serious attempt to alter them.¹²⁰ Employee N testified:

[I]f Moure thinks it should be different, what he should be doing is changing the Board orders, not just ignoring them, and I think at one point he tried to back in 2011, he was saying that this was all a political problem with Wright and Wark. Let's just wait until they leave, and then we will—they just can move forward.

I think in November of that year, Moure had a notation item to change some of the Board orders where you could lift approval levels for contracts, and change some of the things he wanted to do. Mr. Bresland . . . calendared that saying these are huge issues for the agency. We need to have some discussion. You just presented me with this. Here are my

¹¹⁷ Horowitz Tr. at 91-92 (emphasis added).

¹¹⁸ Board Order 28.

¹¹⁹ Loeb Tr. at 11.

¹²⁰ Horowitz Tr. at 93-95.

specific concerns. Can we please talk about it? And that was never discussed. There was never a follow-up meeting on it [board governance].¹²¹

The Committee's investigation has shown that Chairman Moure-Eraso is not interested in following well-established procedure. Rather he has systematically disregarded the limits of his role set by the authorizing statute. Instead of operating through the proper channels to change specific Board orders, the Chairman has chosen to act in a dictatorial manner that undermines his colleagues. An effective chairman should work cooperatively with the Board toward fulfilling the CSB's mission.

B. Improper Handling of the CSB Budget and Spending

To justify their disregard for other Board Members' views, Chairman Moure-Eraso and Managing Director Horowitz blamed politics for their disagreements with Board Members. Witnesses testified that Horowitz would often discount Board Members' opinions and concerns by citing political reasons, and Horowitz used politics as justification for dispensing with Board orders.¹²² On May 3, 2011, Moure-Eraso sent an e-mail to Employee N regarding the CSB's annual operating budget alleging that the CSB's budget had been "impounded."¹²³ The e-mail directed the Employee to immediately execute the appropriation and budget:

¹²¹ Employee N Tr. at 50-51 (emphasis added).

¹²² Horowitz Tr. at 109.

¹²³ E-mail from Rafael Moure-Eraso to Employee N, et al. (May 3, 2011).

-----Original Message-----
 From: Moure-Eraso, Rafael
 Sent: Tuesday, May 03, 2011 10:24 PM
 To: [REDACTED]
 Cc: Horowitz, Daniel; Nguyen, Dai; Bogdan, Mark
 Subject: Budget

May 4, 2011

To: [REDACTED]

From: Rafael Moure-Eraso, Ph.D., Chairperson and CEO

cc: Daniel Horowitz, Ph.D., Managing Director
 Dai Nguyen, Financial Specialist
 Mark Bogdan, Financial Officer

Subject: FY 2011 Budget Execution

Earlier today, Mr. Wright purported to calendar the CSB's operating budget for FY 2011, thereby attempting to effect an impoundment of Congressionally authorized and directed obligational authority. There remain fewer than five months in the fiscal year and in order to avoid a violation of the "Impoundment Control Act," 2 U.S.C. 681 et seq., I hereby direct you to execute the CSB's FY 2011 appropriation and budget as approved by Congress and signed by the President on April 15, 2011 (Public Law 112-10).

Specifically, all personnel costs, rental payments, and other periodic payments that the CSB must make to satisfy its continuing obligations shall continue to be made. In addition, your office shall certify funds availability (assuming that funds have been made available pursuant to Public 112-10) for all individual contracting actions of \$50,000 or less. For the purpose of this memo, a funding action is defined as any individual obligational activity (including travel) whose purpose is to obligate no more than \$50,000 via contract, purchase order, purchase card, or task or delivery order, including an order issued under a blanket purchase agreement (BPA). It does not include interagency agreements with other Federal agencies which shall continue to be obligated as ongoing liabilities of the CSB regardless of dollar amount. In addition, each funding action of \$50,000 or less shall be regarded as an individual funding action regardless of the overall amount of funding provided to any contractor under a contract or BPA.

Any funding actions for contracts or similar items should be coordinated with and approved by the Managing Director. For smaller funding actions, Dr. Horowitz may further delegate this authority, if he wishes.

Since there is some urgent need to pay current obligations, please execute the actions described in this memo as soon as you receive it. Contact me in the phone tomorrow if you have any questions. Thank you.

"I hereby direct you to execute ..."

As required by Board Order 28, Board Members are supposed to approve an annual operating budget once they receive the appropriation specifying how the money will be spent. Employee N testified:

- A. In this case, [Board Member Wright] had some questions about the budget that had been presented. Specifically, that year, we didn't give the Board members as much detail as we had in prior years. I think we just gave them summary level information; whereas, in

prior years, we'd given them down to line items so they could see what we were spending on.

Q. Uh-huh.

A. So Mr. Wright calendared it [the budget] because he had questions that he wanted answered. I think he calendared it on May 3. May 4th, which was the next day, I received this memo from Dr. Moure, which was kind of shocking. I, for better or worse, had never heard of the Impoundment Act. **I'd just never seen anything like this. We had always had our monies approved by the Board prior to that**, so I was asking Chris and Ray [for] advice [on] really can I—can I do this [follow the e-mail directives], because my understanding was we needed to have the Board approve the budget.

One thing that I thought was interesting, too, about the timing of this was the notation item for the budget actually had a voting period, I think, through May 11th, so just—I was really curious why—if Mr. Wright had calendared it, why didn't Dr. Moure and Daniel try to answer some of his questions during the voting period. Instead, just the day after it got calendared, he said, "Go forth and spend the money."

* * *

Q. He says, at the end of the e-mail, Chairman Moure says, "Contact me in the phone tomorrow if you have any questions." Did you ever try to follow up with the Chairman or Dr. Horowitz?

A. I talked with Daniel about how to proceed with this. It was a very strange meeting with Daniel. He—he had this big political problem between the Board members, that Wright and Wark were mad that Mr. Bresland was no longer the chairman, they were just being difficult to Dr. Moure.

Q. Is that what Daniel told you?

A. Told me.

Q. Okay.

A. I hadn't seen any evidence of that, but that was what he said. He said, "**You know, we just need to spend the budget and do things, so just—just, you know, follow orders, do it, do what you're told to do , and if you have any problems with it, just put a memo to the file.**"¹²⁴

¹²⁴ Employee N Tr. at 31-33 (emphasis added).

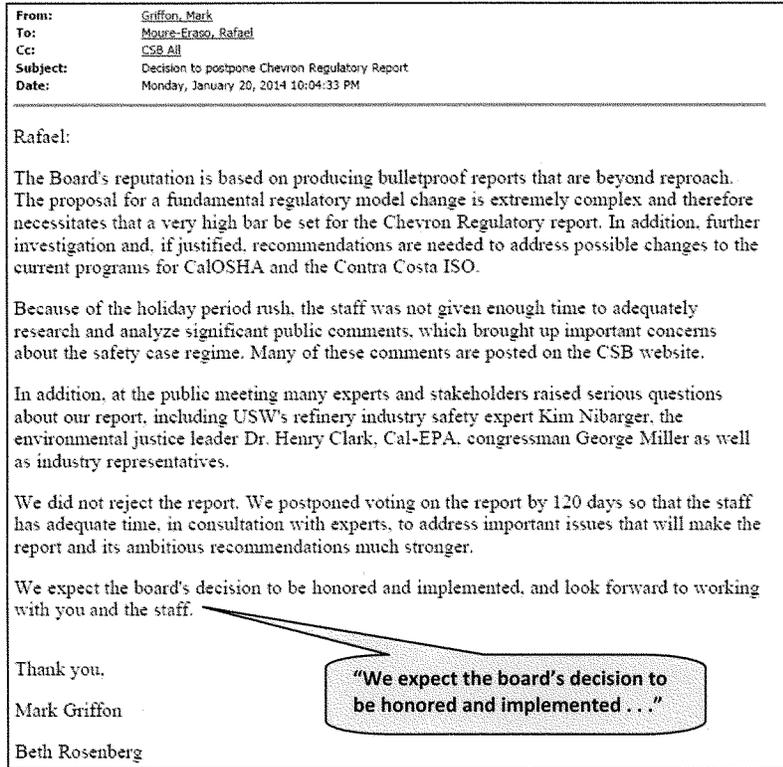
Horowitz dismissed the legitimate concerns of presidentially-appointed Board Members as political differences of opinion. Witness testimony and documents portray senior CSB leadership as close-minded, uncompromising individuals focused *not* on the welfare of the agency and public safety but on the implementation of their own agenda and consolidation of power. Moure-Eraso abused his responsibilities as CSB Chairman when he failed to even attempt to discuss Board Member Wright's valid concerns about the budget.

While current CSB leadership has refused to recognize the Board's authority to offer opinions on most substantive policy matters, it has recognized the Board's role in approving investigative reports. Unfortunately, the process of approving investigative reports has become contentious under Chairman Moure-Eraso.

When the final report on the investigation of the August 2012 Chevron incident in Richmond, California was presented to the Board in January 2014, Board Members Mark Griffon and Beth Rosenberg expressed their concerns with some of the report's recommendations. They voted to postpone voting on the report to allow time to address their concerns. In retaliation for exercising such due diligence, Chairman Moure-Eraso accused the Board Members of behaving recklessly, against the interests of public safety.¹²⁵ Board Members Griffon and Rosenberg defended their actions in an e-mail to Moure-Eraso¹²⁶.

¹²⁵ E-mail from Rafael Moure-Eraso, Chairman, CSB, to All CSB employees (Jan. 16, 2014).

¹²⁶ E-mail from Mark Griffon to Rafael Moure-Eraso (Jan. 20, 2014).



C. The Controversial "Safety Case Regime" Approach to CSB Investigations

The aforementioned e-mail underscores CSB Board Members' concern with the "safety case regime"—a philosophy Chairman Moure-Eraso has embraced and has vehemently sought to apply to CSB's investigative approach. The safety case regime is a controversial approach throughout the industry.¹²⁷ Former investigators testified that steadfast adherence to the safety case regime could prove detrimental to CSB. Wanko, now with OSHA, testified:

¹²⁷ According to the Norwegian safety organization, DNV, the safety case approach is a documented demonstration that the facility owner has identified all major safety and environmental hazards, estimated the risks, and showed how all of these are managed achieving a stringent target level of safety, merging both prescriptive and performance requirements. See Robin Pitblado, *Will the U.S. Warm Up to the Safety Case Approach*, DNV GL, http://www.dnv.com/industry/maritime/publicationsanddownloads/publications/offshoreupdate/2011/01_2011/WilltheUSwarmuptothefacilitysafetycaseapproach.asp (last visited May 6, 2014).

- A. **It seems that [Moire-Eraso and Horowitz] have an agenda, and to me that's just completely wrong. They should be agendaless and neutral and just go where the facts go.** But it seems that they are, for some reason, very taken with a couple concepts. One is inherently safer technology and one is the safety case model from Europe. Some of the folks higher up, maybe Daniel and Rafael, are very taken with these concepts and they will do anything to get those concepts into the reports, whether or not they fit. And that is a problem, a big problem.

And the stakeholders are, if they are not already, they are going to start shutting [out] the CSB. If all they get out of the CSB is a recommendation to . . . do the safety case, . . . redo how we regulate in the United States and initiate the safety case, because it doesn't help. They are not being a help.¹²⁸

* * *

- Q. So is the concern then there would be an onerous restriction on industry because they don't have the back and forth?

- A. Well, it's -- there's an opinion within the -- at the CSB that the safety cases, the be all and end all of process safety. And this was the recommendation. This was the one big recommendation I know of from the Chevron case that came out yesterday, that they have recommended to the State of California that they retool their entire regulatory, safety regulatory system and require a safety case. There's thought and argument that the safety case is the regulatory model that the United States should be going to within the Chemical Safety Board because it's . . . better than what we have now.

Again, it's an agenda item, and do the facts in the case really point to a complete revamp of how we regulate in the United States? The interesting note, . . . I led the Caribbean Petroleum investigation. There was a very similar incident to the Caribbean incident in the U.K. back in 2005. It's the Buncefield incident . . . lots of damage. No fatalities. Buncefield was under the safety case. They did not envision this incident in their safety case. . . . What that means is the safety case is not perfect.¹²⁹

The safety case regime came up again in the final report on the four-year-long investigation of the Tesoro refinery in Anacortes, Washington, which started in April 2010. The Board was scheduled to vote on the final report on January 30, 2014, but Chairman Moire-Eraso

¹²⁸ Wanko Tr. at 76-77 (emphasis added).

¹²⁹ Wanko Tr. at 91-93

and Managing Director Horowitz decided to maneuver that vote into a “listening session,” effectively delaying the actual vote by at least 45 days. They did not consult the rest of the Board prior to setting this course of action. In response, Board Members Rosenberg and Griffon wrote a letter to Representative Rick Larsen to offer an explanation as to why the Chairman may have delayed the critical vote. They stated:

As you may know, a week ago the agency’s Board voted 2-1 to postpone approval of a recommendation for California to undertake a wholesale replacement of its process safety management regulatory regime for oil refineries. This recommendation was tied to CSB’s investigation of the August 2012 fire at the Chevron refinery in Richmond, California. The vote was postponed for 120 days to allow for the full consideration of written and oral comments regarding the adoption of a ‘safety case’ regime from the report on the Chevron fire. These two separate investigations [Chevron and Tesoro] are now linked by a common recommendation to adopt the “safety case” for refineries, **which could explain why the CSB Chairman unilaterally changed the January 30th meeting from a hearing into a ‘listening session’ . . . It is simply inexcusable that multiple commitments made to you and others are not being honored.**¹³⁰

The letter written by Rosenberg and Griffon signals a significant fracture in the Board’s working relationship with CSB Chairman Moure-Eraso. The Chairman did not consult the Board regarding the decision to delay the vote. In fact, Board Members only found out about the schedule change through press accounts.¹³¹ Chairman Moure-Eraso insisted on delaying the investigation further to ensure the advancement of his safety case agenda. Once again, the Chairman acted in his own self-interest, not the interest of the CSB and its mission.

D. The General Lack of Collegiality at CSB

CSB leadership’s contempt for Board Members Griffon and Rosenberg, refusal to uphold Board orders, and numerous attempts to stifle dissent within CSB have cultivated a general lack of collegiality within the agency. Such an environment is detrimental to the organization. Former CSB staff investigators testified that a good relationship with the Chairman and the Board was essential to doing their jobs well. Infrequent interaction with Chairman Moure-Eraso made it difficult for staff and Board Members to develop a good working relationship. John Vorderbrueggen testified:

Q. So then would you say your job relied upon good relations with the Board?

A. Oh, absolutely. Absolutely.

¹³⁰ Letter from Beth Rosenberg and Mark Griffon, Board Members, CSB, to Rep. Rick Larsen (Jan. 27, 2014).

¹³¹ *Id.*

- Q. And the Chairman?
- A. Absolutely.
- Q. Did things change in the way in which you interacted with the board and chairman when Moure Eraso became chairman?
- A. Yes, it did. Chairman Moure Eraso, I mean, it probably was weeks before I even had -- when he came into the agency, it was weeks before we ever even had a discussion. I mean, he never reached out to -- certainly he did not reach out to me. He certainly didn't reach out to my staff. It was kind of like here's this new chairman.
- Q. And that was a change from the other chairmen?
- A. And that was definitely a change. We seldom--I had a few face to faces with him, but they were pretty much very, Hi, how are you? He might have a simple question on something. Never a sit down heart to heart discussion about issues with an accident. He really stayed one away from us, and it was more, he pretty much, all of that interaction was really with Daniel at that point because when Daniel moved in as the MD [managing director], he kind of took on that type of a role, and, again, he became MD after Moure Eraso came in, some months after that, and then Daniel kind of funneled everything, and very seldom did we have face time with Rafael.¹³²

Moure-Eraso's tenure as Chairman has transformed the CSB, which had previously welcomed the open exchange of ideas and opinions, into an agency where the staff is afraid to disagree with him for fear of retaliation or public ridicule. Employee N recounted an incident in which Managing Director Horowitz repeatedly chastised him/her for consulting with the White House Office of Management and Budget regarding the budgetary effects of sequestration and the government shutdown. Employee N testified:

- Q. **But people do fear retaliation from Dr. Horowitz and Chairman Moure?**
- A. **Yes. Yeah.** And if I can give just something specific with me. You know, [REDACTED], and always had a very open policy with OMB, too, where if--we're a small agency . . . trying to wear a lot of hats, and as long as the agency existed, had always been able to just pick up the phone and talk to our [OMB] examiner if a question came up, because although CSB is an independent agency, I had been getting the advice from OMB.

