



Internal Investigations of Environmental Incidents or Allegations of Noncompliance

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The “Incident” – Some Examples

- Pipeline rupture releases crude oil in a residential area as well as a local creek leading to a major river.
- Refinery process upset results in a fire, air permit exceedances, and refined product escaping secondary containment.
- Employees at a manufacturing plant tell management that a fellow employee, who is responsible for NPDES permit compliance, is falsifying data and discharge monitoring reports.



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The “Incident”



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A large pile of dead fish, likely snappers, is scattered across a wooden dock in the foreground. The fish are mostly silver with some orange markings. In the background, there is a body of water reflecting the sky and surrounding greenery. A small boat is visible on the water, and a building with a glass facade is on the right. The sky is blue with some clouds.



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The “Incident”

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The “Incident”

- Environmental incidents or allegations of noncompliance are often 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.
- Before jumping into an investigation where it may feel like time is of the essence, thinking through the issues and having a plan can help reduce the stress and potential pitfalls that often follow environmental incidents.



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You Get the Call. What Should You Be Thinking About?

- Your potential role on the Incident Management Team.
- How can you help prevent harm to people, property and the environment? Where are the Response Plans? What do they say?
- What governmental agencies will be involved? Jurisdiction?
- Proper notifications made to National Response Center and others?
- Typical areas of potential liability?
- What kind of penalties will the company face? How do we mitigate them?
- Your role in preserving of evidence and establishing a legal hold.
- Communication channels and control groups. Privilege.
- Reporting volume released. Strict management is critical.
- Indications of employee wrongdoing?
- Retention of outside counsel.
- Internal investigation.



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What Should You Be Thinking About?

Examples of Statutory Basis for Liability

- Clean Water Act
- PHMSA Regulations
- RCRA
- Oil Pollution Act
- Safe Drinking Water Act
- Endangered Species Act; other wildlife laws such as the Migratory Bird Treaty Act
- Clean Air Act, General Duty Clause
- Related state laws and regulations
- Reporting violations
- Obstruction



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What Should You Be Thinking About?

Civil and Criminal Liability

- Example: Clean Water Act
 - Prohibits negligent or knowing discharge of any pollutant from a point source into the waters of the United States
 - Federal and state regulatory agencies can impose administrative, civil, and/or criminal penalties for non-compliance with discharge permits or other requirements of the CWA
 - Section 311(b)(3) – release violations
 - Section 311(j) – facility response planning violations
 - Section 311(b)(5) – notice-related violations



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Why Perform an Internal Investigation?

- A company's desire to identify the root cause of an incident
- Verify an unconfirmed allegation
- Be a responsible corporate citizen
- Address liability concerns
- Take remedial measures to prevent similar incidents from occurring



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Why Investigate? To Obtain Legal Advice.

- Of course, these incidents also can result in governmental enforcement actions, third-party civil suits, individual liability, and significant reputational damage.
- Accordingly, a key purpose of an internal investigation often is for the company to obtain legal advice based on the investigation findings.
- Many sophisticated business entities require internal investigations when an incident or allegation with environmental implications arises, even if not mandated by law or agency order.



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Federal or State Law May Require an Investigation

Examples:

- 49 C.F.R. § 192.617 Investigation of failures (Natural Gas): Each operator shall establish procedures for analyzing accidents and failures, including the selection of samples of the failed facility or equipment for laboratory examination, where appropriate, for the purpose of determining the causes of the failure and minimizing the possibility of a recurrence.
- EPA, PHMSA or other [Corrective Action Order](#)
- State agencies part of their [NOV](#) notices.



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Why Perform an Internal Investigation?

- A properly performed internal investigation can help businesses mitigate the negative consequences of an environmental incident or allegation of wrongdoing as well as prevent reoccurrence.
- Internal investigations, however, are often urgent, sensitive and distressing for the affected company and its employees. Experienced counsel can help address these concerns through a properly managed investigation which seeks the truth while being cognizant of the practical and legal issues involved.



