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## Title 40 —Protection of Environment

### Chapter VI —Chemical Safety and Hazard Investigation Board

#### Part 1611 Testimony by Employees in Legal Proceedings

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## PART 1611—TESTIMONY BY EMPLOYEES IN LEGAL PROCEEDINGS

**Authority:** 5 U.S.C. 301, 42 U.S.C. 7412(r)(6)(G).

**Source:** 66 FR 17366, Mar. 30, 2001, unless otherwise noted.

### § 1611.1 General.

- (a) This part prescribes policies and procedures regarding the testimony of employees of the Chemical Safety and Hazard Investigation Board (CSB) in suits or actions for damages and criminal proceedings arising out of chemical incidents when such testimony is in an official capacity and arises out of or is related to an incident investigation. The purpose of this part is to ensure that the time of CSB employees is used only for official purposes, to avoid embroiling the CSB in controversial issues that are not related to its duties, to avoid spending public funds for non-CSB purposes, to preserve the impartiality of the CSB, and to prohibit the discovery of opinion testimony.
- (b) This part does not apply to:
  - (1) Congressional requests or subpoenas for testimony or records;
  - (2) Federal court civil proceedings in which the United States is a party;
  - (3) Federal administrative proceedings;
  - (4) Employees who voluntarily testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the CSB. The employee must state for the record that the testimony represents the employee's own views and is not necessarily the official position of the CSB.

- (c) This part only provides guidance for the internal operations of the CSB, and neither creates nor is intended to create any enforceable right or benefit against the United States.

## § 1611.2 Definitions.

*CSB incident report* means the report containing the CSB's determinations, including the probable cause of an incident, issued either as a narrative report or in a computer format. Pursuant to 42 U.S.C. 7412(r)(6)(G), no part of the conclusions, findings or recommendations of the CSB relating to an accidental release or the investigation thereof, may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report.

*Employee*, for the purpose of this part and part 1612 of this chapter, refers to current or former CSB Board Members or employees, including student interns, and contractors, contract employees, or consultants (and their employees). This definition does not include persons who are no longer employed by or under contract to the CSB, and who are retained or hired as expert witnesses or agree to testify about matters that do not involve their work for the CSB.

[66 FR 17366, Mar. 30, 2001, as amended at 66 FR 23854, May 10, 2001]

## § 1611.3 Scope of permissible testimony.

- (a) The statute creating the CSB, 42 U.S.C. 7412(r)(6)(G), precludes the use or admission into evidence of CSB investigative reports in any suit or action for damages arising from such incidents. This provision would be undermined if expert opinion testimony of CSB employees, which may be reflected in the views of the CSB expressed in its reports, were admitted in evidence or used in litigation arising out of an incident. The CSB relies heavily upon its investigators' opinions in its deliberations. Furthermore, the use of CSB employees as experts to give opinion testimony would impose a significant administrative burden on the CSB's investigative staff.
- (b) For the reasons stated in paragraph (a) of this section and § 1611.1, CSB employees may only testify as to the factual information they obtained during the course of an investigation. However, they shall decline to testify regarding matters beyond the scope of their investigation, and they shall not give any expert or opinion testimony.
- (c) CSB employees may testify about the firsthand information they obtained during an investigation that is not reasonably available elsewhere, including their own factual observations. Consistent with the principles cited in § 1611.1 and this section, current CSB employees are not authorized to testify regarding other employee's observations or reports, or other types of CSB documents, including but not limited to safety recommendations, safety studies, safety proposals, safety accomplishments, reports labeled studies, and analysis reports, as they contain staff analysis and/or CSB conclusions.
- (d) Consistent with 42 U.S.C. 7412(r)(6)(G), a CSB employee may not use the CSB's investigation report for any purpose during his testimony.
- (e) No employee may testify in any matter absent advance approval by the General Counsel as provided in this part.

## § 1611.4 Manner in which testimony is given in civil litigation.

- (a) Testimony of CSB employees with unique, firsthand information may be made available for use in civil actions or civil suits for damages arising out of incidents through depositions or written interrogatories. CSB employees are not permitted to appear and testify in court in such actions.