¹³² Vorderbrueggen Tr. at 16-17.

We had two things come up in 2011. One, there was the possible shutdown that happened in April of 2011, and there were all kinds of conference calls and advice and what do you do and just a really stressful time. One of the issues that was a concern was -- at the OMB level was the appearance of senior agency officials were on travel, and there was a government shutdown, and what would that look like? We had one of our members, John Bresland, was supposed to be a keynote speaker over in the U.K., so I called our examiner to say, "And here's the situation, what should we do?"

Q. Your examiner at OMB?

A. At OMB to get his advice. I told Daniel [Horowitz] about it, and he got really irritated that I would go to OMB, that CSB should be setting its own policy. Okay. . . . [REDACTED]; it's very typical in my role to be talking with OMB.

Q. **How did you know he was irritated?**

A. **He balled me out in his office.** And then a few months later, when there was the potential sequester, OMB was asking for information on what would be the effect of a 5 to 10 percent discretionary spending cut. Well, I got this -- Daniel and Loeb were trying to split our budget between fixed cost and variable costs and cuts on all that, and I thought, well . . . CSB's budget is all discretionary. You know, you look at Article 132; it's all discretionary. There's no mandatory. There's fixed cost. There's rent, yes, but CSB as a whole is discretionary. So I talked to the contractor and the examiner [at OMB] just to see . . . what's-- what's mandatory and what's discretionary, so we can put together our numbers for you. **I got really balled out by Daniel [Horowitz] for doing that, that we are a small agency, we should be setting our own -- targeting our own course. We should be telling OMB what we're doing. We shouldn't be running to them for advice.** He even questioned me about timings of e-mails to OMB; "When did you talk to them?" And then when I got my performance evaluation that year, typically, I would have gotten maybe like a \$3,000 performance award. **He cut mine back to \$1,000, and the primary thing he cited was going to OMB and talking to outsiders.**¹³³

Former investigator Jeff Wanko recalled an instance during a leadership meeting when Horowitz singled him out for raising a concern about languishing investigations:

¹³³ Employee N Tr. at 37-39 (emphasis added).

- Q. Would you attend these meetings?
- A. Once I was named the acting -- I'm not going to go through that title again once I became that quasi supervisor I was invited to those meetings. And Roger Evans and I started what we--we were pretty incredulous that the status of investigations, the money that was being spent, the budgets, the plans for completion were not being discussed at the leadership team meetings, so we started bringing those financials that were made available once a month, we started bringing those to the leadership team meeting and made sure that was a topic of conversation. **And during one of those discussions, Dr. Horowitz said to me, a fool knows the cost of everything and the value of nothing, in front of everybody. And at that point I decided, well, if he is going to call me a fool in front of my peers, then it is no longer time for me to be employed here. And that was pretty much the tipping point.**¹³⁴

CSB leadership refused to recognize and take responsibility for problems within the organization. Ridiculing staff and discouraging them from identifying problems and presenting solutions are signs of unacceptably poor management. A drastic change of direction is needed to save the CSB from failure.

VIII. The Abusive and Hostile Work Environment at CSB

Among all witnesses, with the notable exceptions of Horowitz and Loeb, there was a consensus that the work environment at CSB was abusive, toxic, and hostile. One witness went so far as to describe the agency as “a sinking ship.”

A. CSB Mismanagement Forces Seasoned Investigators to Leave the Agency

On January 31, 2011, the first of multiple iron dust flash fires occurred at the Hoeganaes facility in Gallatin, Tennessee.¹³⁵ Headquartered in Cinnaminson, New Jersey, Hoeganaes is a worldwide producer of atomized steel and iron powders.¹³⁶ The accident killed two people. When chemical-related casualties occur, CSB staff deploys to the site to investigate. In the case of Hoeganaes, John Vorderbrueggen, a professional engineer based in the Washington, D.C. CSB office, who had investigated multiple dust fire incidents; and Marc Saenz, his colleague, went to the Hoeganaes site to investigate.¹³⁷ They arrived a day after the accident and

¹³⁴ Wanko Tr. at 15-16 (emphasis added).

¹³⁵ Vorderbrueggen Tr. at 20.

¹³⁶ CSB, Case Study, Hoeganaes Corp., Gallatin, TN, at 2 (Dec. 2011), http://www.csb.gov/assets/1/19/CSB_Case_Study_Hoeganaes_Feb3_300-1.pdf.

¹³⁷ *Id.* at 21.

immediately started working long days to determine what happened. At the end of each day, Vorderbrueggen and Saenz had a debriefing call with CSB leadership in Washington, D.C.¹³⁸

1. Horowitz and Moure-Eraso Micromanage the Hoeganaes Investigation

During the nightly debriefing calls, it became clear that Horowitz and Moure-Eraso were going to micromanage the investigation. Vorderbrueggen testified:

A. I had a long discussion with Daniel and Rafael because kind of the new mantra that Daniel and Rafael had adopted was they're going to call and talk to the IIC, the investigator in charge, every night and find out what we've learned, ask us questions, et cetera, et cetera, so this became routine.

Q. This is a departure from how things were done in the past?

A. It was. Now, in prior events, when I would report to my supervisor, it was -- it never was as long because I think the supervisor recognized we knew what the heck we were doing, and he didn't need to tell us . . . to flip the page every time it was time to flip the page, but **for whatever reason Daniel [Horowitz] decided to really get in and micromanage or attempt to micromanage the activities from Washington, not knowing what's going on at the site, not knowing the risks, not knowing the hazards, not knowing the people, and so it -- that investigation -- and this was the first one that had really gotten to this level of detail, Daniel [Horowitz], he was just micromanaging the heck out of this, and Rafael [Moure-Eraso] was, too.**

* * *

But -- and I know this is kind of a long story, **but he wrote a long memo criticizing me of many things,** and they're all wrong.¹³⁹

2. The Sixteen-Page Criticism of John Vorderbrueggen's Work

One tactic CSB leadership used was to question the credentials of experienced investigators, sometimes to the point of belittlement. When Vorderbrueggen and Saenz returned from their on-site investigation of Hoeganaes, Vorderbrueggen, who was the investigator in charge, received a lengthy, unfounded memorandum from Horowitz criticizing his actions. Vorderbrueggen testified:

¹³⁸ *Id.* at 22-23.

¹³⁹ Vorderbrueggen Tr. at 22-23 (emphasis added).

- Q. So this is a memo to you from Daniel Horowitz regarding the Hoeganaes deployment?
- A. Yes, ma'am, yes.
- Q. He talks about removing you from the investigation?
- A. Yes.
- Q. Can you just explain what went on here?
- A. **If I could figure out what his intent was, I would.**¹⁴⁰

In the memorandum, Horowitz accused Vorderbrueggen of placing himself and his colleague, Saenz, in danger by entering the plant where the accident occurred. Vorderbrueggen disagreed with this assertion. He stated:

It came down after a couple days, Daniel had decided that he was -- without telling me this, he had decided that he was totally dissatisfied with what we were doing . . . We had informed Daniel that we were returning to D.C. I believe on the next day. We were there about 4 or 5 days . . . I said, we are attempting [to work with TN OSHA], but that, there's no reason for us to stay on site. We've completed our onsite work. There's no reason for us to hang out in Tennessee. We've got a million other things to do. We had other investigations we were working on back in D.C. I made a decision that Marc [Saenz] and I would return unless Daniel flat out said, Do not come back, and Daniel had the opportunity to direct me to stay in Tennessee, and he did not do that. We get back to D.C., and about 2 days later, he called me into a meeting and told me that he was removing me as the IIC [investigator in charge] on that investigation. That was on February 14th. So that was 2 weeks after the accident was when we sat down.

He called me in to a meeting. It was Daniel [Horowitz]. It was me and I believe Hillary Cohen, she took notes. **I think it was just the three of us as I recall. [Hall also attended] And he announced that he had lost faith in me and that he was removing me as the IIC on Hoeganaes. And he said I will give you a written explanation to that within the next day or so. That's the February 25th memo.** So it took him another week to generate this many page -- I forget how many pages it is, but he probably didn't put page numbers on it, but he's got 14 items of criticism and accusations and other things, including even doing things unsafe, and **that's what had me more frustrated than anything is he accused me of putting myself and my coworker in an unsafe**

¹⁴⁰ *Id.* at 19-20 (emphasis added).

condition. And I was furious with that because I would never do that.¹⁴¹

A seasoned investigator, Vorderbrueggen was perfectly capable of determining whether it was safe to enter the site to investigate. With regard to safety, Vorderbrueggen stated:

I felt safe, and I was comfortable that we were not putting me or my team in harm's way. And I have pulled people out of areas because I thought they were unsafe. And I was very confident. So that was probably my biggest criticism of Daniel [Horowitz]. But he pulled me off as the IIC and reassigned the IIC position to Johnnie Banks, who worked for me, which didn't really make a lot of sense, but that's what Daniel [Horowitz] decided to do.¹⁴²

Vorderbrueggen took issue with the accusations levied against him in the memorandum as well as the manner in which it was presented to him. Horowitz summoned Vorderbrueggen and some of his peers to a meeting and gave him the memorandum. Regarding Horowitz's behavior at this meeting, Vorderbrueggen testified:

Q. I want to go back real quick to that meeting that you were in with Rob Hall and Daniel Horowitz.

A. Okay.

Q. And that was it; it was you, Rob Hall, Daniel Horowitz and one other person?

A. There was one other. I'm almost certain there was one of Rob's direct reports. I don't think -- Hillary Cohen works for Daniel or works for somebody, and she's an administrative person. But I don't recall if she was there taking notes or not, but I'm almost certain there was at least a third person. Rob would remember, I don't honestly remember.

Q. In your opinion, from the way you described the incident earlier, in your opinion **would you characterize Daniel's [Horowitz] behavior as abusive?**

A. **Yes, absolutely. Absolutely.**¹⁴³

Vorderbrueggen, an experienced professional engineer, left the CSB. He has since risen through the ranks as an investigator at NTSB.

¹⁴¹ Vorderbrueggen Tr. at 24-25.

¹⁴² *Id.* at 26-27.

¹⁴³ Vorderbrueggen Tr. at 97-98 (emphasis added).

3. Vorderbrueggen's Removal from the Investigator-in-Charge Position

Former CSB investigator Hall observed that CSB management improperly questioned the judgment of senior investigators examining the Hoeganaes incident. Hall also noted that Horowitz began micromanaging the IIC's role and improperly consulted outside experts on the investigation. Hall stated:

There was a second investigation just -- just after this occurred with John Vorderbrueggen . . . Vorderbrueggen was investigating a fire that occurred at a plant in Tennessee. It was Hoeganaes. . . .

During that investigation, Daniel Horowitz, very uncharacteristically, began micromanaging the investigation. John Vorderbrueggen was an investigation supervisor, as I was, had been at the CSB about 2 years longer than I was, extremely competent investigator, one of the most productive that they had. **He began uncharacteristically micromanaging them. He consulted outside consultants without the knowledge of the IIC and in violation of policies within the CSB as to not share investigative information with[out a] nondisclosure agreement.** We also looked to have agreements to put in place that there was no conflict of interest. One of the parties that he shared information with subsequently, we found, had a conflict of interest, but he was sharing this information with these parties, kind of doing his own investigation at the desk, at his desk back in Washington.

He ultimately removed John Vorderbrueggen from the investigation and put a different investigation team in. **There are some lengthy back and forth memos in this regard that are available.**¹⁴⁴

Many witnesses the Committee interviewed believed that by questioning the competency of senior investigators, CSB management made junior employees question the security of their own jobs.

4. Mistreatment of Senior Investigators Hall and Vorderbrueggen Caused Jeff Wanko to Question His Employment

Horowitz's questioning of Hall's expertise worried CSB investigator Jeff Wanko, a professional engineer with both public and private sector experience. Wanko witnessed Hall take a lower position at a different agency just to get away from the CSB. Specifically, Wanko stated:

Q. Were there any other interactions that, similar to that, that you had with [Daniel Horowitz] or that you witnessed him treating other investigators that way?

¹⁴⁴ Hall Tr. at 14-15 (emphasis added).

- A. Yeah. **He absolutely questioned Rob Hall's ability to perform metallurgy. And if I have a metallurgical question the first person I go to is Rob Hall.** And this was in the Tesoro investigation, and Rob was pointing to high temperature hydrogen attack, which turned out to be correct, and Daniel would not basically would not allow him to say that. He said he had to hire somebody . . . to hire an expert to make that determination and would not allow Rob. And Rob has sat on ASME Piping Committee, technical committees for 20 years. The man knows metal. And Daniel doesn't know s*** and had . . . no reason to question Rob's expertise in this area.
- Q. Why do you think he questioned Rob Hall?
- A. I don't know. Don't know. **Ultimately it led to Rob's departure, and certainly he made -- Rob made a decision to demote himself, go to NTSB, be an investigator.** And it was that severe enough a blow that he just said that's it, he doesn't care about money, he's out of there. Maybe that was Daniel's intent.¹⁴⁵

Wanko was not alone in this view. This is but one illustrative example of abuse perpetrated by the CSB Chairman and Managing Director that caused the resignation of seasoned CSB investigators.

B. Chairman Moure-Eraso's Attempt to Fire General Counsel Chris Warner

On more than one occasion, Chairman Moure-Eraso attempted to hire and fire whomever he chose, in violation of established CSB procedures. Chairman Moure-Eraso improperly hired Richard Loeb, the current CSB General Counsel, without the approval of a majority of the Board. As a result, CSB Board Members sought the advice of CSB's then-General Counsel, Chris Warner, as to how they could prohibit Chairman Moure-Eraso from making any further personnel decisions without their required approval. Acting as he had done since the inception of the CSB and consistent with his duties as General Counsel, Warner provided advice to the requesting Board Members.

After obtaining this advice from Warner, the majority of the Board passed a measure, referred to as a notation item, limiting Chairman Moure-Eraso's personnel authority on February 26, 2011.¹⁴⁶ The next day, a furious Moure-Eraso attempted to terminate Chris Warner's

¹⁴⁵ Wanko Tr. at 71-72 (emphasis added).

¹⁴⁶ A notation item, "consists of a transmittal memorandum, the draft document proposed for adoption, and pertinent attachments necessary for a full understanding of the document." U.S. EPA, OIG, U.S. Chem. Safety & Hazard Investigation Board Should Improve Its Recommendations Process to Further Its Goal of Chemical Accident Prevention, Report No. 12-P-0724, at 10 (Aug. 22, 2012), http://www.csb.gov/UserFiles/file/20120822-12-P-0724_cert.pdf.

employment in response to the Board's action. Warner recounted the events of that day. He testified:

Q. Did the chairman ever acknowledge to you that he was wrong in attempting to try to fire you?

A. The chairman can play it any number of ways. "Oh, I wasn't trying to fire you, I was" -- I don't know. **I mean, it was very clear that he basically said, "I want your resignation on my desk by the end of the day," and left. And said, "You can go home and do it." And I went home and wrote up a letter and said I wasn't resigning. I had done nothing wrong.**¹⁴⁷

Instead of resigning his position, Warner returned to work, only to have Moure-Eraso demote him.

