



# Process Safety Culture and Environmental Management Systems

Bracewell LLP  
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PROCESS SAFETY CULTURE –  
ASSESSMENTS,  
INVESTIGATIONS, AND  
LITIGATION

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# PROCESS SAFETY EVENT

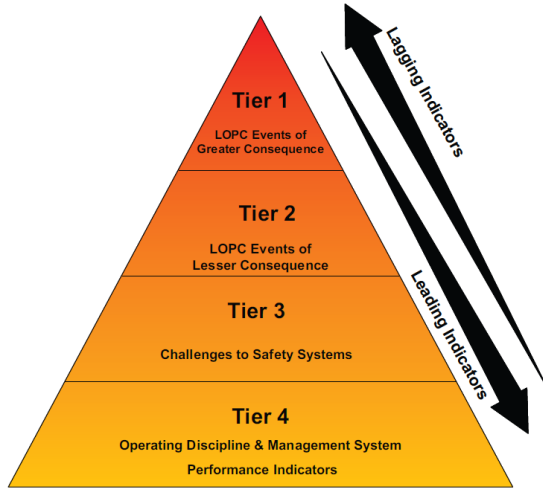


Figure 2—Process Safety Indicator Pyramid

An unplanned or uncontrolled loss of primary containment of any material including non-toxic and non-flammable materials from a process or an undesired event or condition that, under slightly difference circumstances, could have resulted in a loss of primary containment of a material.

## SAFETY CULTURE

“Safety Culture” represents the core values and behaviors resulting from a collective commitment by leaders and individuals to emphasize safety over competing goals to ensure protection of people and the environment.

## ASSESSMENT: PURPOSE

- Identify individual and group values toward safety and risk tolerance
- Measure commitment and effectiveness of safety-management program by evaluating the attitudes, perceptions, competencies, and patterns of behavior of the refinery's workforce.

# ASSESSMENT: APPROACHES AND TOOLS

## Approaches

- Psychological approach
- Engineering approach
- Organizational approach

## Tools

- Written safety survey instrument
- Field observations
- Focus-group discussions
- Individual interviews
- Technical review of two to three process-safety-management topic areas
- Written report

	Qualitative Research	Quantitative Research
<b>Purpose</b>	Used to generate hypothesis Provides underlying insights into perceptions	Used to test hypothesis Measures perceptions of population
<b>Sample</b>	Small	Large
<b>Data Collection</b>	Semi-structured	Structured
<b>Data Analysis</b>	Thematic	Statistical; Variable focused
<b>Outcome</b>	Not generalized to population	Generalized to population

# ASSESSMENT: TOPICS

## BP Safety Review

- Process Safety Reporting
- Safety Values / Commitment
- Supervisory Involvement/Support
- Procedures and Equipment
- Worker Empowerment
- Process Safety Training

## NRC

- Leadership Safety Values and Actions
- Problem Identification and Resolution
- Personal Accountability
- Work Processes
- Continuous Learning
- Environment for Raising Concerns
- Effective Safety Communication
- Respectful Work Environment
- Questioning Attitude



## ASSESSMENT: FINDINGS TABLE

	Process Safety Reporting	Worker Empowerment	Procedures and Equipment
Survey			
Focus Groups			
Interviews			
Observations			
Technical Review			

