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Questions To Ask Before An Internal Investigation Of An Environmental Release Incident

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A pipeline rupture results in the release of crude oil in a residential area and a local creek leading to a major river.

A process upset at a refinery results in a fire, air permit exceedances, and refined product escaping secondary containment.

A manufacturing plant employee responsible for NPDES permit compliance is accused by his co-workers of falsifying data and discharge monitoring reports.

These hypothetical environmental incidents are examples of situations where a carefully structured, detailed, and thorough internal investigation may be appropriate. They are also the types of incidents that can demand an urgent response.

Internal investigations may be driven by a company's desire to identify the root cause of an incident, verify an unconfirmed allegation, be a responsible corporate citizen, address liability concerns, or take remedial measures to prevent similar incidents from reoccurring, among many other reasons. Of course, these incidents also can result in governmental enforcement actions, third-party civil suits, individual liability, and significant reputational damage, so another key purpose of an internal investigation is often for the company to obtain legal advice based on the investigation findings.

Before jumping into an investigation where time is of the essence, thinking

through the answers to the following questions can help reduce the stress and potential pitfalls that often follow environmental incidents.

1. Does the company have a written policy on internal investigations that covers the situation?

Policies will often describe what types of incidents or “level of risk” triggers an investigation, how the investigation will be performed, and how the investigation team should be selected, among other things. Even if a policy is in place, it may not definitively address the particular situation—in which case decisions will have to be made about whether the written policy should be rigidly followed or simply considered as one factor in structuring the investigation.

2. Is there a regulation or governmental order requiring an investigation?

For example, a PHMSA Corrective Action Order may require “physical inspection, testing...or other appropriate action.” 49 C.F.R. § 190.233. Federal regulations governing both natural gas and liquid pipelines require operators to establish procedures for analyzing accidents and failures to determine their causes. See 49 C.F.R. §§ 192.617, 195.402. State agency Notice of Violations often require investigations as well.

3. Should it be a legally privileged investigation, a non-privileged investigation, or should both types of investigations be conducted covering different subjects related to the incident?

Resolving this question can be complex, but it is critically important. Often, a privileged internal investigation is preferable because the privilege can later be released if desired. But that does not cut both ways; a clearly non-privileged internal investigation cannot later be made privileged. In addition, to establish and protect a legally privileged investigation, the investigation must be structured, performed, and reported on in a certain manner throughout the course of the investigation.

4. Will there be a Root Cause Failure Analysis (RCFA) investigation? If so, will it be part of, or separate from, an internal investigation?

There are many types of RCFA investigations that may or may not cover all the issues that the company wants to investigate. It’s possible, for example, that the RCFA investigation will focus primarily on the mechanical mode of failure leading to the release, while a separate investigation may focus on specific personnel, procedural, cultural, and management of change issues that need examination even if they are not part of the root cause of the incident. There are various ways to structure the investigations.

5. Who will manage and direct the investigation? Should it be an attorney?

Identifying the person managing the investigation team, structuring the investigation, and reporting the investigation findings is critical for multiple reasons. Answering this question may depend on whether the intent is to protect the internal investigation as privileged, even if the privilege is later released. The strongest case for maintaining privilege is where outside counsel manages and directs the investigation.

There are a number of different options to consider when deciding who will manage and direct an internal investigation, including:

- Outside counsel who is not consistently retained by the company for ongoing legal work.

- Outside counsel who does perform regular legal work for the company but can nevertheless remain objective and independent.
- In-house counsel who makes clear that he or she is acting in the role of the company's attorney and is not making business or management decisions.
- An investigator or technical expert, from either inside or outside the company, retained by counsel to perform the investigation for the purpose of providing legal advice to the company.

The benefits and potential drawbacks of each of these options should be considered when structuring the investigation.

Keep in mind that still-developing case law continues to address privilege issues in the context of internal investigations, so be sure that your counsel has reviewed the latest opinions in this area. Also, pay close attention to the language of engagement letters for outside counsel and consultants to ensure that their role in the investigation is clear and that it is expressly articulated whether their work will be used to provide legal advice to the company.

Decisions made at the start of an internal investigation into an environmental incident or allegation of noncompliance are critical for performing a thorough, high-quality investigation that addresses the salient issues while ensuring the appropriate protections are in place. Taking time to ask the right questions – and understanding the answers – is essential in this complex area of environmental law.

In an upcoming blog post, we will address the next steps in implementing the internal investigation once the above questions have been answered.