1. Moure-Eraso Exploits Warner's Proper Assistance to Board Members

Moure-Eraso sought autonomy over all CSB personnel actions. Early in his tenure, he wanted to hire an attorney into an SES position. According to witness testimony, there was neither funding nor a human capital plan in place that would justify the hiring of a new attorney. Moreover, Moure-Eraso had not discussed the prospect of hiring an SES employee with his colleagues on the Board.

When the CSB Board Members learned of Moure-Eraso's plan to add a new SES employee, they sought the advice of then-General Counsel Warner to stop it. Warner described the actions of the Board Members when he testified:

And then in February around the 10th they learned of, yes, he's doing some sort of secret hiring, and the board was sort of incensed and went to him and they tried to pass a notation vote that said, wait a minute, we have far greater needs here at the board than one more attorney. And they tried to pass a notation vote that would limit his ability to do these actions until there's a human capital plan and a variety of other things. The chairman calendared that and then in a conversation with Board Member John Bresland basically said, "Don't worry. We'll have a public meeting and we don't do anything until we have that public meeting."

He then went and told the director of human resources to move ahead in secret at all haste to hire this person no matter what and keep it very quiet. The board learned of that and felt that they had been lied to by the chairman, so they on their own asked me for a new voting number. I gave them that voting number, which would be 829(a) and

¹⁴⁷ Warner Tr. at 88-89 (emphasis added).

they subsequently passed, I think on February 16, what we call "829(a)" that said, "Chairman, no, you have" -- "You have personnel authority, but before you do these hires you must have a human capital plan," et cetera, et cetera. So it's slightly different than 829 and it specifically rescinded 829, the calendaring it, as permitted under the board orders.¹⁴⁸

Without Moure-Eraso's support, the Board passed what is referred to as notation item 829(a), requiring the CSB's human capital plan to reflect personnel actions. Moure-Eraso next began to lash out at Warner for assisting with the Board's actions.

2. Moure-Eraso's Attempt to Fire Warner is Reprisal for Processing Board Notation Item 829(a)

One witness believed that Moure-Eraso was under the mistaken impression that Warner orchestrated the vote to limit Moure-Eraso's personnel authority. In fact, Warner, in his capacity as General Counsel, processed the notation item for a vote and wrote an action report on its passage. According to Former Board Member X, then-Board Member William Wark wrote notation item 829(a). Former Board Member X told Committee investigators that although Warner was just doing his job, Moure-Eraso's tried to fire him for it. Former Board Member X testified:

A. So then the next day [after the vote], apparently Dr. Moure-Eraso went into Chris Warner's office and said to him, "I understand you had something to do with the preparation and the approval of 829(a), and because of that, I've lost" -- quoting him, "I've lost my confidence in you and we ask for your resignation."

But as far as I know, Chris Warner had nothing to do with the actual writing of it. He had to process it because that was part of his job, but he didn't instigate it, as far as I can tell.

Q. You said that Mr. Wark was the one that wrote the notation item?

A. I believe so, yes.

Q. Do you know if he consulted Mr. Warner?

A. I don't know. I don't think so [H]e may have had to consult him in terms of putting together the documentation. Mr. Wark didn't write this [referring to the board action report].

Q. Right. And that's from Mr. Warner.

¹⁴⁸ Warner Tr. at 15-16 (emphasis added).

A. This is what they call a board action report, which is the report on the actual vote. The voting document itself, 829(a), is the one that has somehow disappeared. I don't know where it is or why it isn't on the board's webpage. **But Mr. Wark was the person who instigated that and got it circulated to the board members so we could vote on it. And then that led to Dr. Moure-Eraso going to Chris Warner and asking for his resignation.**

Q. Because he had assisted the board with the --

A. Because he assumed that he had assisted the board.¹⁴⁹

Employee A corroborated Former Board Member X's testimony regarding Chairman Moure-Eraso's motivation to fire Warner after the vote on notation item 829(a). In Employee A's view, Moure-Eraso tried to fire Chris Warner in retaliation for advising other Board Members on limiting Moure-Eraso's personnel authority. Employee A stated:

Q. And this vote that occurred, when Moure Eraso didn't participate in the vote, **this is what prompted him to attempt to fire Chris Warner, Chris Warner's involvement in this vote?**

A. **I think so.**¹⁵⁰

Employee A confirmed that Warner's actions were part of his obligation as General Counsel to serve the Board. Employee A testified:

Q. The firing of -- the attempted firing of Mr. Warner you said was in response -- **do you believe that was in response to him doing his job?**

A. **Yeah, absolutely.** I think the sequence there was around the Board's vote on 829, 829(a), which you had asked me about before the break. But I think the Board voted on that and, like, maybe the next day he is trying to fire Warner, in that time period.¹⁵¹

In addition to Former Board Member X and Employee A, several other witnesses stated that Chairman Moure-Eraso attempted to fire Warner for merely doing his job. Board Member Wark sent an e-mail to Moure-Eraso questioning his/her efforts to fire Warner.¹⁵²

¹⁴⁹ Former Board Member X Tr. at 94-96 (emphasis added).

¹⁵⁰ Employee A Tr. at 82.

¹⁵¹ *Id.* at 27.

¹⁵² E-mail from William Wark to Rafael Moure-Eraso, et al. (Feb. 17, 2011).

----- Original Message -----

From: Wark, William
 To: Moure-Eraso, Rafael; Lau, John; Board; Kirkpatrick, Chris
 Cc: Horowitz, Daniel
 Sent: Thu Feb 17 10:33:48 2011
 Subject: Re: Personnel Actions

Rafael,

I understand you're trying to fire Chris Warner for doing his job.

I don't know who you're listening to but you're getting bad advice. I suggest you may want to check with someone who is familiar with government personnel rules, regulations, and employee rights, because the heavy-handed, threatening nature of your conduct and ignoring Board actions duly voted by the majority, has you on very thin ice. In addition to violating any number of federal personnel laws and regulations (called "prohibited personnel practices"), your attempt to fire Mr. Warner is in direct violation of Notation Item 829A which suspended personnel actions in the agency.

I would further suggest that in the future you not send threatening emails to Board Members for doing their job.

Board Member Wark

Employee N also explained, in great detail, the background between Warner and Moure-Eraso. Employee N believed that Moure-Eraso never sought counsel from Warner because the two fundamentally disagreed on the Chairman's role. Like other witnesses, he/she believed Moure-Eraso lashed out after the Board voted on 829(a). Employee N testified:

When Dr. Moure came on, he, for some reason, believed much like the first chairman, that the chairman had the authority over everything, and the Board's role was very minimized. Chris Warner believed the Board was the one that ran the agency and set the high level policy. So there was a friction almost from the beginning between Moure and Warner over that fundamental point.

I think Moure didn't want to take any advice -- this is my opinion from Chris Warner early on because he just had a disagreement that Moure thought he was just in charge of everything and did not want to hear anything else.¹⁵³

Finally, Warner himself believed Moure-Eraso attempted to fire him as an act of reprisal for the assistance he gave Board Members in passing Board notation 829(a). Warner thought the

¹⁵³ Employee N Tr. at 16.

resulting limitation on Moure-Eraso's authority to hire and fire employees contributed to his attempt to end Warner's employment at CSB. Warner testified:

- Q. So the attempted firing was reprisal?
- A. Right.
- Q. And that was a reprisal for what?
- A. For raising the issues with the board about the [personnel] issues concerning Loeb.
- Q. And the way he was hired you mean?
- A. Yes.¹⁵⁴

3. Moure-Eraso's Attempted Firing of Warner Shocks Colleagues

Former CSB Investigations Supervisor Rob Hall informed the Committee about the dramatic events surrounding Moure-Eraso's attempted firing of Warner. He and his colleagues were shocked that Moure-Eraso forcibly removed Warner from the building. Hall was overcome with emotion when he described Moure-Eraso's attempt to fire Warner. Hall testified:

- Q. Can you tell us what you observed during that instance?
- A. Well, I was at work that day, and it was . . . the CSB in the building is actually on three different floors. I worked on the fourth floor. The chairman and Chris Warner were on the sixth floor. And then financial folks were in the basement. But no I just became aware because I got a call from Chris Warner.
- Give me a second [witness begins to get choked-up and emotional]. He called me immediately afterwards, when he was already out of the building, explaining that he had been fired and thrown out of the building, asked me to make sure his staff knew.**
- Q. Take your time. Do you want to take a walk or?
- A. No, I'm fine. I will be fine. **It is just, it was a huge shock at the time, and obviously, there is still some raw emotion there.**¹⁵⁵

Shock and fear reverberated throughout the agency. Employee morale suffered badly.

¹⁵⁴ Warner Tr. at 186.

¹⁵⁵ Hall Tr. at 76 (emphasis added).

4. Moure-Eraso's Attempt To Fire Warner Decimates Morale

News of Warner's firing spread throughout the agency. The ensuing shock among CSB employees sent morale into a tailspin. The firing incident may explain the attrition that has plagued the CSB under Moure-Eraso's tenure. John Vorderbrueggen stated:

Q. And then what effect, since you didn't directly observe it, **what effect did that anecdote [the recounting to the attempt to fire Warner] have on you and your colleagues?**

A. **The whole agency was flabbergasted. The work came to a screeching halt that day.** It happened fairly early in the day, as I recall, and I know that for the next 3 or 4 days we're all scratching our heads, and some of us are saying, Guys, it's out of our control, the best thing we can do is continue on and do our mission. I mean, I know I told my staff that. But at least for the first day, I mean, . . . we were dumbfounded, literally dumbfounded.¹⁵⁶

Moure-Eraso's attempt to bully and intimidate Warner was not the only instance in which he used such tactics. According to witnesses, Moure-Eraso also regularly sent intimidating e-mails to CSB staff. Employee A testified:

Q. And turning your attention back to this e-mail, the fourth line, he -- this is William Wark, mentioning the **"heavy handed threatening nature of your," as in Moure Eraso's, "conduct." Do you believe that's an accurate characterization of Moure Eraso's conduct at CSB?**

A. Which line are you referring to?

Q. The fourth line where he says, "The heavy handed threatening nature of your conduct"?

A. Yeah, that - - that's him. That's Moure. **He's a bully.**

Q. Have you personally seen him bully any other employees?

A. Well, **I think he [Moure-Eraso] sent a bullying e-mail**, which was copied to everybody, to Manuel Gomez, whose employment status is now unclear. . . . **Moure sent him a very obnoxious e-mail back**, and then Loeb wrote an e-mail later for Moure to try to paper it over. I don't criticize Loeb for doing that, but it was very revealing of Moure's nature.¹⁵⁷

¹⁵⁶ Vorderbrueggen Tr. at 100 (emphasis added).

¹⁵⁷ Employee A Tr. at 29-30 (emphasis added).

5. Warner Refused to Resign Because Moure-Eraso's Actions Were Improper

Despite the oppressive nature of Chairman Moure-Eraso's improper actions, Warner did not tender a letter of resignation. Warner was confident that the Chairman's attempt to fire him was a prohibited personnel practice and Moure-Eraso could not fire him for simply doing his job. Warner later returned to work, refused to resign, and sent Chairman Moure-Eraso the following e-mail.¹⁵⁸

From: Warner, Chris
Sent: Thursday, February 17, 2011 5:11 PM
To: Moure-Eraso, Rafael
Cc: Bresland, John; Griffon, Mark; Wark, William; Wright, William; Elkins.Arthur@epa.gov; Bialek.Mark@epa.gov
Subject:

Dr. Moure:

You stated you wanted my resignation today due to a Board vote that occurred last night, and then sent me home for the day. I have absolutely no intention of resigning my position as General Counsel of the CSB because of the Board's vote or for any other reason. I have an exemplary record of performance here at the Board. I suggest you direct your concerns about the outcome of the vote to your fellow Board Members. Your statements today have caused me extreme anguish and physical suffering. I plan to go to the doctor tomorrow and take leave for the rest of tomorrow. I intend to be at work on Tuesday, February 22, 2011. I can be on call over the weekend for bona fide investigative emergencies as one attorney is ill and two others are on leave. Otherwise, I would appreciate some time to recuperate this evening and tomorrow.

Chris Warner

Warner's health suffered as a result of Moure-Eraso's actions. Furthermore, Federal Government personnel policies prohibited them.¹⁵⁹ Employee A testified that the attempt to fire Warner "was part of a string, which have all been reported to OSC."¹⁶⁰ Rob Hall also agreed; Hall testified:

- Q. And you had mentioned that he had attempted to fire Chris Warner, but Chris Warner came back. And he is still working at CSB?
- A. . . . **Chris Warner knew that the firing -- was illegal.** I know that he obtained counsel for himself and I guess was advised to keep going to work because it was an illegal personnel action, and he kept going to work.
- Q. So what position did he have when he went back to work?

¹⁵⁸ E-mail from Chris Warner to Rafael Moure-Eraso, et al. (Feb. 27, 2011).

¹⁵⁹ Warner Tr. at 95.

¹⁶⁰ Employee A Tr. at 30 (emphasis added).

- A. He still had the position of general counsel. Although, with the hiring of Richard Loeb, he had the position really in name only, but all of the general counsel work was shuffled off to Richard Loeb and I believe that Chris Warner worked on FOIAs until sometime more recently, where they did some sort of questionable personnel move that got Warner out of the general counsel position. . . .¹⁶¹

C. Moure-Eraso's Attempted Firing of Warner Had a Chilling Effect at CSB

Warner told Committee investigators that the chilling effect his attempted firing had on CSB caused the attrition that occurred in 2011. Warner told the Committee that Moure-Eraso's abusive behavior caused him to have a "mini heart attack," but his colleagues were supportive, given his years of distinguished service to the CSB. Warner stated:

- Q. So the intent to --
- A. -- Fire me.
- Q. -- fire you had a chilling effect on the entire agency?
- A. **Had an incredible chilling effect. Look at the number of people who left within a year of this happening. Most of the investigators.**
- Q. What was the response of the staff after they learned about this attempt?
- A. There was -- I had a lot of phone calls. I had some heart problems actually right around this time, so -- I lost part of my heart actually, so I had a little mini heart attack. I had a lot of people who came and said . . . "Stick in there. We're backing you up. You're correct."

The board members all sent e-mails protesting the action.¹⁶²

Warner noted that CSB Board Member Mark Griffon, a long time colleague of Moure-Eraso, has publically declared that he disagreed with Moure-Eraso's personnel actions. In the past, Griffon had used back channels to express his dissent. Warner stated:

¹⁶¹ Hall Tr. at 87 (emphasis added).

¹⁶² Warner Tr. at 89-90.

Even Board Member Griffon, if you asked him today whether he thought the vote was good or everything else, he would just -- he would agree with everything now. Back then he came on with Moure and was unwilling to publicly do anything openly that Moure didn't agree with.