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Some Types of Investigations

- Root Cause Failure Analysis (RCFA or RFA)
- Technical investigations such as a [metallurgical analysis](#): often part of RCFA
- Internal investigations
 - Non-Privileged, Privileged
 - Can be part of or separate from RCFA
 - Major releases or concerns of wrongdoing often make an internal investigation essential, beyond the RCFA process.
 - Can cover one or multiple topics: technical and non-technical (e.g., human performance, cultural, management) issues
 - Pool counsel can be used to protect individual employees



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Root Cause Failure Analysis

- “The root cause is ‘the evil at the bottom’ that sets in motion the entire cause-and-effect chain causing the problem(s).”
- “A factor is considered a root cause if removal thereof from the problem-fault-sequence prevents the final undesirable event from recurring; whereas a causal factor is one that affects an event's outcome, but is not a root cause.”
- Four Major Steps in RCFA process (there are variations):
 - (1) Data Collection
 - (2) Causal factor charting
 - (3) Root cause identification
 - (4) Recommendation generation and implementation



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Planning: 5 Key Questions and Considerations

- Planning is essential to a successful internal investigation of an environmental incident or allegation of noncompliance.
- The following are 5 key questions and considerations to review to help **structure your investigation**.



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Question #1: Does the company have a written policy on internal investigations that covers the situation?

- Company policies, SOPs or Directives will often describe what types of incidents or “level of risk” trigger an investigation, how the investigation will be performed, and how the investigation team should be selected, among other things.
- More common with large, sophisticated corporations (or not!).
- 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.
- If no policy is in place, you may have more work to do in deciding whether to start an investigation and how it will be structured.



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Question #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 or Federal agency Notice of Violations or Corrective Action Orders often require investigations.
- Know what these requirements are, follow them, and decide whether the company will perform additional investigations for the purposes discussed earlier.



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Question #3: Perform a legally privileged investigation, a non-privileged investigation, or should both types be performed 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. That does not cut both ways: a clearly non-privileged internal investigation cannot later be made privileged.
- 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.
- Investigations required by law or order clearly are not going to be privileged.



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Question #4: Will there be a RCFA investigation? If so, will it be part of, or separate from, the internal investigation?

- There are many types of RCFA investigations that may or may not cover all the issues that the company wants to investigate. RCFA often focuses on the mechanical mode of failure leading to the release
- 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 to simultaneously satisfy the law, governmental orders, and address internal needs. Multiple layers of investigations may occur with different work products (privileged v. non-privileged).



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Question #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 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 when 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:



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Question #5: Who will manage and direct the investigation? Should it be an attorney? (Continued)

- 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.



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Question #5: Who will manage and direct the investigation? Should it be an attorney? (Continued)

- 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.
- Identify your “control” or “need to know” group. This group, often consisting of company managerial and legal personnel, will oversee the investigation and receive reports on its progress and findings while arguably allowing privilege to be maintained. (Control Group v. Subject Matter v. Upjohn Tests).



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Performing the Investigation

- The following are 5 key steps in actually **performing** your investigation.
- Of course, there may be variations based on the circumstances, but these steps are usually important no matter the answers are to the 5 planning questions.



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Step #1: Prepare a written investigation plan

- The plan may have a name such as “terms of reference,” “investigation charter,” or simply “investigation plan.”
- It should include a summary of the incident being investigated, the purposes of the investigation, the identity of who is managing and directing the investigation and other members of the investigation team, the components of the investigation (such as employee interviews, records review, and technical testing), the timeline of the investigation, and how the findings will be reported. [Example](#)
- Plan usually approved by the control group to whom the findings will be reported.
- Be prepared to make updates to the plan during the investigation if necessary.



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Step #2: Have a kickoff meeting with the investigation team

- Discuss and potentially edit the investigation plan.
- Address issues of privilege and explain how it works. Discuss how notes will be taken, labeled, and used.
- Make decisions regarding the schedule and path forward such as the order of interviews, allocation of tasks, and reporting.
- Periodic team meetings are usually beneficial during the course of the investigation.