## ASSESSMENT: WRITTEN REPORT

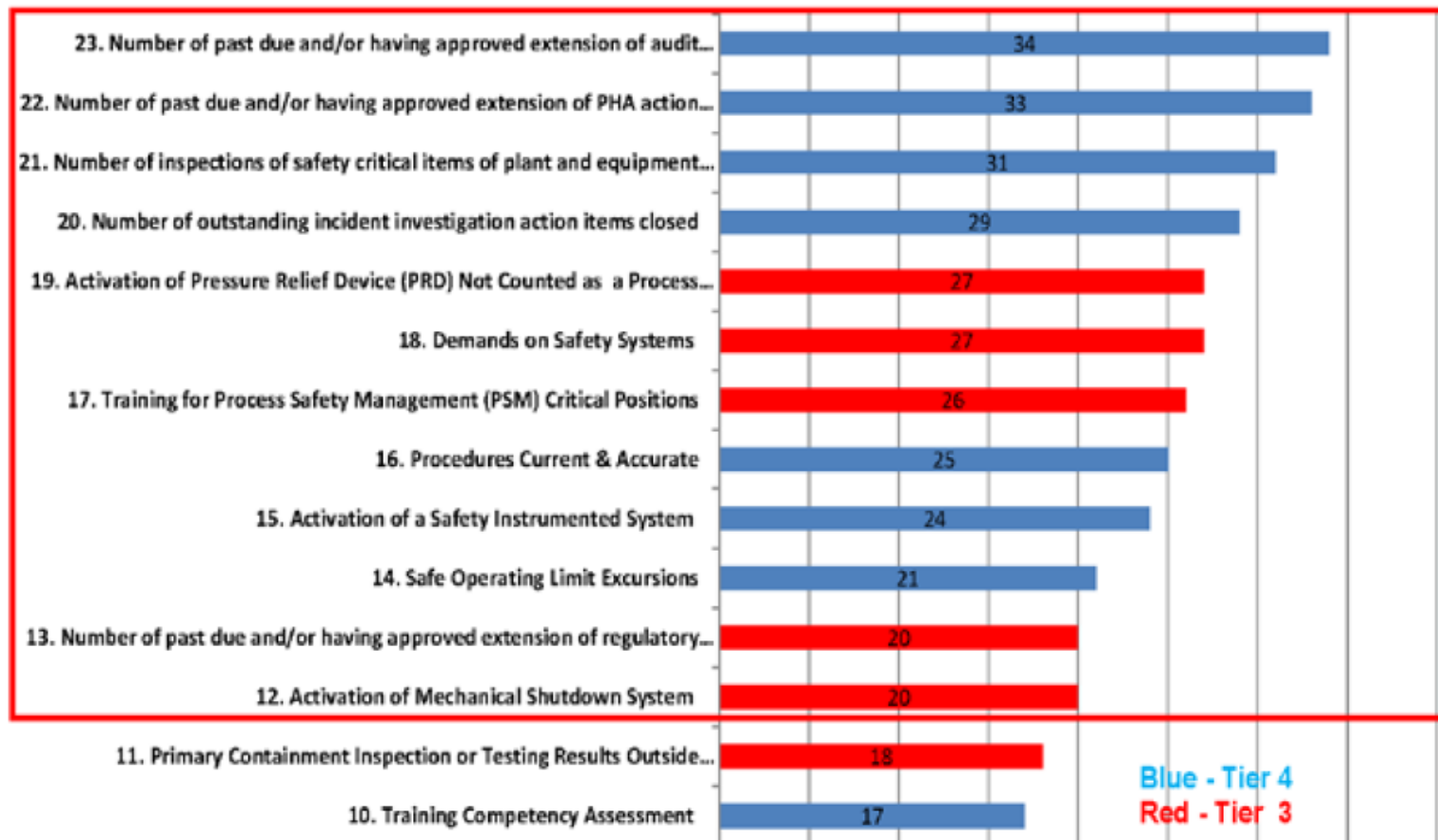
- Management Commitment and Leadership
- Individual Performance and Accountability
- Peer Perception and Accountability
- Safety Program Performance

## INVESTIGATIONS: WHAT ARE AGENCIES FINDING?

- Poor records of timely maintenance on safety-critical equipment
- Failure to close out on corrective-action items from routine inspections and audits
- Lack of depth and rigor in process hazard analysis and poor implementation of safeguards
- Failure to timely close action items from incident investigations, audits, and PHAs
- Poor mechanical integrity inspections

## Figure 2 -Number of Companies using a Specific Indicator\*

\*see Appendix B for numeric data and a list of leading indicator names



The background of the slide features a close-up of a wooden gavel and a pair of scales of justice. The scales are positioned in the upper half, and the gavel lies horizontally across the lower half. The background is a blurred American flag with stars and stripes. Overlaid on this scene are several semi-transparent geometric shapes: a large green pentagon in the center-right, a blue pentagon on the left, and a blue pentagon on the right. The text "LITIGATION HYPOTHETICALS" is centered within the green pentagon.

LITIGATION  
HYPOTHETICALS

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## HYPO: IS THE U.S. CHEMICAL SAFETY BOARD REPORT ADMISSIBLE?