But he would -- for that whole year in 2011 '12 he would go talk with staff and basically back up everything the staff was saying. He'd say, "I disagree. I disagree," but he would not publicly write anything. And it's only recently where he's said, "I've had it." He's gone to Congress, he's gone to Waxman, he's gone to the Attorney General. So, I mean, if you convince somebody that's known -- you for 30 years to just call it that's pretty -- pretty telling.¹⁶³

Additionally, Managing Director Horowitz admitted that Moure-Eraso's treatment of Warner had a chilling effect on other CSB employees. He testified:

- Q. Do you think that the attempt to or at least asking Chris Warner for his resignation had a chilling effect on the agency, or other folks were fearful of retaliation because of it?
- A. It was a tense and conflicted time. So I think it had . . . a lot of people were having a lot of upset feelings at that time about it, yes.¹⁶⁴

2. Moure-Eraso's Retaliatory Actions Amount to an Undeserved Demotion of General Counsel Warner

When Chairman Moure-Eraso realized that he could not fire Warner, he demoted him. In September 2012, Moure-Eraso removed Warner from the General Counsel's office, stripped him of his duties as General Counsel and limited his portfolio. This harsh demotion took place at the same time of Richard Loeb's appointment as CSB's new General Counsel. Former Investigation Supervisor Vorderbrueggen stated:

- Q. Speaking of being blackballed, in your experience and observation, **did you observe reprisal against Chris Warner? Do you believe that's why he was demoted from --**
- A. **Well, I think that in and of itself was reprisal. The fact that Rafael [Moure-Eraso] says -- number one, when he comes in and says you're fired to me that's reprisal, and then when Rafael discovered he couldn't fire him, he didn't have the legal right to, and he would never win that from what I understand, the fact that he took him out of his role as general counsel and**

¹⁶³ Warner Tr. at 90 (emphasis added).

¹⁶⁴ Horowitz Tr. at 87.

summarily appointed Richard Loeb, who had no -- Chris Warner has since 1997 experience with the Chemical Safety Board, and Chris Warner knew . . . what our mission is and what we need to do.¹⁶⁵

Moure-Eraso limited Warner's responsibilities to Freedom of Information Act and ethics issues. Employee A testified that this significant change in duties, although not a pay decrease, constituted a demotion.¹⁶⁶ Managing Director Horowitz, however, refused to admit such action was a demotion. Horowitz testified:

Q. So it was a demotion?

A. No.

Q. What does he do now?

A. Senior counselor to the chairperson.

Q. **And what is that [Senior Counselor to the Chairman] exactly?**

A. **His [Warner's] primary responsibilities are for freedom of information, agency ethics. He was already doing a lot of freedom of information work as general counsel.**¹⁶⁷

* * *

Q. **So you don't view this as a demotion?**

A. **I mean, I guess it's in the eye of --**

Q. **Once general counsel and now you're handling FOIA?**

A. **I mean, it's somewhat in the eye of the beholder, I guess.** All I can say is if I were in his shoes, I would be relieved. But I mean, I guess anyone can have a view on this.¹⁶⁸

A pervasive climate of fear ensued following Moure-Eraso's actions against Chris Warner. These actions had far-reaching effects.

¹⁶⁵ Vorderbrueggen Tr. at 105.

¹⁶⁶ Employee A Tr. at 82-83.

¹⁶⁷ Horowitz Tr. at 39.

¹⁶⁸ Horowitz Tr. at 39-40 (emphasis added).

IX. After the Demotion of Warner, Agency Employees Fear the Chairman's Retaliation in All Aspects of Their Work

FINDING: Current and former CSB employees agree that Chairman Moure-Eraso retaliated against whistleblowers. As a result, all employees fear retaliation at the hands of the Chairman.

The abusive and hostile work environment created by Chairman Moure-Eraso has instilled fear throughout the agency. Staff fear recriminations if they question the Chairman and his management team. Former Board Member X testified:

Q. Did staff and Board Members feel like they could -- you had mentioned before the ability to discuss things with people with differing opinions and you were able to work together and come to a consensus on things. Did you feel that way under Chairman Moure-Eraso? **Did you feel like you could come and express an opposing opinion and you could have a civil conversation, or were people sort of afraid to do that?**

A. **I think generally people would be afraid to do that because they might think there'd be some action taken against them because of that.**¹⁶⁹

Agency personnel have witnessed Moure-Eraso retaliate against several employees who contradicted or questioned him. After a senior OSC attorney purportedly revealed the names of CSB whistleblowers to CSB General Counsel Loeb, their fears of retaliation came true. Employee A told the Committee that whistleblowers whose names were revealed suffered reprisal. Specifically, Employee A testified:

Q. **So that the names that were revealed to Loeb, have those employees had reprisal actions taken against them after that?**

A. **Yes, I believe that would be accurate.** I know that -- well, I was -- again, there are employees, and there's Board Members. The employees I'm aware of were **Mr. Warner and myself and [REDACTED], and . . . we've suffered reprisals.** That's our belief. So we were left with the recourse of reporting our concerns to OSC. And the dilemma is . . . what do you do when the watchdog is corrupt? That is why I'm -- here. We're waiting. We're waiting for OSC to do something.

¹⁶⁹ Former Board Member X Tr. at 88-89 (emphasis added).

I think the IG probably did what they could. They issued a 7 day letter. And some of these issues aren't that complicated. The people either did what is alleged, or they have some other story.¹⁷⁰

Warner, one of these whistleblowers, related to the Committee that Moure-Eraso took adverse action against him upon learning of his whistleblower status. Specifically, Moure-Eraso stripped him of most of his professional responsibilities. Even though Warner was still officially the CSB's General Counsel, Moure-Eraso refused to communicate with him, instead choosing only to speak with Loeb. According to Warner, he became General Counsel in name only. Warner testified:

Q. **[W]ere there any adverse actions taken against you that you believe were related to the fact that your identity was now known as a whistleblower?**

A. Well, **absolutely** -- well, clearly everything that happened after that was accelerated. **I was not involved in most legal operations that occurred.** Moure would just go to Loeb. He wouldn't even make a pretense of asking general counsel on whether I have to get a vote or do this or that, and continued to go to Loeb on everything. So it was very clear during 2012 that **I was general counsel in name only.** . . .¹⁷¹

A. Even CSB Board Members Fear Retaliation from the Chairman

Chris Warner was one of the agency's first employees, and he has worked under every CSB Chairman. Unfortunately, Warner perceives a significant difference between the relationship Chairman Moure-Eraso has with the current board and the relationship between previous Chairmen and their Boards. Warner added that the current Board feels powerless and that agency staff is scared to say anything to Moure-Eraso, Loeb, and Horowitz. Warner testified:

Q. **During your time during the life span of the Chemical Safety Board, have you ever seen the board operate this way before or experience -- this level of toxicity in the workplace?**

A. **No, I haven't.** . . .

So no, I've never seen it like this at all. But more importantly, that everybody is confused. There were rules, there are procedures, there are board orders, people could -- yes, we have this protection. You could do this or that. Now the **Board Members** just throw up their hands and don't know what their rights are. They don't know what they can do and not do. They

¹⁷⁰ Employee A Tr. at 90 (emphasis added).

¹⁷¹ Warner Tr. at 189-190 (emphasis added).

sort of **feel powerless**. They tell the staff they're powerless, and **the staff is scared about saying anything and everything to any of those three.**¹⁷²

Witnesses the Committee interviewed testified that Chairman Moure-Eraso, Managing Director Horowitz, and Richard Loeb essentially run the agency. Warner testified, “[b]asically it's Loeb, Horowitz and Moure basically run the place.”¹⁷³ Former Board Member X stated that the Chairman, Loeb, and Horowitz would make all the decisions, excluding the other CSB Board Members. Former Board Member X stated:

But you have to realize that his management style, from my perspective, was somewhat strange, unusual in that . . . [i]t was very noninclusive. It was very little in the way of discussion with the other board members. It was much more, again, as I say, **the chair, Dr. Horowitz and Richard Loeb would get together and come up with some conclusions as to the way things should be, without taking into consideration the opinions of the other board members.**¹⁷⁴

Employee A testified that the Board Members have serious reservations about the way Moure-Eraso has been running the board, but are afraid that Moure-Eraso's management may tarnish their reputations if they voice their concerns. Employee A stated:

Q. Do you know what Board member Rosenberg and Griffon's reaction has been to the way the Board has been run in the past year and a half?

A. I think they're disturbed. I think Griffon has been disturbed for quite a while. I think he's **raised concerns both internally and externally. And I think he's probably suffered a form of reprisal.** That's not the same as an employee, but **I understand that he's been smeared in various places.** You'd have to ask him for the details. I don't know, but that's what I've heard.

So there is a little fear there, I think, with Rosenberg and Griffon that their reputations will be sullied, or some other action will be taken by Moure and others working for him to hurt them, not physically but professionally. **And I think their concerns are very well founded.** That's my opinion.¹⁷⁵

B. Administrative Support Employees Fear for Their Jobs

¹⁷² Warner Tr. at 166-167 (emphasis added).

¹⁷³ *Id.* at 100-101.

¹⁷⁴ Former Board Member X Tr. at 88 (emphasis added).

¹⁷⁵ Employee A Tr. at 95-96 (emphasis added).

After the attempted firing and demotion of Counsel Warner, agency staff feared for their jobs. Former investigation supervisor Hall stated, “**after the chairman attempted to fire Chris Warner, I mean, that had a very chilling effect on the entire staff. . .**”¹⁷⁶ Further, Employee N told the Committee that this incident sent a clear message to CSB employees not to do anything of which the Chairman would disapprove. Employee N testified:

- Q. -- after [the firing incident]? And when --
- A. And that -- and if I can back up a little bit. [The firing of Warner] **had a very chilling effect** because most of the staff became aware of it, and it was a **very strong message to the entire agency, never ever question or do anything that Moure might not approve of.**
- Q. Do you know of anyone specifically that left after this incident because of this chilling effect?
- A. I don't think you can have a direct tie. **I think that the culture at CSB had very much changed.**
- Q. After this incident?
- A. **After that incident, and we started losing investigators, senior investigators.** Some of them said they did not want to work in that kind of an environment.¹⁷⁷

Shortly after Moure-Eraso's attempt to fire Warner, he directed Employee N to process a personnel action for Richard Loeb. Employee N had been with the CSB since its inception and was very familiar with CSB's hiring procedures. Thus, in an effort to avoid processing what he/she believed to be an improper personnel action, he/she contacted the General Counsel's office for advice. In the following e-mail, both the Human Resources Director, John Lau, and Employee N state they feared retaliation by Chairman Moure-Eraso and Managing Director Horowitz if they did not comport with the Chairman's directives. Employee N sent the e-mail to Chris Warner, CSB's General Counsel at the time. The e-mail demonstrates Employee N's palpable fear of retaliation.¹⁷⁸

¹⁷⁶ Hall Tr. at 75-76 (emphasis added).

¹⁷⁷ Employee N Tr. at 18 (emphasis added).

¹⁷⁸ E-mail from [REDACTED], CSB, to Chris Warner, General Counsel, CSB (Mar. 4, 2011) [hereinafter [REDACTED] e-mail].

From: [REDACTED]
Sent: Friday, March 04, 2011 8:21 AM
To: Warner, Chris
Cc: [REDACTED]
Subject: FW: New Employee

Chris,

I continue to be extremely concerned about whether or not it is legal to pay the new employee. I need your opinion on how to proceed.

As discussed in yesterday's e-mail, the hire does not appear to be in accordance with Notation Item 829A. Therefore I need to know if it is legal for me to take any action to facilitate paying this individual in the immediate term. Based on direction given to John Lau earlier this year by the Chairman to process the job offer, I am concerned that the Chairman or Managing Director will direct me to take any action as well, so I urgently need to know if action is legal. Also, if it is determined that paying this individual is not legal, would I be personally or criminally liable if I do anything to facilitate the payment?

As you are aware, this is a very sensitive situation. A couple of weeks ago the Chairman asked you to resign for assisting another Board Member in processing a notation item. A couple of days ago the Chairman directed our HR Director to process the job offer, which the HR Director told me he did because he feared retaliation by the Chairman or Managing Director if he did not. I may be facing a similar situation - facilitating payments to an individual who may have been illegally transferred, so need your legal opinion on the proper way for me to proceed. I have been in federal service for over 20 years, and throughout my career I have been careful to ensure that my actions were proper. I do not want to do anything improper, but I also do not want to be retaliated against so I am in a very precarious situation.

"which the HR Director told me he did because he feared retaliation by the Chairman or Managing Director if he did not"

"I do not want to do anything improper, but I also do not want to be retaliated against so I am in a very precarious situation."

[REDACTED]

[REDACTED]

¹⁷⁹ Employee A Tr. at 66-69.

¹⁸⁰ *Id.* at 70 (emphasis added).

¹⁸¹ *Id.* at 69.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. Moure-Eraso's Demotion of CSB Staff Extended Beyond the Office of General Counsel

Employee N has been with the CSB since 1998. He/She started with CSB as a program analyst and became [REDACTED] in 2000. In that role, he/she was the [REDACTED], among other responsibilities. As [REDACTED] at CSB, Employee N's primary role is to ensure that the Board is properly expending its funds in accordance with Board orders.

In the course of performing his/her duties during Moure-Eraso's tenure, Employee N noticed a number of irregularities, and questioned the expenditure of funds made without Board approval. Specifically, he/she questioned the validity of student loan payment increases on which the Board had not voted. Former General Counsel Warner testified:

¹⁸² *Id.* at 25.
¹⁸³ *Id.* at 68.
¹⁸⁴ *Id.* at 24-25.

I think I've documented a variety of things that have happened on [sic] **retaliation against individuals that have been raised to me or the IG.** But those are typically the things. ■ raising issues about funding, board votes. You know, all of a sudden we're giving out student loan amounts that are six times higher than they were, but the board hasn't voted on it. There's no annual budget voted on at the board. There's no board vote on awards. There's nothing else.¹⁸⁵

As a result of his/her actions, Employee N believes he/she suffered reprisal. In fact, similar to Warner and Employee A, Employee N saw his/her job responsibilities curtailed and transferred to Loeb.¹⁸⁶ Yet, he/she has chosen to remain at the agency. In spite of Employee N's willingness to stay on, a number of employees have left because they could no longer withstand the abusive work environment prevalent at CSB.

Further, in the summer of 2012, Managing Director Horowitz took away Employee N's role as ■, without any explanation whatsoever.¹⁸⁷ Employee A testified to the Committee that Employee N's oversight role has been limited. Employee A confirmed that Employee N lost his/her position as ■, and lost a number of his/her other roles for the agency. Employee A also testified that Employee N received e-mails from management "putting [him/her] in [his/her] place."¹⁸⁸

Employee A also told Committee staff that Employee N's duties changed because he/she asked questions about financing and contracting issues.¹⁸⁹ Instead of answering Employee N's questions about certain expenditures, the Chairman and Loeb demanded that Employee N certify that funds existed—nothing more. Employee A stated:

Q. Do you know if, in fact, Employee N was retaliated against because of these issues?

A. Yes, I believe so. I think that in general ■ would raise issues about financial matters, concerns, questions, like I did on the IT cap reply, and because of that, [his/her] role was changed, reduced. And I believe at one point [he/she] got an e-mail from somebody, maybe Loeb or Moure directly, just saying, look, your job is to certify whether or not we have funds, nothing else.¹⁹⁰

Witnesses told the Committee that CSB personnel who disagree with Moure-Eraso and his management style risk losing their jobs. Former General Counsel Chris Warner and others

¹⁸⁵ Warner Tr. at 106 (emphasis added).

¹⁸⁶ Employee N Tr. at 6-7.

¹⁸⁷ *Id.* at 6.

¹⁸⁸ Employee A Tr. at 34-35.

¹⁸⁹ *Id.* at 34.

¹⁹⁰ Employee A Tr. at 37.

testified that Moure-Eraso and his management team marginalized Employee N and anyone else who disagreed with them.¹⁹¹

Testimony further revealed a tendency on the part of Chairman Moure-Eraso to instruct CSB employees to take questionable actions. For example, Employee N was concerned that Loeb's hiring was improper since the budget did not account for this SES position. Employee N also raised concerns about the propriety of student loan payments. It was well within the scope of his/her duties for Employee N to voice such concerns. In both cases, the CSB management team either overlooked or completely ignored his/her concerns. In fact, they instructed Employee N to take actions he/she believed to be inappropriate. As it turned out, this was not limited to Employee N.

X. CSB Leadership Directs Employees To Take Improper Actions

FINDING: Chairman Moure-Eraso's disregard for the proper Board governance processes caused CSB employees and fellow Board members consternation, leading to an unproductive work environment.

