

AVOIDING INCIDENTS

Evaluating a company's environmental, health and safety culture could be the difference between compliance and noncompliance.

This article first appeared in *Exploration + Processing*, May/June 2009.

by Mark L. Farley and Kristine K. Linville



Mark L. Farley

Environment, Land Use & Natural Resources
+1.713.276.7615
mark.farley@pillsburylaw.com



Kristine K. Linville

Environment, Land Use & Natural Resources
+1.713.276.7746
kristine.linville@pillsburylaw.com

Mark Farley and Kristine Linville are attorneys in Pillsbury Winthrop Shaw Pittman's Houston office. In addition to assisting companies evaluate their EHS performance and culture, they advise boards of directors and corporate executives on their roles in overseeing EHS performance and evaluating the effectiveness of compliance programs.

Environmental, health and safety (EHS) culture is a measure of corporation's values and reflects the atmosphere in which employees make decisions and take actions. High-profile incidents, such as the 2008 dust explosion at the Imperial Sugar refinery in Savannah, Ga., that killed 14 and injured 38 people, or the 2005 explosion at the BP Texas City refinery that killed 15 and injured more than 170 people, underscore the need for companies to evaluate their EHS culture as part of their periodic reviews of EHS compliance programs and other management systems. The increasing frequency of criminal investigations of worker endangerment in the aftermath of major incidents makes regular, pre-incident reviews of EHS culture even more important.

Governmental agencies such as the U.S. Chemical Safety and Hazard Investigation Board (CSB) and OSHA continue to focus on the importance of corporate culture and oversight as part of their incident investigations. In this context, the agencies are analyzing why managers and employees made certain decisions and took the actions that they did.

The initial focus often is on whether the organization identified hazards and attempted to mitigate them

through engineering and administrative controls. The investigation, however, quickly moves on to evaluate what the company did after it identified the risk.

What controls were imposed? What procedures were developed? Were they followed? If not, why? Were deviations from the procedures known and tolerated? It is in this latter phase that the focus is on the company's EHS compliance and decision-making culture.

The post-incident focus on EHS culture and corporate oversight by regulatory and investigatory agencies has contributed to the increasing frequency of worker endangerment prosecutions. When incident investigators move beyond the more traditional technical root causes of an incident, they begin to consider issues very similar to the ones considered by prosecutors in deciding whether to charge a corporation or individual defendant with criminal wrongdoing. For example, when CSB identifies cultural factors that lead it to conclude a company's culture tolerated a long-standing practice of not following operating procedure, the agency's findings are more likely to resonate with a prosecutor who considers issues in the context of knowledge and intent. These are

elements relevant to proving a criminal violation.

It, therefore, is essential for a company to consider its EHS culture as part of its overall management of EHS risks. Most importantly, an organization may prevent future incidents or noncompliance by detecting and correcting a weak EHS culture. Periodic evaluations of EHS culture also give the company support for post-incident arguments against civil or criminal enforcement.

One factor the U.S. Department of Justice considers when determining whether to prosecute a corporation, for example, is whether the corporation has a comprehensive compliance program. The evaluation of EHS culture is an important part of any compliance program and aids a company in arguing to the government that it had systems in place to prevent and identify misconduct and ensure that corporate activities are conducted in accordance with the law.

A company can evaluate its EHS culture in a variety of ways. EHS management systems typically are based on the familiar continuous improvement cycle of “plan-do-check-act,” where the organization (1) assesses the operational and EHS compliance risks associated with the business (i.e., spills, fires, explosions, toxic releases); (2) designs and implements systems to mitigate the risks; (3) periodically reviews and evaluates those systems to ensure that they are functioning as intended; and (4) takes appropriate actions to improve the systems based on management’s review of the

systems’ performance. Increasingly, companies are considering their EMS culture as part of the “check” component of the cycle.

The evaluation can be a standalone review as is often appropriate when there is a specific concern (i.e., employee or whistleblower complaint) or in the face of a general deterioration of EHS performance. The evaluation also may be incorporated into other regular evaluations such as the employee participation element of a process safety management audit required by OSHA or the leadership accountability element frequently considered as part of an operational management system review.

The process of evaluating EHS culture does not have to be complicated or burdensome. One can develop a strong sense of EHS culture by merely walking around a facility and taking the time to speak with a representative number of operators, frontline supervisors and managers about their perceptions of EHS performance.

Indicators of a weak EHS culture include poor housekeeping (e.g., plant trash, overflowing drip pans, spills that have not been cleaned up, illegible warning signs, etc.), torn or frayed fire-retardant clothing, tolerance for noncompliance with personal protective equipment or other requirements, and examples of poor communication and trust within the organization. In conversations with operators, supervisors and managers, the answers to the following types of questions generally elicit a good sense of EHS culture:

- What worries you the most about our EHS performance?
- What hazards exist in the workplace?
- Where is the next incident going to occur?
- What can we do to prevent it?
- Do we fix problems when we find them?
- If we don’t fix them, why not?
- Are operating procedures followed?
- Can you report hazardous conditions without fear or negative consequences?
- Is your contribution valued?

Soliciting the answers to questions such as these is only the first part of the process, however. It is very important that the company completes the fourth step of the continuous improvement cycle (i.e., “act”) and promptly addresses concerns or deficiencies that are identified. Not responding to indicators of a poor culture only weakens the culture further by reinforcing perceptions that the company and its managers are indifferent to worker concerns and EHS performance.

One important consideration is whether to include an external perspective as part of the review. Retaining outside legal counsel or technical consultants provides not only a fresh view on issues, but it can be especially beneficial where key elements of a healthy EHS culture are missing or broken. For example, if employees do not believe that they work in an environment where they

can speak openly about EHS concerns, then it may be difficult for individuals within the company to obtain meaningful information through employee interviews.

Corporations undertaking stand-alone EHS culture evaluations always should consider conducting the evaluations subject to an attorney-client privilege, especially if the evaluation is in response to an allegation of misconduct. As with any review or assessment, third parties may attempt to use the results of the review in subsequent legal proceedings against the company. In making this evaluation, a corporation should balance protecting its legal rights with the need to build trust and openness within the organization.

Corporations have a number of incentives to conduct evaluations of their EHS culture and may structure the review in a variety of ways. By regularly evaluating EHS culture and addressing deficiencies as they are observed, corporations can reduce the risk of injury, minimize environmental impacts and avoid the legal ramifications of noncompliance.