- Wrongful death lawsuit in Louisiana
- CSB deployed to the site, conducted an investigation, and issued a final report
- Report describes process safety cultural failures including poor MOC, PSSR, ineffective safeguard selections, and poor operating procedures.
- Report recommends, among other things, a process safety culture assessment

## HYPO: IS THE PROFFERED EXPERT QUALIFIED TO OPINE ON SAFETY CULTURE?

- Administrative proceeding before the NRC.
- Former NRC employee with 32 years experience & BS Nuclear Engineering
- Responsible for all reactor-related rulemaking, financial assurance, regulatory analysis, project management, licensing, and inspection activities.
- Responsible for implementing the Systematic Evaluation program at one plant and the Technical Specification Improvement plan at another.
- He also worked on improving risk-informed decisions at plants.
- Qualified Incident Investigation Team leader and Emergency Officer.

## HYPO: IS THE EMAIL ADMISSIBLE?

- Criminal case seeking to prove criminal violations of safety regulations for a gas transmission line explosion in the San Bruno area in 2010.
- Author is writing about a gas distribution line in North Bay (different area than San Bruno) in 2007
- Email reads, “The day went as well as could be expected. Several employees noted that a culture change was needed and that they felt this would create a climate where feedback upwards was desired and budget didn’t trump regulatory compliance. They also noted this was a long-standing culture and they were eager to see it change.”



## HYPO: ARE THE SAFETY MEETING MINUTES ADMISSIBLE?

- Federal enforcement case
- The meeting notes reflect discussion of safety performance for the entire year
- There are opportunities for improvement
- Safety budget is discussed and committee was under budget for the year
- There is also discussion of anticipated employee Personal Incentive Plan criteria and payouts.
- One criterion is the committee safety budget; savings is viewed as a positive factor

## HYPO: IS THE EMAIL ADMISSIBLE?

Email reads, “Deferral would result in significant risk of being in noncompliance with . . . inspection requirements and would increase the expense requirements in 2010 to achieve the required compliance by 2012. Additionally, the cost of this work would increase from \$600k to about \$725k due to the cost of demobilizing and remobilizing. [The business unit] has already deferred \$1.8 million of work into 2010 from 2009, which is believed to be the maximum amount feasible to avoid significant compliance risk.”

## EVIDENTIARY FRAMEWORK

- Evidence is relevant if it has any tendency to make a fact more or less probable and the fact is of consequence in determining the action
- Relevant evidence is presumed admissible
- Relevant evidence can be excluded if its value is substantially outweighed by danger of unfair prejudice, confusion, deception, delay, wasted time, or it is cumulative



ENVIRONMENTAL  
MANAGEMENT SYSTEMS —  
SPOTTING THE LEGAL  
ISSUES AND PITFALLS

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# OVERVIEW

- The EMS Development and Implementation Challenge
- Legal Issues Involved in Adopting an EMS
- Legal Issues Arising from Language in EMS Documents
- Examples
- The Role of In-House Counsel

## THE EMS DEVELOPMENT AND IMPLEMENTATION CHALLENGE

- Whether it's recognized at the time or not, critical legal decisions are involved in the development and implementation of an EMS
- Plaintiffs' lawyers, prosecutors, and defense counsel will all look at your EMS for evidence of:
  - What you say and what you don't say
  - What you do and what you don't do
  - What you say you do and then don't do
  - Who is responsible for what and when

## THE EMS DEVELOPMENT AND IMPLEMENTATION CHALLENGE (CONT.)

- Formalized approach to environmental management is an absolute necessity for many companies
- However, many of these companies fail to recognize the legal implications and to assure appropriate legal review and consultation

# THE EMS DEVELOPMENT AND IMPLEMENTATION CHALLENGE (CONT.)

- And so the key is finding the right balance between:
  - The need to develop and document a system that can meaningfully direct, inspire, and incentivize appropriate environmental-related conduct
  - Without unnecessarily creating or increasing liability risk and exposure for the organization or the individuals within it



## LEGAL ISSUES/DECISIONS INVOLVED IN ADOPTING AN EMS

- Adoption of an EMS necessarily:
  - Requires decisions on numerous critical legal issues
  - Generates numerous documents with legal significance
  - May effectively create legally significant burdens both for the company and for individual officers and employees