A. Improper Contracting Practices

One provision of Board Order 28, discussed previously, governs the use and expenditure of CSB funds. Because Chairman Moure-Eraso and Managing Director Horowitz refuse to uphold Board Order 28, however, they frequently have to direct staff to act in spite of it. Specifically, Board Order 28 states the Chairperson possesses "authority to control the use and expenditure of funds, including the power to authorize and execute contracts and interagency transfers in an amount **not** to exceed \$50,000."¹⁹² This means any contract which exceeds \$50,000 requires Board approval. In March 2012, Chairman Moure-Eraso sought the Board's informal approval for a five-year contract for public affairs support and video production services known as the "Sandy Gilmour Contract." Employee N testified:

- Q. Can you give any examples of that [improper expenditures] that we haven't already touched on?
- A. Yeah, I know Richard Loeb and he sent me an e-mail that said basically, well, I know in the past you have concerned yourself with whether or not the Board approved a Notation Item, but you really don't need to do that. As far as particular procurements, I know that they started going out without Board approval. One of the biggest examples was we have a contract with Gilmour Communications for public affairs work.

¹⁹¹ Warner Tr. at 101.

¹⁹² Board Order 28 (emphasis added).

After the 2011 operating budget got calendared we still needed to have a contract for that year's public affairs work. I asked if we had received a Board approval for that, and [I] kind of got no answer about it. I'm trying to piece back a few years, that Moure just wanted the members just to, via e-mail, or just sit down and say yes we think this is a good idea go ahead and fund it. But the Board orders pretty clearly say you have to either have it approved in the operating budget or have it approved as a standalone notation item. You can't just say, oh yeah, that is a good idea. Let's do it.

Moure directed me to process that procurement without the Board approval. I was cc'd on an e-mail from John Bresland who had some concerns about it. I asked John Lau who was my supervisor what I should do. Within a couple of minutes I got an e-mail from Moure saying, just process it. Don't listen or take advice from anyone else.

Q. Did you process it?

A. Yes, and reported it to the IG.¹⁹³

Notation Item 662 governs the Sandy Gilmour Contract. In accordance with Board Order 28, Notation Item 662 states that the full Board must approve expenditures in excess of \$50,000. The requirement goes even further, requiring a formal Board vote. Then-Board Member John Bresland expressed his dismay with Chairman Moure-Eraso's attempt to subvert the process. The Chairman sought the Board's approval without the required vote. On March 9, 2012, Bresland sent the following e-mail to the Chairman:

¹⁹³ Employee N Tr. at 46-47 (emphasis added).

From: Bresland, John
 Sent: Friday, March 09, 2012 10:17 AM
 To: Moure-Eraso, Rafael; Board
 Cc: Loeb, Richard C.; Horowitz, Daniel; Warner, Chris; [REDACTED]
 Subject: RE: Sandy-Gilmour Contract-Follow up

Rafael,

This in response to your March 1 and March 5 e-mails regarding the Board approval of Sandy Gilmour contract.

Notation Item 662 for the execution of a contract for public affairs support and video production services was approved by the Board on November 14, 2008. The approved contract has a maximum year value of not to exceed \$6,743,178. In the same Notation Item the Board approved the allocation and expenditure of appropriated FY 2009 funds up to a fiscal year maximum of \$395,000.

The Board is required by Board Order 1 to approve "Contracts, interagency transfers, or other expenditures exceeding \$50,000". Since the approval of Board Order 1 in 2002 the Board has voted by Notation item to satisfy this requirement. Board Order 28, originally approved in 2002, repeats this requirement in paragraph 8(f).

As I understand your March 1 e-mail, you are asking the Board to approve funding of \$278,000 for the public affairs support contract. I am prepared to vote by Notation Item on the funding of the \$278,000. However, in your March 5 e-mail you are asking the Board to express its concurrence on the expenditure of \$ 278,00 by e-mail. I am not prepared to do that. Board Orders 1 and 28 are very clear that Board approval is required for "expenditures exceeding \$50,000".

As an aside, I note that Board Order 28 requires Board approval of the "final operating budget of appropriated funds". A FY 2012 operating budget has not been approved by the Board. In FY 2010 the operating budget included the approval of the public affairs contract, thus eliminating the need for a separate Notation Item. A Notation Item for the FY 2012 operating budget should include the funding for the FY 2012 public affairs contract.

Let me reiterate that I am not prepared to approve the expenditure of \$278,000 by e-mail. It should be approved by a Notation Item or by a vote at a public meeting.

John

"[I]n your March 5 e-mail you are asking the Board to express its concurrence on the expenditure of \$278,000 by e-mail. I am not prepared to do that. Board Orders 1 and 28 are very clear that the Board approval is required."

As Employee N testified, he/she did not feel comfortable processing the request without Board approval because he/she knew doing so would violate Board Order 28. He/She contacted Deputy Managing Director John Lau for guidance, but received an e-mail from the Chairman minutes later ordering him/her to process the request:

From: Moure-Eraso, Rafael
Sent: Friday, March 09, 2012 10:41 AM
To: [REDACTED]
Cc: Lau, John; Horowitz, Daniel
Subject: Gilmour Contract
[REDACTED]

Notwithstanding any other advice or consultation which you may be following, I authorize and direct that you take action to commit and obligate the funds for the Gilmour contract per my e-mail of 5:43 pm on 3/8/2012. Please confirm that you are following this direction.

Thank you,
RME

In this manner, Chairman Moure-Eraso unilaterally approved the funds for the contract in direction violation of Board Order 28. By approving the funds, he demonstrated complete disregard for both CSB rules and the concerns and opinions of fellow Board Members. In a follow-up e-mail to the Chairman on this matter, then-Board Member Bresland described the Chairman's actions as "a blatant disregard" of the CSB approval process:

From: Bresland, John
Sent: Wednesday, March 21, 2012 1:42 PM
To: Moure-Eraso, Rafael; Board
Cc: Loeb, Richard C.; Horowitz, Daniel; Warner, Chris; [REDACTED]
Subject: RE: Sandy-Gilmour Contract-Follow up

Rafael,

In my March 9 e-mail (see below) to you I indicated that that approval of funding for the public affairs contract should be by Notation Item or by a vote of the Board Members at a public meeting. Mark Griffon, in a separate e-mail concurred with me.

Since sending you my March 9 e-mail I have determined that \$278,000 has been committed to fund the public affairs contract and that the Bureau of Public Debt has been instructed to obligate that sum. As you are aware, the Board has not approved this expenditure of the \$278,000, either by Notation Item or by a vote at a public meeting.

I am very concerned about this blatant disregard of the Chemical Safety Board's process for approving expenditures of more than \$50,000. Please take the necessary steps as soon as possible to rescind the commitment of the \$278,000 until the Board approves the expenditure.

"I am very concerned about this blatant disregard of the CSB's process for approving expenditures..."

B. Improper Use of Personal E-mail for Official Board Communications

There is evidence that Chairman Moure-Eraso, Managing Director Horowitz, and General Counsel Loeb may have violated the Federal Records Act (FRA) by using personal e-mail accounts to conduct official CSB business. The FRA defines federal records as “documentary materials that agencies create and receive while conducting official business that provide evidence of the agency’s organization, functions, policies, decisions, procedures, and operations, or that contain information of value.”¹⁹⁴ Using personal e-mail to conduct official business creates a potential gap in the record. This Committee has investigated numerous instances of the inappropriate use of personal e-mail to conduct official business. Such use often occurs in an attempt to hide improper, inappropriate, embarrassing, and potentially illegal material from investigative entities such as inspectors general and Congress, as well as FOIA requesters.

Prior to the start of the EPA IG’s investigation of CSB, Moure-Eraso, Horowitz, and Loeb demonstrated scant knowledge of Federal Records Act. Horowitz testified:

- Q. Do you use personal e-mail accounts ever to conduct business while you're at the CSB?
- A. I have sometimes, or from home. But last year the IG raised it as an issue, and I have -- made a point to avoid it as much as possible.
- Q. Well, when you do use your personal e-mail account, do you make sure to forward or -- copy it to your official account?
- A. I never gave it much thought prior to the IG raising it. We don't have any policy, like--some agencies, on use. But when they raised it, I set up rules so that if I receive e-mail from work -- because a lot of times, like, an address will auto fill. It's forwarded back or I--reply back from my official account, so that it's --
- Q. Well, you are aware of the Federal Records Act, though?
- A. Yeah, yeah. No, I'm aware that it exists. I haven't read it or anything.¹⁹⁵

Horowitz’s attitude about the possible violations of federal law is consistent with the manner in which he has operated as CSB’s Managing Director. General Counsel Richard Loeb testified candidly that CSB’s express purpose in communicating via private e-mail accounts was to conceal deliberations among Moure-Eraso, Horowitz, and Loeb from the Office of General Counsel:

¹⁹⁴ 44 U.S.C. § 3301.

¹⁹⁵ Horowitz Tr. at 88-89.

- Q. So what I hear you saying is that you sometimes were e-mailing with the Chairman--
- A. Uh-huh.
- Q. -- on personal e-mail?
- A. Yes.
- Q. And this was an exchange of drafts?
- A. Always drafts, nothing ever final. And it would typically be a draft of something he was planning on sending to the Board or to a staff member or something.
- Q. Okay. And my understanding, and please correct me if I'm wrong, is that there is a dispute with the EPA IG over the production of documents that includes personal e-mails between, I believe, you and possibly the Chairman to private counsel that's been retained by the agency and whether those documents are considered attorney-client privileged. Is that correct?
- A. I believe that's true.
- Q. So I guess I'm confused that that --
- A. Well, the --
- Q. My understanding is that those were e-mails that were conducted through the use of personal e-mail accounts.
- A. Those initially were. They were done through personal e-mail accounts. And as I told others, the reason for that is there was a belief that our e-mail, particularly with respect to the Office of General Counsel, was not -- I don't want to use the word "secure," but not -- there was a belief that the Office of General Counsel could see those e-mails and that people -- there was no expectation -- I think it's been remedied, but there was a belief that people could get into other people's e-mails on the CSB system. Apparently, there had been some issues of that prior to my getting there. And e-mails were, I'm not sure quite how, but they were -- people got in.

So the concern was that when we retained Mr. Broida [the outside counsel for CSB], that we not initially put that on the CSB e-mail server, but we have retained everything as a record. So that is

retained as a record. After talking to the EPA IG, we switched everything over to the CSB account, so we do have that. And I would consider those e-mails to be attorney-client privileged with respect to advice Mr. Broida has given us. But I don't deny that there are official records of the CSB.¹⁹⁶

CSB leadership's use of private e-mail was part of its effort to completely shut out Board Members and staff of all CSB deliberations and decisions. It is another example of how Moure-Eraso, Horowitz, and Loeb are at odds with other CSB employees and the agency's authorizing statute – all in an apparent effort to maintain absolute power. Documents and materials obtained by the Committee show that they systematically disregard rules and regulations and abuse staff and other CSB Board Members. They do so as a means to advance their own agenda and ideology.

XI. Conclusion

The actions of a select few—Chairman Moure-Eraso, Managing Director Daniel Horowitz, and General Counsel Richard Loeb—have compromised the Chemical Safety and Hazard Investigation Board's mission and left the agency in disarray. Their actions, ranging from belittlement of staff and micromanagement of CSB investigations, to prohibited personnel actions and improper staff directives, are simply unacceptable. These practices must change without delay.

The CSB is charged with undertaking investigations into accidents which have often had tragic human consequences. Following an investigation, CSB is to issue insightful reports that provide analysis and explanation of the facts and circumstances of the specific incident. The agency must complete these investigatory reports as quickly as possible in order to provide answers and, if appropriate, effectuate positive change in the related industry. The toxic and abusive work environment at CSB caused a high rate of attrition, which has stymied the ability of CSB to provide any public safety benefit.

Current leadership mishandled the identity of whistleblowers and wasted millions of taxpayer dollars on redundant and lengthy investigations, some of which have been pending for years. Employees who raised questions about agency management or spending faced retaliation. Relations among the Board Members are strained to the extent that discussion and votes regarding investigations are not occurring in a timely manner. The crisis situation at the CSB cannot continue. To ensure that CSB gets back on track, CSB leadership needs to make drastic changes.

¹⁹⁶ Loeb Tr. at 41-43.



U. S. Chemical Safety and Hazard Investigation Board
Office of Investigations
MEMORANDUM

To: CSB Board Members February 10, 2014
CC: Chairman Rafael Moure-Eraso
From: Investigation Supervisors and Team Leads
Subject: Rebuilding Trust

We are writing to you as the entire CSB Investigation Team Leads/Supervisors group to express our serious concerns regarding Board members behavior that has done significant damage to the morale of investigative personnel and the mission of the CSB. We are the lead investigators, team leads and supervisors of the agency responsible for leading and managing the conduct of incident investigations and studies, producing draft reports, and reconciling the opinions of the Board so that a final report is approved and prevention of injury, death and harm to the environment is furthered. Since 2010, as agency leaders, we have initiated a number of processes and tools to seek Board input and guidance early on in our investigations so that the final draft reports have been fully vetted and the Board member views have been reconciled. These processes include the full availability of investigative records and correspondence; the development of scoping documents and recommendations briefs; the circulation of draft reports; and the use of logic tools, report outlines, and Board briefings. Board/staff communications must have the goal of reaching resolution and implementing safety improvements expeditiously. We are dedicated to ensuring that all the Board Member input is addressed and the CSB mission is advanced.

Vital to this process are staff/Board candor, transparency and honesty—without these values the process breaks down and trust is lost. Both the Board and staff must trust that the process is operating to honestly resolve issues. It is in the spirit of honest communication that we write to you to express our profound disappointment that our trust is broken.

We are seriously concerned that over the last number of months Board member actions and behaviors have impaired the Board/staff relationship and effective performance of the agency's mission. Some examples:

- In June 2013 Board Member Rosenberg traveled to the Denver office and held unannounced private meetings with individual investigators. In these meetings she stated that she was working to remove Chairperson Rafael Moure-Eraso and Daniel Horowitz from their positions. She stated she was interested in assuming the role of Chair. She had similar follow-up conversations with staff on several occasions. These communications had a severely disruptive impact on the investigative staff.

- During the resolution of Board comments in September 2013 for the NDK investigation, Board Member Griffon spoke to a member of the investigative team and stated he was delaying the approval of the report so that Daniel Horowitz would not receive credit for the report and attainment of his annual goals.
- In October 2013 Board Member Griffon met with the Director of the Western Regional Office (WRO) in Denver. At that meeting the Board Member Griffon made a request to retard progress on the reports being developed out of the WRO. He stated the completion of significant reports made Chairman Moure-Eraso look good which he viewed as a negative outcome. The WRO Director replied that the staff's job is to complete high quality reports in a timely manner.
- During the NDK public meeting in November 2013 Board Member Griffon stated publicly that the delay in the release of the report was a failure of planning. Board Member Griffon did not mention that the lead drafter of the report, who was the only investigator deployed to the incident still on the investigative team, was out for a lengthy maternity leave and also dealing with the death of her mother and additional staff resources were unavailable. A 50-year mechanical engineer and ASME committee chair who spoke at the public meeting noted that the technical analysis conducted by the CSB was challenging and time-consuming, recognizing that incident investigations can be protracted. Board Member Griffon then uttered to nearby personnel "is that guy on Horowitz's payroll?"
- In recent conversations with staff, Board Member Rosenberg stated that Rafael Moure-Eraso may be gone by September 2014. She also said that it may be the case that no reports such as Chevron, Deepwater, and Tesoro are approved until then.
- In the last year, Board Members Rosenberg and Griffon have initiated or engaged few investigation team leads and supervisors in conversations about questions or concerns concerning CSB investigative reports—often by-passing team leads to converse with individual investigators. Many report reviews have only superficial evaluative remarks such as "I am not convinced" or "you have not adequately addressed this issue" that provide little substantive direction for improvement or alternative policy approaches. In the December 2013 Chevron draft review it was obvious that neither board member had read the report prior to a key quorum meeting—Board Member Griffon asked if he had been sent the draft. Board Member Rosenberg's written comments only extended to the Executive Summary of the report.
- As described herein board member actions are working to delay reports--it is all the more disheartening to hear those same Board members working actively to reach out to stakeholders and the public to complain that reports are being delayed through poor planning or ineffective leadership. While the Chair has ultimate authority over deployments, the other two board members tacitly supported or did not oppose deploying the staff to a number of new investigations adding to the investigative backlog. We remain concerned that investigators are deployed to new incidents at a rate that maintains a backlog of investigations while the Board

has not seriously addressed closing administratively old cases the agency has been unable to place on our annual action plan for a number of years.