- (b) Normally, depositions will be taken and interrogatories answered at the CSB's headquarters in Washington, DC, and at a time arranged with the employee reasonably fixed to avoid substantial interference with the performance of his or her duties.
- (c) CSB employees are authorized to testify only once in connection with any investigation they have made of an incident. Consequently, when more than one civil lawsuit arises as a result of an incident, it shall be the duty of counsel seeking the employee's deposition to ascertain the identity of all parties to the multiple lawsuits and their counsel, and to advise them of the fact that a deposition has been granted, so that all interested parties may be afforded the opportunity to participate therein.
- (d) Upon completion of the deposition of a CSB employee, the original of the transcript will be provided to the deponent for signature and correction, which the CSB does not waive. A copy of the transcript of the testimony and any videotape shall be furnished, at the expense of the party requesting the deposition, to the CSB's General Counsel at Washington, DC headquarters for the CSB's files.
- (e) If CSB employees are required to travel to testify, under the relevant substantive and procedural laws and regulations the party requesting the testimony must pay for the costs, including travel expenses. Costs must be paid by check or money order payable to the Chemical Safety and Hazard Investigation Board.

#### **§ 1611.5 Request for testimony in civil litigation.**

- (a) A written request for testimony by deposition or interrogatories of a CSB employee relating to an incident shall be addressed to the General Counsel, who may approve or deny the request consistent with this part. Such request shall set forth the title of the civil case, the court, the date and place of the incident, the reasons for desiring the testimony, and a showing that the information desired is not reasonably available from other sources.
- (b) Where testimony is sought in connection with civil litigation, the General Counsel shall not approve it until the CSB's investigation report is issued.
- (c) The General Counsel shall attach to the approval of any deposition such reasonable conditions as may be deemed appropriate in order that the testimony will be consistent with § 1611.1, will be limited to the matters delineated in § 1611.3, will not interfere with the performance of the duties of the employee as set forth in § 1611.4, and will otherwise conform to the policies of this part.
- (d) A subpoena shall not be served upon a CSB employee in connection with the taking of a deposition in civil litigation.

#### **§ 1611.6 Testimony of former CSB employees.**

- (a) It is not necessary to request CSB approval for testimony of a former CSB employee, nor is such testimony limited to depositions. However, the scope of permissible testimony continues to be constrained by all the limitations set forth in § 1611.3 and § 1611.4.
- (b) Any former employee who is served with a subpoena to appear and testify in connection with civil litigation that relates to his or her work with the CSB, shall immediately notify the CSB General Counsel and provide all information requested by the General Counsel.

[66 FR 17366, Mar. 30, 2001, as amended at 66 FR 23854, May 10, 2001]

### **§ 1611.7 Testimony by current CSB employees regarding prior activity.**

Any testimony regarding any incident within the CSB's jurisdiction, or any expert testimony arising from employment prior to CSB service is prohibited absent approval by the General Counsel. Approval shall only be given if testimony will not violate § 1611.1 and § 1611.3, and is subject to whatever conditions the General Counsel finds necessary to promote the purposes of this part as set forth in § 1611.1 and § 1611.3.

### **§ 1611.8 Procedure in the event of a subpoena in civil litigation.**

- (a) If the CSB employee has received a subpoena to appear and testify in connection with civil litigation, a request for his deposition shall not be approved until the subpoena has been withdrawn.
- (b) Upon receipt of a subpoena, the employee shall immediately notify the General Counsel and provide all information requested by the General Counsel.
- (c) The General Counsel shall determine the course of action to be taken and will so advise the employee.

### **§ 1611.9 Testimony in Federal, State, or local criminal investigations and other proceedings.**

- (a) As with civil litigation, the CSB prefers that testimony be taken by deposition if court rules permit, and that testimony await the issuance of the investigation report. The CSB recognizes, however, that in the case of coroner's inquests and grand jury proceedings this may not be possible. The CSB encourages those seeking testimony of CSB employees to contact the General Counsel as soon as such testimony is being considered. Whenever the intent to seek such testimony is communicated to the employee, he shall immediately notify the General Counsel.
- (b) In any case, CSB employees are prohibited from testifying in any civil, criminal, or other matter, either in person or by deposition or interrogatories, absent advance approval of the General Counsel.
- (c) If permission to testify by deposition or in person is granted, testimony shall be limited as set forth in § 1611.3. Only factual testimony is authorized; no expert or opinion testimony shall be given.

### **§ 1611.10 Obtaining CSB investigation reports and supporting information.**

It is the responsibility of the individual requesting testimony to obtain desired documents. There are a number of ways to obtain CSB investigation reports, and accompanying investigation docket files. The rules at part 1612 of this chapter explain CSB procedures for production of records in legal proceedings, and the CSB's Freedom of Information Act rules at part 1601 of this chapter explain CSB procedures for producing documents more generally. See also the information available on the CSB web site, at [www.csb.gov](http://www.csb.gov). You may also call the CSB Office of General Counsel, at (202) 261-7600. Documents will not be supplied by witnesses at depositions, nor will copying services be provided by deponents.