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Chemical Safety and Hazard Investigation Board
1750 Pennsylvania Avenue, N.W., Suite 910
Washington, D.C. 20006

January 13, 2020

Re: Accidental Release Reporting, CSB-2019-0004, 84 Fed. Reg. 67,899 (Dec. 12, 2019)

To whom it may concern:

GPA Midstream Association ("GPA Midstream") appreciates this opportunity to submit comments to the Chemical Safety and Hazard Investigation Board ("CSB") on its proposed rule, Accidental Release Reporting, CSB-2019-0004, 84 Fed. Reg. 67,899 (Dec. 12, 2019) ("Proposed Rule").

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 80 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

Summary

GPA Midstream acknowledges the important role that the CSB serves in investigating serious accidents and providing reports and recommendations to avoid recurrences. The Proposed Rule offers the CSB the opportunity to define by regulation its role in receiving reports of accidental chemical releases, as required by the federal district court in *Air Alliance of Houston v. CSB*. While the proposal offers some prudent direction, there are specific aspects that we urge CSB to reconsider and revise before finalizing a rule. Specifically,

- **The Proposed Rule exceeds CSB's statutory authority – and should be revised to conform to the direction provided by Congress.** Although the Clean Air Act ("CAA") requires regulations for reporting significant accidental releases to CSB, the Proposed Rule as written expands the definitions of "regulated substances" and "extremely hazardous

substances” beyond the boundaries already established by EPA regulations. CSB has no authority under the Clean Air Act to alter those regulations, including by adding new substances to those already regulated or disregarding the threshold quantities defined by EPA. As such, CSB should limit the reporting requirements to substances as already defined by EPA, including their threshold quantities.

- **The definition of “serious injury” should be modified to ensure CSB focuses on receiving reports of incidents that are actually potential candidates for a CSB investigation.** The Proposed Rule defines “serious injury,” a core term for triggering a report, far too broadly. This overbroad definition would require reporting of minor accidental releases that would not require a CSB investigation. CSB should narrow the scope of this term to avoid imposing undue burdens on industry, as well as inundating CSB with unnecessary reports.
- **The definition of “substantial property damage” should be clarified – and the threshold for such damage should be raised.** The Proposed Rule defines substantial property damage as \$1 million, without guidance on how to calculate that amount. Given the different ways that damages can be valued, and the implications for any incorrect reporting, more guidance should be provided in the final rule. Moreover, given that minor damage to costly specialized equipment could unnecessarily trigger a report, CSB should adopt a higher (\$3-5 million) reporting threshold.
- **The reporting period should be expanded to allow an operator more time to make a report to CSB – as well as the option to revise a report if warranted by subsequently developed information.** The Proposed Rule imposes a reporting period of only four hours. That timeline is far too short, especially for serious incidents, given the need to bring releases under control and potentially evacuate employees from the facility. Nor is a report in four hours necessary given the immediate reporting already required to other agencies, including the National Response Center (“NRC”), as well as state and local first responders. Instead, CSB should match the reporting requirements imposed by Occupational Safety and Health Administration (“OSHA”) for an incident resulting in a fatality (8 hours) or other reportable injuries (24 hours). Having the same reporting period as OSHA not only avoids the confusion of different reporting periods, but there is no documented basis for imposing a shorter timeline.

Discussion

I. CSB Lacks the Authority to Expand EPA’s Lists of “Regulated Substances” and “Extremely Hazardous Substances” or Disregard Their Threshold Quantities

The Proposed Rule would require accidental release reporting for any minor injury resulting from virtually all chemical releases at any quantity, no matter how minute. Importantly, the Proposed Rule asserts that CSB may establish accidental release reporting requirements that disregard threshold quantities for regulated and extremely hazardous substances established by EPA. 84 Fed. Reg. at 67,905. CSB lacks the authority to do so.

“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). “[I]f there is no statute conferring authority, a federal agency has none.” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Here, the Clean Air Act provides no regulatory authority for CSB to modify either the statutory definition of “accidental release,” 42 U.S.C. § 7412(r)(2)(A), the lists of regulated or extremely hazardous substances issued by the EPA Administrator under Section 7412(r)(3), or their respective thresholds under Section 7412(r)(5).