- Leading up to the January 15, 2014, Chevron Public Meeting Board Member Rosenberg assured two CSB staff members on separate occasions that she supported the safety case regulatory recommendations and would vote for the draft Chevron regulatory report. One assurance of support was made just hours before the meeting. Board Member Griffon did not state his voting position to CSB staff. Five hours into the meeting Board Member Griffon presented a prepared typed motion to postpone the vote to address various issues which was seconded by Board Member Rosenberg. The motion had not been shared with the leadership or staff and many of the issues were presented to the staff for the first time in the motion. Half of the issues in the motion were taken directly from a letter by Congressman George Miller to the Board directing the staff to investigate regulatory issues related to Cal/OSHA and Contra Costa County. Many of the issues were either addressed in the CSB draft, not causally related to the Chevron incident or in the case of abatement, subject to a dispute between Congressman Miller and the Governor of California. This interjection of outside political influence raises a concern over the independence of the CSB. While some on the Board had been provided the Congressman Miller letter in advance, the CSB investigators saw the letter for the first time at the start of the public meeting. Similarly, a letter received by some Board members from Professor Nancy Leveson addressing the report's recommendations was not provided to the staff but was referenced by Board Member Rosenberg in her opening remarks. The Leveson letter was also referred to and submitted into the record by former CSB Chairman John Bresland, who acknowledged in his written comments that he was a Chevron contractor. Chevron outside legal counsel conferred with Professor Leveson about submitting the letter. Board Member Rosenberg also cited as key evidence an email she received from a UK writer, Rory O'Neill, but has yet to share that email with the investigators. The failure to provide the staff with what are asserted to be key documents and seek responses, providing misleading assurances about member positions on issues or support for reports, and the failure to substantively engage the investigative staff on issues, questions and concerns—all speak to a seriously broken process. In fact, the actions by two board members in the Chevron review process and public meeting can only be explained by what appears to be a planned effort to mislead and publically embarrass the staff and agency. These actions not only harm the agency that you are sworn to serve but damage the cause of our preventative mission and the credibility of the work produced by the CSB and its staff. These actions ultimately weaken our agency's credibility with stakeholders, including organizations that many of us have worked with for decades.
- In a letter to Congressman Larson dated January 27, 2014 Board Members Griffon and Rosenberg stated the investigative team "cut and paste" sections of the Chevron report in the Tesoro draft. The staff only learned about the letter from press reports and these concerns were never addressed to the staff. While the letter implies the safety case is a new issue inserted into the Tesoro report, the staff has

been submitting detailed Tesoro plans and drafts that address the safety case since May 2013. This negative reference is offensive to a hard working staff--the safety case section of the Tesoro draft is a unique analysis of the Tesoro causal factors, Washington L&I regulatory gaps and how the safety case would play a more preventative role. The regulatory section also compares the Tesoro incident to Chevron arguing that issues related to both incidents make a strong argument for the needed fundamental reform.

We are writing because it is our hope that these behaviors will cease and the broken trust can be rebuilt. We have serious concerns that these problems, if uncorrected, will likely lead to the departure of many of the investigative staff who do the actual work of the agency. We propose that the board members address in the upcoming facilitated Board meetings meaningful solutions to the problems we have described. To assist in this effort the investigative staff leadership proposes the following:

1. Board members and staff will not speak ill of agency employees outside of the agency. Under no circumstances will board members engage staff in the manner described in this memo. The CSB should develop a personnel conduct and communication policy for the agency.
2. Board members must work sincerely and diligently to comprehensively review reports in a timely way and further the mission by pitching in to reduce the investigative backlog. Board member reviews should be conducted within suggested time frames--this is their most important task. Board members will work through and thoroughly engage the investigative team leaders and supervisors to resolve issues and concerns. A CSB Board Order or regulation that describes board member duties, responsibilities, timely completion of requested work, and appropriate conduct should be implemented.
3. Board members must be open and transparent with the staff about their views and positions. Board members should declare their positions and intentions prior to a public meeting and absent some unforeseen circumstances those views should be consistent with votes cast. These requirements should be placed in a Board Order or in a CSB regulation on the report reviewing process.
4. Board members must cease and desist from the extreme negative trashing of the agency to the public and stakeholders that places political posturing above the safety mission of the agency. All agency personnel must acknowledge that we are **all** responsible for the successes and failings of the agency. A failure by Board members to take responsibility for agency performance is a failure of leadership. The Board and staff should receive required periodic training on appropriate employee conduct, behavior and communication.
5. The Investigation Team Leads/Supervisors group requests to meet with the board members to discuss this letter and pursue avenues for needed agency reforms.

We conclude by assuring you we are willing to actively work toward the improvements in organizational performance we have described. Only by working together will we be successful and trust be regained.

JUL 10 2014

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

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Rafael Moure-Eraso, Ph.D.
Chairperson



June 10, 2014

The Honorable Darrel Issa
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa:

Thank you for the opportunity to testify at the Committee on Oversight and Government Reform's June 19, 2014, hearing entitled, "Whistleblower Reprisal and Management Failures at the U.S. Chemical Safety Board." Enclosed are formal responses to the questions submitted for the hearing record.

Sincerely,

A handwritten signature in black ink that reads "Rafael Moure-Eraso". The signature is written in a cursive, flowing style.

Rafael Moure-Eraso Ph.D.
Chairperson

Enclosure

cc: The Honorable Elijah Cummings, Ranking Member

1. What steps have you taken to notify all CSB employees of their right to communicate freely with Congress without fear of retaliation from agency management?

Answer: On July 9, 2013, the CSB General Counsel sent an e-mail to all CSB staff informing them of provisions of the Whistleblower Protection Enhancement Act of 2012, including the role of the IG "ombudsman." The General Counsel's e-mail also specified the role of the EPA Inspector General with respect to implementation of the law and included a message from the Inspector General.

The CSB's intranet web site includes the Chairperson's February 18, 2011, memo to all CSB staff concerning "Cooperation with the Office of Inspector General."

The CSB has also posted Office of Special Counsel notices concerning "Whistleblowing" in prominent places throughout our offices.

The agency's ethics program does not currently include training on communications with Congress. However, we plan to add a section to our ethics training on the provisions of the Lloyd-LaFollette Act, 5 U.S.C. § 7211.

2. Have you ensured that all CSB employees are aware of their rights and whistleblower protections?

Answer: The CSB subscribes and endorses all OSC policies, and as mentioned above, the agency posts OSC "Whistleblowing" notices throughout its offices.

3. Have you also ensured that CSB managers are aware of the consequences for retaliation against witnesses who furnish information to Congress?

Answer: All CSB managers and supervisors are aware that retaliation against "whistleblowing" will not be tolerated -- whether such disclosures are made to OSC, the IG, agency leadership or Congress. Through the agency's Workplace Improvement Committee (WIC), we plan to further emphasize this policy.

4. How much has the Chemical Safety Board spent on outside legal counsel since June 2010? How much does the agency plan to spend by the end of the current fiscal year? What is the agency's projected spending on outside legal counsel for the upcoming fiscal year?

Answer: Since June 2010 and to the present time, our contracts and procurement office informs us that the CSB has obligated approximately \$76,000 on outside legal work, exclusive of the agency's legal jurisdictional issues related to the Deepwater Horizon investigation, which amounted to an additional \$14,550. The total was thus \$90,550.

During FY 2014, we estimate that the CSB will obligate approximately \$45,000 for outside legal services. We have no specific projections on spending for legal services during FY 2015, but we would expect them to be in accord with prior years, i.e., in the range of \$25,000 - \$45,000, depending on the circumstances.

Prior to my becoming Chairman in June 2010, the agency obligated considerably more on outside legal services on a smaller overall budget. For example, during the period FY 2005 through FY 2010 (prior to my becoming Chairperson), the agency obligated approximately \$347,750 on outside legal work. For the period of FY 2000 – FY 2004, the agency obligated approximately \$400,500 for outside legal work.

5. On June 19, 2014, you testified that you disagree with the turnover rate figure reported by the EPA Inspector General. Please explain your understanding of the turnover rate at the CSB and why is it different with the figure reported by the Inspector General?

Answer: The CSB believes that the IG's calculated turnover rate for the CSB presents an inaccurate portrayal of "voluntary vs. involuntary" turnover for the agency. For example, among the CSB's investigative staff, the IG has reported turnover rates ranging from 5% - 20% per year. In FY 2009, the IG reported a turnover rate of 20% (4 investigators leaving out of 20), but in fact, one investigator died while on duty. The IG declined to remove this unavoidable turnover from their figures despite the employee's literally passing away on the job.

The CSB has recommended that the IG use three types of turnover in calculating rates: Voluntary, involuntary and unavoidable. This is the standard used in private sector personnel management.

Voluntary turnover occurs when a satisfactorily performing employee leaves the agency. Involuntary turnover occurs when a probationary or poorly performing employee is separated from the agency. Unavoidable turnover occurs when a life situation for the employee changes over which the agency has no control; e.g., death or major life changes (pregnancy/child rearing decisions/spousal relocation).

Using private sector methodologies, the CSB has experienced an average voluntary turnover rate of 9% per year rather than the 15% calculated by the IG. In addition the CSB notes that its average turnover rate of 9% is less than the industry wide average

(10%) in the industries against which we compete for technical talent (petrochemical and chemical industries).

6. **The Office of the Inspector General recently noted in the FY 2014 Key Management Challenges report that in FY 2012, CSB did not deploy investigators to 98% of incidents that involved fatalities – incidents that clearly fall within the statutory mandate of CSB. CSB cites a lack of resources as a reason for its failure to investigate accidents under their jurisdiction. Despite CSB’s purported deficiency in resources, CSB employees have been visiting several chemical plants and refineries over the last several years, asking for various reports and information, pursuing suggestions to require a “safety case,” mandating inherently safer technologies or including limits on reactive chemicals into federal regulations. It appears as if instead of investigating cases as mandated, CSB is focused on a very specific policy agenda of moving the industry toward the “safety case.” How does CSB justify this mismanagement of resources? Does CSB have a long term plan to address this management shift and to close this investigation gap?**

Answer: The CSB continually tracks and monitors high consequence chemical incidents that result in deaths, hospitalizations, significant property damage, large evacuations, and/or off site damage. CSB staff recorded an estimated 334 incidents during 2012 and 249 incidents in calendar year 2013. Due to resource constraints and a small staff the CSB is not able to investigate every accident.

We respectfully disagree with statement that the **“CSB employees have been visiting several chemical plants and refineries over the last several years, asking for various reports and information, pursuing suggestions to require a “safety case.”** The CSB develops safety recommendations addressing issues such as technical improvements, policy changes, and regulatory revisions, only as a result of investigations, studies and specific field findings. While the CSB's enabling statute only references EPA and OSHA as potential recommendations recipients, CSB only considers regulatory recommendations if there are gaps or weaknesses in the regulatory system that are causal to the incident. Since 2012 the CSB has issued eight reports that do not address the safety case. We have twelve investigations that are open and only two of these are evaluating the safety case. The CSB has gathered information about refinery incidents to better understand the refinery safety in order to address whether or not a refinery study is warranted. The CSB has not been visiting chemical plants to require a "safety case". Other than the two incidents referenced above, the CSB is not examining the safety case in any other current investigations.

CSB does not merely visit chemical plants. Rather, we strategically identify high consequence accident investigations and conduct a thorough root cause analysis in order to carry out our congressionally mandated mission. The CSB only makes voluntary

recommendations out of incident investigations and safety studies. As a non-regulatory agency it is simply not within our jurisdiction to mandate Inherently Safer Technologies (IST). Rather the CSB indentified IST as a key issue area in its 2012 – 2016 strategic plan. In the Tesoro Anacortes Refinery investigation report, the CSB made a recommendation to the EPA to incorporate the concept of IST into its Risk Management Program (RMP).

IST is an industry-developed concept for eliminating or reducing process hazards. IST is applied to the design and operation life cycle, including manufacture, storage, use, and disposal, and considers substituting a less hazardous material, using less hazardous process conditions, and/or designing a process to reduce the potential for harm. As noted in a 2011 Process Safety Progress article, the CSB examined the importance of IST as part of recent investigations, including the Valero and Kleen Energy incidents. In one case, the CSB recommended that chlorine be replaced with safer chemicals for use in cooling water treatment, and in the other the CSB recommended that natural gas be replaced with nitrogen or air for purging newly constructed gas piping systems. These recommendations were successfully implemented.

It is important to note that in the past few years, the CSB has had the most challenging and important cases before it in its history. These include a major investigation, requested and supported by bipartisan leaders in the House, of the Deepwater Horizon blowout and explosion in the Gulf. Within the past two weeks, the CSB issued its report which was the first – among all the much costlier and better resources investigations by other groups – to accurately determine and report on why the Deepwater Horizon’s blowout preventer failed to seal the well and stop the 87-day release of oil into the Gulf. Other major CSB investigations include West Fertilizer in Texas, where a plant explosion killed 15 and devastated a town; the CSB was the first to call for stronger storage practices for ammonium nitrate, the fertilizer that caused the blast. The CSB also recently completed an investigation at the Tesoro refinery in Washington State, revealing industry-wide problems in how the integrity of key refinery equipment is assured, leading the CSB to call on EPA to require companies to use safer technologies and materials of constructions. In addition, the CSB has two reports on the Chevron refinery fire in California in 2012, which endangered the lives of 19 refinery workers and sent more than 15,000 community residents to the hospital for exposure to smoke and fumes. Following the CSB investigation, California has begun a complete overhaul of its process safety regulations for refineries and chemical plants (California alone has 15 refineries) and has tripled the number of state process safety inspectors.

- 7. The current CSB organization chart shows that there are 17 investigators and 15 administrative or non-investigative personnel (excluding board members). The primary mission of CSB is to investigate, so if a limited budget is a long term constraint, the number of non-investigative personnel should be modified to achieve**

a better balance. What is CSB doing to realign its priorities and ensure its personnel structure supports prompt and thorough accident investigations? Will CSB be seeking additional resources from Congress or pursue an amendment to its statutory mandate?

Answer: The CSB has been on record on the urgent need for additional investigative resources. Currently we are focusing on hiring new investigators by interviewing applicants. We respectfully disagree with the assessment of our breakdown of investigative versus administrative staff. As correctly noted, the CSB currently employs 17 direct investigators. However, we disagree that the agency employs 15 administrative personnel.

Included in your count of "administrative" personnel, are two Recommendations Specialists who perform work relating to the development and follow-up of recommendations that directly result from investigative activities and are essential to the development and follow-up of investigation's recommendations. We believe that these two personnel are more properly considered a part of the investigative staff. Inclusion of these personnel in the investigative category increases investigations staff to 19 and decreases the "administrative" count to 13.