## LEGAL ISSUES/DECISIONS INVOLVED IN ADOPTING AN EMS (CONT.)

- Approaches to corporate compliance policies
  - Ensure legal standards (e.g., U.S. Sentencing Guidelines for Orgs.) and key areas of legal compliance are considered
  - Ensure meaningful language without promising the unattainable
- Assigning detailed roles and responsibilities
  - Avoid starting with the proposition that “everyone is responsible for environmental compliance”
  - Consider how “knowledge” could be attributed

## LEGAL ISSUES/DECISIONS INVOLVED IN ADOPTING AN EMS (CONT.)

- EMS auditing and corrective action components
  - Documentation of an audit itself, as well as findings and corrective actions, could become evidence of such problems
    - “Who knew what, when”
    - Company’s own evaluation of a problem’s significance
    - Company’s exercise of due care (or lack thereof) in correcting problems
  - Consider legal privilege and precisely craft auditing records

## LEGAL ISSUES ARISING FROM LANGUAGE IN EMS DOCUMENTS: QUALIFICATION FOR LENIENCY

- A well-crafted EMS can maximize potential benefits as a mitigating factor under prosecution and sentencing guidelines, administrative/civil penalty policies, etc.
- However, a poorly-drafted EMS can endorse unrealistic liability standards or create a presumption of responsibility for individuals or organizations, potentially undercutting defenses

## LEGAL ISSUES ARISING FROM LANGUAGE IN EMS DOCUMENTS: NEGLIGENCE

- Basic standard of care: duty to act reasonably to avoid harm
- Looking to content of EMS to set “duties”:
  - Evidence of awareness
  - Evidence of “reasonable” policy
- Failure to follow dictates of EMS as proof of failure to meet duty

## LEGAL ISSUES ARISING FROM LANGUAGE IN EMS DOCUMENTS: NEGLIGENCE (CONT.)

- What to avoid in EMS documents:
  - Ambiguity
  - Vagueness
  - Exaggeration
  - Unattainable aspirations
- Creates inflated view of due care rooted in the company's own words
- **IMPORTANT** to adopt policies that are reasonable and achievable
- Should be phrased in a manner not easily twisted by plts' counsel

## LEGAL ISSUES ARISING FROM LANGUAGE IN EMS DOCUMENTS: CRIMINAL LIABILITY

- A well-crafted and implemented EMS can reduce potential criminal liability, but a poorly-crafted EMS can establish knowledge:
  - “All employees are responsible for environmental compliance”
  - “The Plant Manager is responsible for obtaining all required permits”

## EXAMPLES

- How certain EMS elements—and certain legal principles—can intersect . . .
- Real examples of good intentions gone wrong



## ENVIRONMENTAL POLICY

- Issue: Setting the bar too high
  - “Environmental protection is our number one priority”
- Result: Negligence
  - Self-established “reasonable” standard not met

## ASPECTS REVIEW

- Issue: Failure to follow through
  - “All audit findings will be corrected and closed out within 90 days.”
- Result: Negligence
  - Self-established “reasonable” standard not met
- But what if budgetary constraints require delay of project until next budget cycle?
  - Possible criminal liability – knowledge and money motive

## ROLES/RESPONSIBILITIES

- Issue: Overstating responsibility level
  - “The VP of EHS is charged with ensuring compliance at all facilities and providing all necessary resources to achieve this objective.”
- Result: Potential criminal liability
  - Knowledge much easier to establish

# MANAGEMENT REVIEW

- Issue: Top-Level Evaluation of System's Effectiveness
  - Limited review vs. careful review
- Result:
  - Negligence – limited review failed to catch and correct
  - Criminal – detailed review establishes knowledge and responsibility

## ROLE OF IN-HOUSE COUNSEL

- Scenario test the substantive commitments – are they realistic?
- Ensure such commitments are couched in language that avoids overstatement and maintains critical flexibility
- Participate in internal audits and reviews of EMS conformity
- Where appropriate, establish privilege to better shield findings
- Through appropriate training at all levels, convey the potentially severe legal consequences of failing to meet commitments



QUESTIONS?

*And Remember . . .*

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BEING A  
**LAWYER**

— IS EASY, IT'S LIKE —

**RIDING A BIKE**

EXCEPT THE BIKE IS ON FIRE  
YOU'RE ON FIRE  
EVERYTHING IS ON FIRE  
AND YOU'RE IN HELL



# THANK YOU



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