Rather, the text and structure of Section 112(r) compels CSB to adopt existing lists of extremely hazardous or regulated substances. Under the CAA, Congress provided CSB with jurisdiction to investigate an “*accidental release* resulting in a fatality, serious injury or substantial property damages.” 42 U.S.C. § 7412(r)(6)(C)(i) (emphasis added). However, Congress charged EPA alone with determining what release of substances may be considered an “accidental release” under the CAA. Section 112(r)(2)(A), defined “accidental release” as the “unanticipated emission of a regulated substance or other extremely hazardous substance....” 42 U.S.C. § 7412(r)(2)(A). Moreover, Section 112(r)(2)(B) defines a “regulated substance” as a “substance listed under paragraph (3),” 42 U.S.C. § 7412(r)(2)(B), while paragraph (3) (Section 112(r)(3)) delegates that authority exclusively to EPA. 42 U.S.C. § 7412(r)(3). Specifically, Congress provided that EPA alone *shall* create the list. *Id.* (“*The Administrator shall promulgate*” the list of substances “which in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury or serious adverse effects to human health, or the environment.”) (emphasis added). Moreover, Congress directed that “*the Administrator shall use ... the list of extremely hazardous substances*” that EPA publishes under “the Emergency Planning and Community Right to Know Act ... with such modifications *as the Administrator* deems appropriate.” *Id.* (emphases added). EPA regulations “establishing the list shall include an explanation of the basis for establishing the list.” *Id.* Moreover, EPA, not CSB or any other agency, “shall establish procedures for the addition and deletion of substances from the list” consistent with other EPA authorities under Section 112(b). *Id.* The EPA Administrator has already acted on that authority defining those substances in 40 C.F.R. § 302.4 and 40 C.F.R., Part 355, Appendix A.

Unable to cite any statutory authority for CSB to alter or expand these lists, the Proposed Rule relied on legislative history to support an open-ended approach where any and every chemical, alone or in combination, is presumed to be subject to accidental release reporting requirements. 84 Fed. Reg. 67,905. Of course, where, as here, the statute is plain, CSB should not and indeed cannot look to the legislative history to try to divine additional authority. Regardless, the legislative history cited in the proposed rule goes to the list of substances that the *EPA Administrator* would establish under 42 U.S.C. § 7412(r)(3), not any authority delegated to the CSB. If the lists of regulated and extremely hazardous substances are to be expanded, this may only be done by EPA. CSB simply lacks the authority to include other, unidentified substances as part of its accidental release reporting rule.

Nor does CSB identify any authority for its assertion that the CSB need “not incorporate the concept of a threshold quantity” in its reporting rule. 84 Fed. Reg. 67,905. Rather, CSB asserts that “[t]here is nothing in the statutory scheme to suggest that a death or serious injury caused by less than a threshold quantity of a ‘regulated substance’ or other hazardous substances falls outside the CSB’s investigatory jurisdiction.” 84 Fed. Reg. at 67,905-06. Yet, to the contrary, the statutory scheme does demand a threshold quantity to trigger 112(r) action by a regulator, as CSB’s assertion

ignores an essential aspect of the statutory framework that Congress established when it directed EPA to identify those substances that would be subject to Section 112(r). Specifically, as noted, Section 112(r)(3) requires EPA to develop the lists of substances – and as mandated by the Congress under Section 7412(r)(5), when EPA creates the lists, EPA *must* include a “threshold quantity” for each substance listed. 42 U.S.C. § 7412(r)(5) (“At the time any substance is listed pursuant to paragraph (3), the *Administrator shall* establish by rule, a threshold quantity for the substance...”)(emphasis added); *see* 40 C.F.R. § 302.4; 40 C.F.R., Part 355, Appendix A (setting out lists). Below the threshold quantities the listed substances are *not* a regulated substance and *not* an extremely hazardous substance under Section 112(r) – and thus a release below those thresholds is not an “accidental release.” Thus, CSB has no jurisdiction to investigate.

CSB claims more broadly that it must consider all accidental releases that may “cause serious injuries and death,” regardless of the quantity. 84 Fed. Reg. at 67,905. Yet, CSB’s assertion ignores the fact that EPA – following the express delegation by the Congress – has already made that assessment when it established the threshold quantities for each listed substance. When developing the list that defines the scope of an accidental release of a substance that may be subject to Section 112(r), EPA has already taken “into account the toxicity, reactivity, volatility, dispersibility, combustibility, or flammability of the substance *and the amount of the substance* which, as a result of an accidental release, is known to cause or may be reasonably be anticipated *to cause death, injury or serious adverse effects to human health* for which the substance was listed.” 42 U.S.C. § 7412(r)(5) (emphases added). While CSB may or may not agree with EPA’s decisions, CSB has no authority under the Clean Air Act to alter EPA’s threshold quantity determinations. Those may only be changed by EPA. 42 U.S.C. § 7412(r)(3).