However, even among the 13 so-called administrative staff, most of the employees are engaged in investigative activities or strongly supporting the investigative function. For example, attorneys in the Office of General Counsel issue subpoenas, assist investigators in working with entities under investigation (especially those represented by counsel), and generally perform full-time work in support of investigative activities, in addition to performing general agency legal functions (FOIA, ethics, legal advice to the Board and staff, etc.) The information technology department includes 3 employees, whose work is essential to investigative activities, including the maintenance of the agency's database of investigative documents. The Finance Department, which includes two employees, processes all agency financial obligations, the vast majority of which are in direct support of investigative activities. Similarly, the contracting office supports the CSB by acquiring the services of investigative and expert consultants.

There are really no administrative positions at the CSB. All positions support the agency's fundamental investigative functions. In fact, the CSB does not employ any administrative support personnel, whatsoever. For example, the agency employs no secretaries, clerks or paraprofessionals, either to support the Board or the staff.

The CSB believes that it is using its extraordinarily limited resources in an effect manner to accomplish an outsize mission. However, recognizing that no organization can be perfectly efficient, we have also engaged with a management consulting firm to assist in achieving even greater organization effectiveness.

The CSB is always seeking ways to leverage its limited resources. The President's proposed budget for the CSB for FY 2015 seeks \$12.676 million, an increase of 15.24% over the FY 2014 appropriation. We support the President's budget request, which we believe reflects the Administration's commitment to the work of the agency.

The CSB has no current plans to seek amendments to its organic statute

- 8. A federal Employee Viewpoint Survey has been administered at the agency each year since 2007. When the survey was administered in 2007, 57.1% of staff members agreed that they had a high level of respect for the CSB's senior leaders. In 2013, only 16.65% of staff agreed with this statement, a decline of over 40%. When asked in 2008 whether leaders within the CBS generate high standards of honesty and integrity, 52.4% of respondents answered positively. When asked this same question in 2013, only 20.27% responded positively; a decline of over 30%. These statistics indicate a leadership crisis at the agency. What evidence does the CSB possess to show the agency is taking action(s) to address these sharp declines?**

Answer: The statistics referenced are indeed troubling. CSB agency leadership at the highest levels is taking responsibility for these results, and is engaging a nationally-known management consulting company in order to reverse this trend and create a culture of excellence and integrity. The Managing Director and Chairperson are both committed to engaging with this consulting company's leadership coaches in order to learn new management and communication techniques, with the goal of pushing the CSB towards becoming an employee-focused organization. The management consultant was obtained for an initial assessment and report and an additional contracting action is underway to finalize selection of a management consultant to implement the recommendations. In addition, the first Workplace Improvement Committee (WIC) that was formed to tackle the troubling employee viewpoint survey engaged in extensive fact-finding to obtain more detailed information behind the statistical results, and thereafter made a handful of recommendations, chief of which was to bring on board the management consultant. Towards the end of the first WICs term, the team created a charter which was intended to recreate the WIC with new members and a plan to address employee issues and concerns each year in relation to employee viewpoint survey results. The process of selecting members for the new version of the WIC remains ongoing. Moreover, the CSB senior leadership remains committed to implementing the actions recommended by Representative Waxman, as well as other relevant recommendations that may be put forward by the agency's Inspector General, among other potential sources of best practice ideas.

- 9. OSHA, EPA, and DHS recently provided the White House with a joint report entitled "Action to Improve Chemical Facility Safety and Security – A Shared Commitment." The report indicated that of the hundreds of comments submitted,**

nearly all comments regarding the adopting of the “safety case” regulatory model were negative. In addition, even the well respected National Institute of Occupational Safety and Health recently rescinded its support for safety case, “based on re-evaluation of the scientific evidentiary foundation.” Such lack of support for the “safety case” regime calls into question CSB’s policy recommendations, which attempt to advance the “safety case.”

10. What is the agency’s response to the decline in support of the “safety case?” CSB faces the possibility that its recommendations will not be implemented due to CSB’s underlying support for the “safety case.” In light of this fact, does CSB have any plans for adjusting its focus and altering the manner in which it investigates cases and issues recommendations? What is the agency’s response to the lack of support your recommendations are receiving from other government agencies and chemical safety stakeholder? What internal mechanisms does the CSB have in place to ensure that recommendations will actually reduce the likelihood of chemical accidents?

Answer for 9 & 10: The CSB believes there are a number of serious challenges for improving industrial process safety in the U.S. Both OSHA and EPA process safety standards rely heavily upon list based approaches for determining which facilities and companies have to comply with the most rigorous requirements. This concept of a hazardous chemical list was largely borrowed from environmental statutes of the 1970’s and 1980’s. However, process safety experts generally recognize that process hazards are a function of chemistry itself, and it makes little sense to assert that the overall risks from chemical processing and handling can be adequately captured using small lists of chemicals. Time and again the CSB has found serious chemical hazards capable of causing major disasters residing in facilities that have largely escaped regulatory scrutiny.

These facilities of which West Fertilizer (a massive explosion at a fertilizer storage and distribution facility in West, TX that fatally injured twelve volunteer firefighters, two members of the public and caused hundreds of injuries) is but one example fall outside the scope of existing regulatory standards, which were developed in the 1990’s and have seen few updates since then. All too often, a tragedy like the one at West suddenly exposes the hazards of a chemical or process that had somehow been overlooked. The effects of these regulatory and enforcement challenges are evident in the accident rates for U.S. refineries and petrochemical sites.

In 2008, a leading insurance company, Swiss Re, told the CSB and federal regulatory agencies that property losses from U.S. refinery accidents were occurring at approximately four times the rate of the rest of the world. In a follow up briefing, Swiss

Re officials asserted the gap between refinery safety performance in the U.S. and in the rest of the world was continuing to widen.

Many developed nations have adopted a different approach for controlling major process hazards. For example, nations in Europe and elsewhere have implemented a “safety case” regime, that requires hazardous facilities to continuously meet higher standards and reduce risk. Elements of the safety case system have been applied by U.S. institutions such as the Nuclear Regulatory Commission and NASA. The CSB has found that this approach enjoys wide-spread international support from companies, the regulator, and worker representatives. Companies work directly with the regulator to identify the most appropriate safety standards from around the world, which they then are required to follow as a condition of operating. The focus is on preventing accidents in highly complex technological systems rather than post accident punishment.

Implementing an effective regulatory regime such as the safety case, with the ability to manage and regulate high hazard industries and prevent serious accidents, requires a number of interdependent features. The safety case regime also imposes a general duty on industry to reduce all risks in its operations to as low as reasonably practicable (ALARP). Such an approach places the impetus on industry to evolve with current best safety practices, wherever they have been developed anywhere in the world, to ensure that process hazards have been adequately identified, evaluated, and controlled. Furthermore, this regime requires industry to utilize leading and lagging indicators to drive risks involved in major hazard facilities to as low as reasonably practicable. Finally, for effective implementation, this type of regime requires an independent, competent, and well funded regulator. Experience and competence in technical areas such as chemical engineering, human factors, and process safety management are necessary to provide effective auditing and regulatory oversight for prevention.

The CSB continues to examine the regulatory regime referred to as the “safety case.” To date there are no formal CSB recommendations which call on industry to implement “safety case.” To put it simply our mission is to save lives - if there is an existing regulatory scheme available that can reduce workplace injuries and fatalities - as an agency we are committed to exploring such opportunities.

The CSB is internationally known as an expert organization in chemical safety and prevention and has built a solid reputation by deploying to over 100 incidents since 1998.

These investigations have included over 700 new chemical safety recommendations to EPA, OSHA, state regulators, industry organizations, unions, and companies – our recommendations continue to have a broad impact on safety. The CSB tracks recommendations to completion and has so far successfully closed 76% of its safety

recommendations (533) based on acceptable actions by recipients. These actions make American businesses, workplaces, and communities safer. Among the major actions prompted by specific CSB investigations and recommendations are:

- The national and international fuel gas codes have been changed, and new codes have been developed, to prohibit unsafe natural gas handling practices (such as releasing natural gas in or near building during pipe cleaning operations) which had previously led to many accidents and fatalities, including Connecticut and North Carolina blasts investigated by the CSB
- New York City comprehensively overhauled its fire code, adopting a modern fire code for the first time since 1918, following the CSB investigation of a building explosion in Manhattan
- Massachusetts developed new stringent hazardous materials rules for plants, following the CSB investigation of a plant explosion that devastated a community in Danvers, MA
- Mississippi enacted new rules increasing safety at thousands of oil sites, following a innovative CSB investigation conducted collaboratively with Mississippi students about the problem of teenagers being accidentally killed while “hanging out” near remote oil tanks containing explosive vapors
- OSHA began rulemaking, in 2009, on a comprehensive standard to prevent combustible dust explosions in industry, which the CSB found had led to nearly 300 plant fires and explosions over a 25 year period
- OSHA modernized its hazard communication standard to require companies to disclose combustible dust hazards through worker right-to-know programs
- OSHA added a new appendix to its laboratories standard (1910.1450) to emphasize the importance of evaluating physical hazards in laboratory settings
- EPA updated its risk management program requirements to require more timely reporting of accidents to regulators and the public, and to require reporting on accidents cause by reactive chemicals – this followed a number of reactive chemical accidents the CSB investigated
- The Treasury Department strengthened its requirements for the safety of federal contracts directing hazardous activities (following an explosion during fireworks disposal that killed five contract workers)
- The President issued Executive Order 13650, in August 2013, which calls upon federal agencies like OSHA and EPA to evaluate the need for potential regulatory changes to promote chemical safety. As a result of the EO OSHA issued a Request for Information (RFI) on potential revisions to the PSM standard. The CSB submitted

extensive comments to the RFI in a letter dated March 31, 2014 available at:
http://www.csb.gov/assets/1/16/CSB_RFComments.pdf

- The American Petroleum Institute developed numerous new safety practices, including safety guidance for starting up and operating oil production sites, for reporting safety indicators from refineries, and banning unsafe trailers from hazardous areas of refineries (the cause of 15 deaths and 180 injuries at BP's Texas City refinery, investigated by the CSB)
- National engineering curriculum groups developed new requirements so that all U.S. chemical engineers are taught chemical safety concepts as part of undergraduate education, following a reactive chemical explosion the CSB investigated in Florida
- The American Chemical Society developed new guidance for evaluating fire and explosion hazards in chemical research laboratories, that had caused many accidents in universities, including a Texas university explosion the CSB investigated
- The American Institute of Chemical Engineers developed new guidance for evaluating and controlling reactive chemical dangers in industry
- CSB findings and recommendations have led to a broad range of changes in NFPA codes and ICC standards such as those pertaining to safe handling and storage of flammable and combustible liquids, compressed gases and liquefied petroleum gas
- In 2009, Congress passed on a bipartisan basis the American Communities' Right to Public Information Act to prevent companies' misuse of secure information designations (such as SSI) to prevent communities from learning about plant safety practices and hazards
- Acting on a specific CSB urgent recommendation, British Petroleum (BP) created and funded, at a cost of \$30 million, the expert Baker Panel to review and improve the safety culture at all its US refineries, leading to the seminal Baker Report used worldwide by oil and chemical companies

**DIVISION OF POWER AND RESPONSIBILITIES BETWEEN THE
CHAIRPERSON OF THE CHEMICAL SAFETY AND HAZARD
INVESTIGATION BOARD AND THE BOARD AS A WHOLE**

Under the Clean Air Act Amendments of 1990 and general principles governing the operation of boards, the day-to-day administration of Chemical Safety and Hazard Investigation Board matters and execution of Board policies are the responsibilities of the chairperson, subject to Board oversight, while substantive policymaking and regulatory authority is vested in the Board as a whole.

In disputes over the allocation of authority in specific instances, the Board's decision controls, as long as it is not arbitrary or unreasonable.

June 26, 2000

**MEMORANDUM OPINION FOR THE GENERAL COUNSEL
CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD**

You have asked for our opinion regarding the legal division of powers and responsibilities between the chairperson of the United States Chemical Safety and Hazard Investigation Board ("Board") and the Board as a whole. This memorandum responds to your request.

The Board was established under section 301 of the Clean Air Act Amendments of 1990 (the "Act") as a tenure-protected agency charged with investigating and monitoring accidental chemical releases at industrial facilities and in transport. *See* Pub. L. No. 101-549, § 301, 104 Stat. 2399, 2565-70 (1990) (codified at 42 U.S.C. § 7412(r)(6) (1994)). The Act provides that 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." 42 U.S.C. § 7412(r)(6)(B). "The Chairperson," the Act continues, "shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board." *Id.* The Act vests in the Board a range of powers and responsibilities relating to investigating, monitoring, and reporting accidental chemical releases. *See id.* § 7412(r)(6)(C)-(S). It further provides that "[t]he Board is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties." *Id.* § 7412(r)(6)(N).

As we understand it, a basic disagreement has existed for some time between the former chairperson of the Board, who resigned as chairperson on January 12, 2000, but is still a Board member, and the other Board members regarding the relative authority of the chairperson and the Board as a whole under this statutory scheme.¹ The former chairperson maintains that "the statute provides [the chairperson] . . . with complete authority over all aspects of the [Board] except that all of the Board Members must vote on three items: approval of Board Investigation Reports, recommendations to the Administrator of [the Environmental Protection Agency (EPA)] and the Secretary of Labor, and approval of regulations to be published in the *Federal Register*." December Hill Letter at 1. The Board, by contrast, believes that the Act places day-to-day administration of the Board in the chairperson's hands, subject to the Board's general policies and directives, while conferring on the Board responsibility for the various substantive functions that are outlined in its statute; that the Board decides whether a matter is an administrative concern of the chairperson or a substantive concern of the Board, as long as its views are reasonable; and that, in the absence of Board policy on a specific issue, the chairperson possesses substantial discretion to act on his own. *See* Warner Memorandum at 2; November Board Letter (stating that the Board believes that the Warner Memorandum is correct).

We believe that, under the Act and general principles governing the operation of boards, the day-to-day administration of Board matters and execution of Board policies are the responsibilities of the chairperson, subject to Board oversight, while substantive policymaking and regulatory authority is vested in the Board as a whole. In disputes over the allocation of authority in specific instances, the Board's decision controls, as long as it is not arbitrary or unreasonable.

We note at the outset that we do not address the details of how these principles apply to specific management and governance areas in which disagreements might arise between the chairperson and the Board.² Indeed, when addressing a similar set of questions regarding the relative authority of the chairman of the Interstate Commerce Commission ("Commission") and the Commission members over the administrative and substantive affairs of the Commission, we observed that "this Office is neither well-suited nor sufficiently well-versed, as a practical matter, in the internal workings of the Commission to provide more than a general response" to the questions being addressed. Memorandum for Reese K. Taylor, Jr., Chairman, and Heather Gradison, Commissioner, Interstate Commerce Commission, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 1 (Dec. 8, 1983). We think that an apt observation in the Board's case as well. Nevertheless, we believe that our discussion of the Board's organization and of the background principles governing deliberative bodies against which it operates should be sufficient to guide you in resolving disagreements about the proper balance of authority in the Board's affairs.

We begin with the language of the Act. As noted above, the Act provides that the chairperson "shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board." 42 U.S.C. § 7412(r)(6)(B). The terms "Chief Executive Officer" and "executive and administrative functions" are decidedly vague, and nowhere does the Act define them. Even so, the terms do provide some general guidance on the proper division of authority between the chairperson and the Board as a whole. They make clear that it is the "executive" and "administrative" aspects of the Board's business — as opposed to its substantive and policymaking functions as laid out in the rest of the statute (*see id.* § 7412(r)(6)(C)-(S)) — that are the province of the chairperson as chairperson. The chairperson, in other words, superintends and carries out the day-to-day activities necessary to effectuate the Board's substantive decisions.³ He does not, absent some form of Board approval (such as an express delegation by the Board or the Board's acquiescence in the chairperson's actions — *see infra* pp. 5-8), make those decisions by himself.

