

Vol. 14 No. 1

January 20, 2006

COMMENTS DUE ON CHEMICAL ACCIDENT EVIDENCE PRESERVATION PROPOSAL

by
Jane C. Luxton

Allowing a scant 30-day notice period, the Chemical Safety and Hazard Investigation Board (CSB) has proposed sweeping changes to the evidence preservation requirements applicable to facility owners and operators in the event of chemical accidents and releases. The proposed regulation, 71 Fed. Reg. 309 (Jan. 4, 2006), would impose a broad new obligation, enforceable by subpoena, civil action, and potential criminal prosecution, to preserve all evidence “believed to be involved in the accident, or in any way relevant to the accident and/or the [subsequent] CSB investigation.” 71 Fed. Reg. at 312. The rule would further require owners and operators to “keep intact the status quo with respect to the site (or scene) of an accidental release.” 71 Fed. Reg. at 311. Taken together, with expansive definitions designed to maximize flexibility “based on an analysis of the totality of the circumstances” (*id.*), these provisions create an enforceable standard of care the specifics of which are far from clear, raising questions about the adequacy of notice provided to those who will be held accountable for violation of the new regulation.

Among the issues the proposal presents are:

- Given the CSB’s reputation for slow response and resolution – unlike the NTSB – are there any limits that would apply to the requirement to “keep intact the status quo with respect to the site (or scene) of the accident”? How long must a facility remain shut down to comply with the need to preserve evidence? Should the CSB, in fairness to parties subjected to an order to preserve evidence, impose a time limit on itself to complete its review?
- Alternatively, could an “intact” “status quo” mean something different if an accident occurs while a process is running – must the owner/operator keep it going to meet the strict letter of the regulation?
- Are there possible Fifth Amendment self-incrimination implications if an employee is required under the proposed rule to preserve evidence that might be used to prosecute him/her for violations of the Clean Air Act or other laws?
- What procedural mechanisms are available to owners/operators who seek to challenge the scope or duration of a Notice of Accident Investigation Initiation and Order to Preserve or a subpoena?
- On what basis will a determination be made of what evidence is “believed” to be involved in or “in any way relevant” to the accident or the follow-on CSB investigation? Is the standard based on some objective set of criteria, what a “reasonable person” would “believe” in light of knowledge available at the time, or CSB’s after-the-fact interpretation when far more facts are known?

Affected businesses and other interested parties can file comments on this proposed rule on or before February 3, 2006, by mail or express delivery service. Comments should be addressed to: Chemical Safety and Hazard Investigation Board, Office of General Counsel, Attn: Christopher Warner, 2175 K Street, N.W., Suite 650, Washington, D.C. 20037.

Jane C. Luxton is a partner in the Washington, D.C. office of the law firm King & Spalding LLP

About WLF and the COUNSEL'S ADVISORY

The Washington Legal Foundation (WLF) is the nation's largest non-profit, free enterprise public interest law and policy center. WLF litigates *and* publishes in order to advocate legal policies that promote economic growth, job creation, and the civil liberties of business. As a 501(c)(3) tax exempt organization, WLF relies upon the charitable support of individuals, businesses, associations, and foundations to fund its programs.

This COUNSEL'S ADVISORY is one of WLF's seven publication formats. Its purpose is to inform the free enterprise community about a development in the legal policy world that can be favorably influenced by the immediate involvement of legal experts and business and community leaders.

For more information on the Washington Legal Foundation, please contact Daniel J. Popeo, Chairman, at (202) 588-0302.

**Washington Legal Foundation
on the World Wide Web:**

<http://www.wlf.org>