As a practical matter, the Proposed Rule’s unjustifiably broad scope, in combination with the absence of threshold quantities, deviates from CSB’s goal of requiring reports of chemical releases that are “extremely hazardous” or create “consequences” which “may be lethal.” 84 Fed. Reg. at 67,905. The absence of defined substances or threshold amounts, as CSB proposes, would force operators to take an extremely conservative approach to release reporting, swamping CSB with reports of minor releases at levels EPA, after years of administrative rulemaking, has determined do not present a threat. CSB could receive countless reports every day of minor incidents, such as a slip-and-fall resulting from spilled oil or minor scrapes during liquids unloading at a natural gas well.

GPA Midstream recommends that CSB limit its reporting requirements for “accidental releases” to those “regulated substances” and “extremely hazardous substances” as they have already been listed by EPA, including their threshold quantities.

II. The Proposed Rule’s Definition of Serious Injury Should be Modified

CSB’s proposed definition of “serious injury” is overbroad and may include even minor injuries. Implementing this definition may require operators to submit a significant volume of reports for incidents that are not candidates for CSB investigation. CSB should modify the definition to be no more stringent than OSHA’s existing standard for reporting injuries.

Specifically, the proposal would define a “serious injury” to mean *any* injury if it results in any of the following:

(1) Death; one or more days away from work; restricted work or transfer to another job; medical treatment beyond first aid; loss of consciousness; or

(2) *Any injury or illness* diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

Proposed Rule, § 1604.2, 84 Fed. Reg. at 67,909 (emphases added). A report would then be required for “any accidental release resulting in a fatality, serious injury or substantial property damages.” Proposed Rule, § 1604.3, 84 Fed. Reg. at 67,910.

This is overbroad in that the definition could include a wide array of minor injuries. The reporting burden would be exacerbated by the absence of minimum quantities for the release of an “extremely hazardous substance” or a “regulated substance.” *See* discussion, *supra*. As a result, *any* minor injury resulting from the release of any quantity of an “extremely hazardous substance” or “regulated substance” could be reportable, including where the releases may only be fugitive emissions that occur during normal operations.

For instance, a contractor performing a leak detection inspection at a natural gas compressor station stumbles over the edge of a concrete pad and sprains his ankle. Because there are fugitive emissions of “regulated substances,” such as butane, ethane, or isobutene (even though they are below regulatory levels requiring repair) and because the contractor’s work with those releases “resulted in” an injury that required “one or more days away from work” or “restricted work or transfer to another job,” it could require a CSB report. As could any injury related to fugitive emission work, such as muscle soreness or pulls while replacing leaking components. As another example, the release of a small amount of residual material classified as a “regulated substance” contacts an employee’s arm causing a chemical irritation and a doctor prescribes a topical prescription ointment. Under the Proposed Rule, this could also require a CSB report despite the absence of any significant release or injury that would warrant a CSB investigation.

Operator responses to even minor injuries are typically cautious. Company policies may require “restricted work” for employees and contractors subject to scrapes, bruises, or strains for precautionary reasons. Should any of these minor injuries occur in conjunction with even the smallest release, the operator would be required to file a report with CSB. This would also penalize (in the form of a reporting obligation) an employer’s choice to allow time off before returning injured workers back to their regular duties. By contrast, an employer that did not give the injured worker time off, even for the same or a similar injury, would not have to report.

GPA Midstream generally agrees that CSB should rely upon existing OSHA definitions, where appropriate. 84 Fed. Reg. at 67,906 (“use of an existing OSHA definition would contribute to greater understanding among the regulated community and help to ensure faster and more effective compliance with the new regulation”). Yet, the Proposed Rule goes well beyond what OSHA requires for recording and reporting of occupational injuries and illness. 29 C.F.R. § 1904.7. For example, OSHA only requires operators to keep records of “a *significant* injury or illness diagnosed by a physician or other licensed health care professional.” 29 C.F.R. § 1904.7(a) (emphasis added); *see also id.* at 1904.7(b)(7) (defining a “‘significant’ diagnosed injury or illness”

as “[w]ork-related cases involving cancer, chronic irreversible disease, a fractured or cracked bone, or a punctured ear drum” diagnosed by a physician or other licensed health care professional.”).