The Act also empowers the Board to "establish such procedural and administrative rules as are necessary to the exercise of its functions and duties." 42 U.S.C. § 7412(r)(6)(N); *see also* S. Rep. No. 101-228, at 236 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3620 ("The Board is given authority to promulgate administrative rules as may be necessary to carry out its functions."). These could include rules bearing on matters of internal Board governance (such as voting procedures and the delegation of Board authority and responsibilities) as well as rules governing the conduct of Board business with the public (such as investigations and hearings). To the extent the Board establishes such rules, the chairperson, as the Board's administrative and executive officer, must put them into practice.

Furthermore, the chairperson is subject in the exercise of his functions and duties as chairperson to oversight by the Board as a whole and to such general policies and decisions that the Board is authorized to make. Indeed, that this must be so flows from the

very nature of the chairperson's office as the executor and administrator of the Board's decisions and policies, which the Board can modify or amend as circumstances or programmatic objectives require. It is also spelled out in the Act's legislative history, which unambiguously states that "[t]he chair's conduct of the executive function is subject to oversight by the Board as a whole." S. Rep. No. 101-228, at 229, *reprinted in* 1990 U.S.C.C.A.N. at 3613.

To be sure, this does not mean that the Board, exercising its oversight authority and its powers to make substantive decisions and "such procedural and administrative rules as are necessary to the exercise of its functions and duties," may or should attempt to address itself to the plethora of minute administrative problems bound up with the operation of a complex organization. Some degree of managerial discretion is inherent in the concept of an executive or administrative office, and the statutory assignment of the Board's executive and administrative functions to the chairperson necessarily vests the chairperson with a degree of managerial autonomy on which the Board, in the proper exercise of its powers, cannot trench. Likewise, some day-to-day aspects of Board affairs may be so unrelated to the Board's effective execution of its statutory responsibilities that they cannot be said to be proper objects of the full Board's authority. At the same time, however, any number of Board activities or day-to-day aspects of Board business, while at least in part administrative and even seemingly mundane, may involve or affect the Board's duties and functions in ways that are of legitimate concern to the Board as a whole. Where that is the case, it is the prerogative of the Board to pass upon such issues in ways appropriate to its function as a policymaking and rule-setting body.

Aside from the general delineation of powers, the Act itself does not address, with specificity or precision, when particular aspects of Board business should be said to be a legitimate concern of the Board as a whole or, in contrast, should be left to the chairperson as the Board's executive and administrative officer. The Act's legislative history does state that, while the Board has the power to hire staff, "[t]he chairperson of the Board is given authority for directing the work and assignments of the staff except that each Board member shall be assigned such personal staff as are necessary to carry out responsibilities of a member." S. Rep. No. 101-228, at 229, *reprinted in* 1990 U.S.C.C.A.N. at 3613. Immediately following this statement, however, is the declaration that "[t]he chair's conduct of the executive function is subject to oversight by the Board as a whole." *Id.* So even when it comes to directing staff work and assignments, the legislative history appears to contemplate that the chairperson may have to answer to the Board in some respects. Again, however, the statute does not specify the precise bounds of the Board's oversight authority.

In light of the lack of explicit statutory guidance on the issue, we believe that, under the general principles of corporate common law that we have previously found instructive in similar cases, the Board as a whole, acting reasonably, has the final authority to resolve disputes over whether a specific matter is within its oversight authority or is an administrative or executive concern of the chairperson or a legitimate concern of the Board as a whole. Our past opinions addressing governance issues raised by multi-member boards and commissions have repeatedly recognized that basic and well-established principles of corporate common law make clear "that the basic premise governing deliberative bodies is that the majority rules." Letter for Mason H. Rose V, Chairperson, United States Architectural and Transportation Barriers Compliance Board, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Sept. 17, 1981) ("Rose Letter"); *see also* S. Rep. No. 101-228, at 229, *reprinted in* 1990 U.S.C.C.A.N. at 3613 (stating that "[t]he Board will operate by majority vote").⁴ In resolving a dispute between members of the Architectural and Transportation Barriers

Compliance Board ("Compliance Board") and its chairperson over the authority to call an additional meeting of the Compliance Board, for example, we relied on the majority-rule principle to conclude that the Compliance Board had the authority to call an additional non-emergency meeting despite the lack of a rule authorizing it to do so. See Rose Letter at 4. We observed that, given that principle, "[i]t would . . . be anomalous to conclude that the Board cannot deal with the situation because the rules are silent" on the issue. *Id.* Likewise, on separate occasions, we applied general principles regarding a board's authority to act to conclude that both the Federal Home Loan Bank Board and the Advisory Board of Cuba Broadcasting could meet and conduct business without a properly appointed chairperson. In both cases we pointed out that, in the absence of specific statutory prohibitions barring the boards from acting without a chairperson, business transacted at board meetings would be valid so long as the meetings complied with basic rules of corporate common law governing notice to and attendance of board members. See *Federal Home Loan Bank Board — Chairman — Vacancy — Reorganization Plan No. 3 of 1947* (5 U.S.C. App. 1), *Reorganization Plan No. 6 of 1961* (5 U.S.C. App.), 3 Op. O.L.C. 283, 284 (1979); Memorandum for Christopher D. Coursen, Advisory Board for Cuba Broadcasting, from Daniel L. Koffsky, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the Advisory Board for Cuba Broadcasting to Act in the Absence of a Presidentially Designated Chairperson* at 2-4 (Jan. 4, 2000). Finally, we noted when passing on an issue concerning the legal authority of the National Commission on Neighborhoods to enter into a proposed agreement that where a statute "is silent as to [a c]ommission's internal organization, practices, and procedures[, t]he clear implication is that these matters are to be decided by the members of the [c]ommission." *National Commission on Neighborhoods* (Pub. L. 93-24) — *Powers — Appropriations*, 2 Op. O.L.C. 366, 367 n.5 (1977); cf. Memorandum for Tim Saunders, Acting Executive Clerk, Executive Clerk's Office, from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of a Chairperson of the World War II Memorial Advisory Board* at 2 (Nov. 21, 1994) (noting that, if a chairperson were appointed to the World War II Memorial Advisory Board, the board would remain "free under general parliamentary law to make or amend its own rules for such matters as conducting business and calling meetings"). These principles, we believe, apply with equal force here.

These principles also undermine the former chairperson's view that the Act's designation of the Board's chairperson as its "Chief Executive Officer" significantly expands the chairperson's statutory responsibilities and powers beyond those which he might otherwise have (i.e., as simply the "chairperson"). October Hill Letter at 1-2. The term "Chief Executive Officer" (CEO) comes from corporate law. CEOs and presidents of corporations, as a matter of corporate common law, are "subordinate in legal authority" to their corporations' boards of directors. Grange, *supra* note 4, at 450; see 2 Fletcher et al., *supra* note 4, § 495, at 528; Stevens, *supra* note 4, § 164, at 768. Their specific powers derive in large part from the resolutions and by-laws passed by those boards and from the practice and custom of the particular corporation. See, e.g., Grange, *supra* note 4, at 451, 452 (stating that the "chief determining factor is the usage of the particular corporation" and that "[i]n brief, the president exercises such powers as he is given by the board, or as he may assume with the board's acquiescence"); 2A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 553, at 14 (perm. ed. rev. vol. 1982) (observing that the powers of a corporate president may be enlarged by a board's "practice of permitting him to do certain things without objection"). Thus, while it may not be unusual for a president and CEO of a corporation to possess substantial authority over corporate affairs, such authority exists largely as a matter of the board's grace and does not deprive the board of its ultimate authority to manage corporate business. See, e.g., 2 Fletcher et al., *supra* note 4, § 495, at 528-29 (a board's delegation of authority to corporate officers does not mean that the board has abdicated its authority and does not

deprive the board of its stated authorities and responsibilities); Stevens, *supra* note 4, § 164, at 768 (whatever the precise duties and powers of a corporate president, "the authority and duty to manage the corporate business is vested exclusively in the board of directors"). Nothing in the Act suggests that this general understanding of what it means to be a CEO should not obtain in the specific case of the Board.

We do not agree that the Act provides the chairperson "with complete authority over all aspects of the [Board] except that all of the Board Members must vote on three items: approval of Board Investigation Reports, recommendations to the Administrator of EPA and the Secretary of Labor, and approval of regulations to be published in the *Federal Register*." December Hill Letter at 1. In support of that reading, the former chairperson points out that "[t]he Congress has repeatedly segregated these responsibilities through 'reorganization plans' of various multi-member boards and commissions in the past." *Id.* But whatever the import of such reorganization plans,⁵ the Act itself in no way suggests that the Board's chairperson is vested "with complete authority over all aspects" of Board business except the three responsibilities just mentioned. Indeed, as we explain above, the language of the Act and the general principles of corporate common law against which it must be read belie that conclusion. The Act's legislative history does mention these responsibilities in the context of delegation, stating that the Board "may (by vote) delegate responsibilities to the chairperson or other member, except that it shall require a majority vote of the full Board to issue a report on the cause or probable cause of an accident, make a recommendation to the Administrator [of EPA] or the head of another Federal agency, or promulgate a rule." S. Rep. No. 101-228, at 229, *reprinted in* 1990 U.S.C.C.A.N. at 3613. This statement, however, only makes clear Congress's intent that the Board not delegate these responsibilities to the chairperson or any other single member. It does not suggest that these responsibilities are the only ones that are, in the first instance, vested in the full Board. In fact, by stating that the Board may delegate all other responsibilities, it suggests the opposite, for the Board could not make the delegation if those responsibilities were committed to the chairperson instead of the Board as a whole.

Along similar lines, we do not attribute great significance to the fact that, as is apparent from the Act's legislative history, Congress contemplated that the Board would be "modeled on the structure, activities and authorities of the National Transportation Safety Board (NTSB), an independent Federal agency which investigates accidents in the transportation industry." S. Rep. No. 101-228, at 228, *reprinted in* 1990 U.S.C.C.A.N. at 3612. Even if the chairperson of the NTSB is the chief moving force on the NTSB and principally responsible for executing its policies, it does not follow that the Board's chairperson also should be understood to have expansive authority over nearly all of the Board's affairs. See October Hill Letter at 2; December Hill Letter at 1. The division of authority at the NTSB upon which the former chairperson focuses is much less a matter of statutory mandate than it is a matter of the development, through collegial practice and over time, of the NTSB's own internal policies concerning delegation of authority to the NTSB chairperson, the NTSB's acquiescence in the chairperson's assertion of authority over certain substantive areas, and the general evolution of the NTSB's current allocation of responsibilities. See, e.g., Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from the Chemical Safety and Hazard Investigation Board at Attach. 1 (Dec. 27, 1999) (discussing development of division of responsibilities at the NTSB). Indeed, as it existed in 1990, when the Act was passed, the statute establishing the NTSB stated that "[t]he Chairman . . . shall be governed by the general policies established by the Board, including any decisions, findings, determinations, rules, regulations, and formal resolutions." Pub. L. No. 93-633, § 303(b)(3), 88 Stat. 2156, 2167 (1975).⁶ The legislative history emphasized this point. "The Chairman," it provided, "is to be the chief executive officer of the Board, but in acting as such, he is subject to the

decisions and policies decided upon by the entire Board, and it is intended that each member shall participate actively in all aspects of the executive function." S. Rep. No. 93-1192, at 43 (1974).

That the NTSB's chairperson may, as a matter of internal NTSB policy and longstanding practice, exercise significant authority and influence over many substantive and procedural aspects of NTSB operations does not dictate that the Board's chairperson be allowed to do the same. Had Congress intended that result, it could have looked to the specifics of the division of authority within the NTSB in 1990 and spelled out a similar division of authority more explicitly in the Act. It did not do so. Instead, as discussed above, the Act leaves the Board free to shape and structure the details of its own internal operations in large part as it sees fit, and to do so in a practical matter, over time and on a case-by-case basis as its goals and agenda demand. The Board ultimately may or may not think it appropriate to follow a course similar to that of the NTSB. In any event, the Board's determination of the appropriate division of authority between itself and its chairperson will of necessity turn on considerations of internal administration and practical working arrangement within the Board.

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¹ The Board's Office of General Counsel, at the request of the Board, examined this issue and presented a written opinion to the Board on August 30, 1999. See Memorandum for the Chemical Safety and Hazard Investigation Board, from Christopher Warner, General Counsel, *Re: Board Governance Issues* (Aug. 30, 1999) ("Warner Memorandum"). When this opinion failed to resolve the dispute, both the chairperson and the other Board members, in separate letters, requested our views on the subject. See Letter for Beth Nolan, Assistant Attorney General, Office of Legal Counsel, from the Chemical Safety and Hazard Investigation Board (Nov. 16, 1999) ("November Board Letter"); Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Paul L. Hill, Jr., Chairperson, Chemical Safety and Hazard Investigation Board (Dec. 1, 1999) ("December Hill Letter"). Both have agreed to be bound by our opinion. See November Board Letter; December Hill Letter at 2.

² See Warner Memorandum at 18-31, 18 (analyzing specific management and governance areas with an eye toward "limit[ing] areas of potential disagreement"). By this statement, we mean neither to call into question nor to affirm the specific legal conclusions of the Board's General Counsel in this regard.

³ Webster's Third New International Dictionary of the English Language defines "execute" as, among other things, "to put into effect" and "to carry out fully." *Webster's Third New International Dictionary of the English Language, Unabridged* 794 (1993). It defines "administer" as, among other things, "to manage the affairs of." *Id.* at 27; see also *Webster's Ninth New Collegiate Dictionary* 434 (1986) (stating that "execute" and "administer" both mean "to carry out the declared intent of another").

⁴ With regard to these common-law principles, see, e.g., 2 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* §§ 392, 495 (perm. ed. rev. vol. 1998); Robert S. Stevens, *Handbook on the Law of Private Corporations* §§ 145, 161 (2d ed. 1949); William J. Grange, *Corporation Law for Officers and Directors: A Guide to Correct Procedure* 381-89 (1935); see also General Henry M. Robert, *Robert's Rules of Order: Newly Revised* § 1, at 4, § 43, at 395 (9th ed. 1990).

⁵ A large number of reorganization plans exist, most of which can be found in Appendix 1 to title 5 of the United States Code, and we have not examined the provisions of each one in detail. However, our brief review of the plans has revealed no evidence of the repeated segregation of responsibilities of the sort described in the former chairperson's submission. See generally 5 U.S.C. app. 1. In fact, such plans are generally intended only to improve the efficiency of the housekeeping and day-to-day operations of multi-member bodies by placing primary responsibility for such affairs with a chairperson, not to effect a large-

scale transfer of significant powers and authorities to the chairperson from the body as a whole. See, e.g., David M. Welborn, *Governance of Federal Regulatory Agencies* 9 (1977) (discussing reorganizations); see also Special Message to the Congress Transmitting Reorganization Plans 1 Through 13 of 1950, *Pub. Papers of Harry S. Truman* 199, 202 (1950) ("[T]hat under these . . . plans the commissions retain all substantive responsibilities deserves special emphasis. The plans only eliminate multi-headed supervision of internal administrative functioning. The commission[s] retain policy control over administrative activities since these are subject to the general policies and regulatory decisions, findings, and determinations of the commissions.").

⁶ At the time of the Act's passage, the NTSB's organic statute provided in pertinent part as follows:

The Chairman shall be the chief executive officer of the Board and shall exercise the executive and administrative functions of the Board with respect to the appointment and supervision of personnel employed by the Board; the distribution of business among such personnel and among any administrative units of the Board; and the use and expenditure of funds. . . . The Chairman . . . shall be governed by the general policies established by the Board, including any decisions, findings, determinations, rules, regulations, and formal resolutions.

Pub. L. No. 93-633, § 303(b)(3), 88 Stat. 2156, 2167 (1975).