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Step #3: Master the available facts and data at the outset of the investigation

- Investigation team should master facts as much as possible before conducting witnesses interviews
- Preserve evidence by circulating document holds
- Conduct preliminary inquiry to identify sources of information
- Identify fact and data gaps
- Managing documents and data
 - Determine scope and reassess periodically
 - Investigation Plan should be clear
 - What about immediate threats discovered before investigation has concluded?
- Structured interviews: similar to preparing for a deposition, the investigation team may want to develop an interview outline



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Step #4: Prior to witness interviews by counsel, determine if the “Upjohn warning” will be provided to employees.

- Among other things, the warning language makes clear that counsel is representing the company and not the individual employees and that the company holds, and can waive, the attorney-client privilege. Usually recommended. Memorialize when given. [Example](#)
- Also consider whether it is appropriate to retain “pool counsel” for employees being interviewed. Pool counsel attends the investigatory interviews, answers employees’ questions about the process, and identifies circumstances where an employee may need to retain separate counsel based on his or her involvement in the incident.
- Ensure you haven’t represented any of the employees you’re going to interview. Review local Rules of Professional Conduct. See ABA Model Rules: 1.13 & 4.3



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Step #5: Determine how the investigation findings will be memorialized and reported.

- Highly dependent on the type and purpose of the internal investigation.
 - A report for a non-privileged investigation done at the company’s own volition or required by a regulation or governmental order will often be available to the public.
 - This type of written report will typically include detailed factual analysis and conclusions concerning the cause of the incident along with remedial measures being performed or considered to prevent reoccurrence.



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Step #5: Determine how the investigation findings will be memorialized and reported. (Continued)

- A privileged investigation report performed primarily for the purpose of providing legal advice to the company would typically only be provided to the company's control group.
 - The report may contain legal analysis, address liability issues, and address other sensitive issues surrounding the incident.
 - This information may be provided in a written report, but there is also a trend to provide privileged investigation findings to the control group orally instead, depending on the nature of the investigation.



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Related Issue: What will be done with the results?

- Provide to government? Others?
 - Disclosure may be required by regulation or strongly encouraged by guidance issued by regulator
 - Cooperation can affect decision to bring criminal or civil charges
 - Possible privilege waiver and roadmap to civil litigants
 - Cooperation can minimize disruption to company's business operations
 - Cooperation often means an independent investigation
 - Report will be subject to FOIA once received by agency
 - Confidential Business Information needing redaction?
 - Transparency and good corporate citizenship in the community
 - Recommendations in the report? Pros and cons.
 - Again, consider multiple investigations to split-up issues



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Special Issue: Reporting Volume Released – Important Considerations

- Discharger may be accused of underreporting the flow-rate and size of the release because it affects the penalty assessed. Public relations issues and technical proof also come into play. This must be considered at all times.
- You must have a process to calculate and control this information. You do not want multiple unauthorized calculations going on within the company. It must be a scientifically justifiable process. Consider using a neutral technical team. Have a defensible and objective system in place.
- No one should improperly influence this process, including in-house and outside counsel. But counsel should be involved to ensure no undue influence, downplaying or cherry-picking of numbers, or manipulation. Appropriate qualifying language should be supplied.
- Executives and others have been criminally charged with obstruction and false statements based on volume reporting. SEC has brought charges that a company unreported spill to boost stock prices.



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Summary

- Stop any suspect conduct and do not permit it to continue while investigation is ongoing
- Determine need for an investigation. What type(s)? How many?
- Secure team to conduct investigation. Very important to have the right people.
- Develop a strategy and protocol to learn facts and interview witnesses
- Take steps to preserve ability to claim attorney-client privilege and assert work product doctrine
 - Purpose is to provide legal advice
 - Materials prepared with an eye toward litigation/enforcement action
 - Identify underlying investigative materials that are privileged
- Memorialize and communicate findings appropriately
- Consider merits of voluntary disclosure to government and regulators if required or appropriate



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THANK YOU!

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