CSB’s proposed definition, however, goes well beyond what OSHA *recording* regulations would require, as an employer apparently would be required to file a report with CSB even where a doctor finds only insignificant injuries. This could include any number of scrapes, bruises, or minor cuts treated with nothing more than a Band-Aid. This is not only inconsistent with CSB’s goal of avoiding confusion by relying on OSHA’s definition of a serious injury, but would unduly burden operators with reports of insignificant injuries that CSB could not possibly have a reason to investigate.

To avoid these unnecessary reports, GPA Midstream recommends modifying the proposed definition of “serious injury” to be consistent with the OSHA criteria for reporting serious injuries. These include (1) an employee death, (2) in-patient hospitalization, or (3) an amputation or loss of an eye. 29 C.F.R. § 1904.39(a). By capturing fatalities and significant injuries that require hospitalization, the OSHA reporting definition strikes the right balance between over-reporting and under-reporting significant incidents. It will capture significant injuries without involving unnecessary reports for minor incidents.

In sum, GPA Midstream proposes that the final rule adopt OSHA’s definition of reportable injuries or, if CSB insists on using a lower standard, at least conform the final definition to OSHA’s definition of recordable injuries.

III. The Proposed Rule’s Definition of “Substantial Property Damage” Should be Clarified

CSB’s proposed definition of “substantial property damage” lacks necessary details regarding how the \$1 million threshold must be calculated. Whether that damage amounts to \$1 million requires operators to answer certain questions first:

- Is the value of damaged equipment the cost of repair, replacement, or the depreciated value of that equipment? This could make a significant difference as the depreciated value of a 15-year old process unit may be \$500,000 but cost \$1 million to repair or \$2 million to replace with updated technology and materials. The proposed rule provides no guidance as to which metric should be used.
- If the operator must use the cost to replace or repair the equipment, must the “substantial property damage” calculation include the cost of materials only or the cost of bidding the work, design, engineering, and labor as well?
- If property that is damaged or destroyed by an incident is insured, such as a truck or off-site property, should the value of property be valued at the amount of insurance proceeds?

Because property damage can be valued in a number of ways, CSB should provide guidance as to how damage should be calculated in determining whether any incident caused the “substantial property damage” threshold to be exceeded. This is especially important in that the failure to make a report could subject an operator to administrative, civil, or criminal penalties, per

proposed 40 C.F.R. § 1604.5(b). Operators should not be subject to enforcement actions where the failure to file a report stems from unclear regulations or an honest misunderstanding of how damages should be calculated under the rule.

IV. The Threshold Damage Value is Too Low

The proposed rule's damage threshold of \$1 million is too low and will not serve the purpose of distinguishing between significant and insignificant damage from a release. For specialized industrial equipment, repair or replacement costs can easily exceed \$1 million. This is especially true if that total must include the cost of inspecting the damaged equipment (often by specialist contractors), design, engineering, bidding, labor, materials, and any regulatory costs, such as permitting. Should all of these aspects count towards the threshold amount, even relatively minor damage to equipment could exceed \$1 million in total costs. This is also true with respect to environmental impacts: specialist contractors are required to estimate damages to the environment, which may include the costs of studies, remediation, and natural resource replacement. Again, these costs could exceed \$1 million in total costs for even minor environmental damage. GPA Midstream recommends that the final rule use a higher damage value threshold in the range of \$3 million to \$5 million. This will make it more likely that operators will only report releases that resulted in significant damage to equipment.

V. The Final Rule Should Allow Up to 24 Hours to Report a Release

The requirement to report a qualifying release to CSB within four hours is overly burdensome and risks unnecessary confusion. Instead, the CSB should adopt reporting requirements consistent with OSHA, so that reports of a fatality or serious injury are made to both OSHA and CSB simultaneously. Indeed, in the event of a significant release, operators must concentrate on managing the release within the first few hours. This may include managing the evacuation of employees from a site, fighting fires, working with first responders to address any injuries, and containing the potential release. This response effort should be the operator's focus, before assembling information for a report to investigators.

Although GPA Midstream appreciates the Proposed Rule's attempt to reduce duplicative reporting burdens by allowing operators the option of providing the CSB with an NRC report identification number, the proposal does not stop there, as it would require additional information about injuries that are not part of an initial report to the NRC. *See* 84 Fed. Reg. at 67,908 (discussing additional information required under proposed 40 C.F.R. § 1604.4).¹ Yet, a four hour time period may not enable operators to understand the true extent of employee injuries or damage and some incidents may still be in the process of being controlled or monitored by the relevant knowledgeable personnel who would perform this reporting. With respect to injuries, because the

¹ GPA Midstream notes that requiring additional reports beyond those to the NRC, or the reporting of additional information, frustrates the NRC's purpose. The NRC "is the designated federal point of contact for reporting all oil, chemical, radiological, biological and etiological discharges into the environment, anywhere in the United States and its territories." EPA, National Response Center, *available at*, <https://www.epa.gov/emergency-response/national-response-center>. This provides both a single source for industry reporting and a single source for local, state, tribal, and federal government agencies to receive reports of discharges.

Proposed Rule does not limit them to OSHA's definition of serious injuries, an operator may not discover an employee's injury until one or more days after the incident. These may include minor injuries such as rashes or muscle pulls or instances where employees are taken to the hospital for precautionary evaluations where employers are not told of any injuries until a day or more afterwards. The final rule should make some provision with respect to latent injuries that are not discovered until sometime after the release. With respect to damage, as noted above, the cost of repair or replacement of equipment may not be understood until the equipment is inspected. To the extent that contractor equipment was damaged, such as vehicles or scaffolding, it will take some time to get the contractor's estimate of the damage value.

GPA Midstream recommends reporting requirements similar to those found in OSHA regulations. There, an operator must report an incident resulting in the death of an employee within eight hours and all other reportable injuries within 24 hours. The proposed rule premised the very short four hour reporting period on CSB's need "to make deployment decisions as quickly as possible" so that physical evidence is undisturbed and so that "the facts and circumstances are still fresh" in the mind of witnesses. 84 Fed. Reg. at 67,908. OSHA faces these same needs when it decides to undertake an investigation. OSHA investigations also require the source to have preserved physical evidence and need the recollections of witnesses, yet there is no evidence in the record developed by CSB that the few additional hours offered by OSHA's reporting times have frustrated its mission in any way through the loss of evidence. To the contrary, significant incidents typically involve first responders, such as state or local fire, police, emergency management personnel, and other agencies, who arrive promptly on the scene and help to secure the site. Moreover, evidence preservation protocols are commonly implemented promptly, obviating the need for a shorter reporting timeline.

VI. GPA Midstream Supports the Ability to Revise Reports

Whether a four or a 24-hour reporting period is ultimately required, GPA Midstream strongly supports CSB's proposal to provide operators the ability to revise reports. *See* 84 Fed. Reg. 67,908. As noted, reports are often provided "on short notice based on the best available information" and operators are often overly conservative. Thus, as sometimes happens with NRC reports, a report may be made even though the operator does not yet know the substance released, the quantity released, or the extent of injuries or damages. Employees may be taken to a local hospital for precautionary evaluations and they may not be injured at all. Under these circumstances, reports may be made to CSB even though, based on subsequently developed information, the incident may not have warranted reporting. Operators should have the ability to "pull back" reports in such circumstances and the CSB should establish a written response protocol to rescind the reported incident.

For other events, the post-incident investigation may determine that a quantity of substance released was under-reported. For instance, the operator may not have immediately known that technical issues delayed the shutdown of upstream equipment, causing a release to be larger than initially believed. Given that the Proposed Rule states that it "is not intended to create a trap for any owner/ operator submitting a report on short notice," 84 Fed. Reg. at 67,908, operators should be able to revise their reports within 30-days of the incident in accordance with subsequently discovered information. This is especially important given that claims of a "false" report could subject the operator to administrative, civil, or criminal penalties.

VII. GPA Midstream Supports a One Year Delay in Enforcement

Due to the various vague aspects of the proposed rule discussed above, particularly CSB's open-ended approach to the chemicals covered by the rule, the very low threshold for a reportable injury, and the multiple ways to calculate damage, GPA Midstream supports the proposed one year delay in enforcing a final rule. 84 Fed. Reg. at 67,909. Although GPA Midstream appreciates that this one year time period "is required to allow adequate time for compliance education," *id.*, clarifying the aspects of the proposed rule identified above would obviate the need for such "compliance education." Unfortunately, that compliance education will likely involve CSB providing details for the rule in guidance documents and presentations that should have been included in the proposal and finalized in a rulemaking. However, we support a delay in enforcement so that industry can better understand the requirements.

GPA Midstream appreciates the opportunity to submit these comments in response to CSB's request and is standing by to answer any questions that it may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matt Hite". The signature is written in a cursive, flowing style.

Matt Hite
Vice President of Government Affairs
GPA Midstream Association