

Chemical Safety Board’s New “Best Practice Guidance for Corporate Boards of Directors and Executives in the Offshore Oil and Gas Industry for Major Accident Prevention” – Onshore Operators Take Notice!

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Company Boards of Directors and senior executives of oil and gas companies should take notice of a May 14, 2020, guidance document issued by the Chemical Safety Board (CSB) entitled, “[CSB Best Practice Guidance for Corporate Boards of Directors and Executives in the Offshore Oil and Gas Industry for Major Accident Prevention](#).” And don’t be deceived by its title reference to offshore activities. Companies also need to pay mind to the guidance for onshore operations. Why? If there is an accident, government agencies will likely argue that the principles articulated apply equally as well on dry land.

Why issue guidance now? The guidance comes at the 10-year anniversary of one of the most significant offshore explosions in history—the Deepwater Horizon explosion that occurred in the Macondo Prospect in the Gulf of Mexico, offshore of Louisiana. The symbolic step of issuing the guidance just one week ahead of the 10 year anniversary of the May 20, 2010, Macondo blowout, fire, and explosion was surely intended to bring additional attention to its release.

The guidance focuses on boards of directors’ and executives’ roles in ensuring implementation of effective safety management systems to manage risks of major accidents properly. The guidance points to a recent industry report [1] noting that process safety is one of the least discussed topics at corporate board meetings. Clearly, the CSB perceives this to be a sign that top-level management at oil and gas companies are not paying enough attention to these issues.

Onshore facilities may have dismissed the guidance document as irrelevant to their operations, but doing so would be unwise in that the guidance has lessons for (and may even be cited against) onshore facilities or, even any industry that operates a hazardous facility.

What does the guidance recommend? The guidance cites the benefits of an effective process safety program as identified by the leading independent body that speaks to process safety issues in the chemical and oil and gas sectors—the Center for Chemical Process Safety (CCPS). [2]

The guidance states that boards of directors and executives should:

- Ensure a robust safety management system is in place;
- Promote a strong process safety culture;
- Consider adopting a corporate philosophy encouraging the use of inherent safety principles or drives major accident risk to As Low As Reasonably Practicable (ALARP) or a similar risk-reduction target;
- Ensure at least one of the company's directors has the necessary and relevant education, experience and training to gather, assess and communicate important process safety-related information;
- Establish a board champion for process safety who initiates discussion at all board meetings and leads process safety oversight and other initiatives on behalf of the board;
- Develop a process safety policy that is periodically reviewed and revised as necessary and is an integral part of the company's culture, values, and performance standards;
- Ensure the following items are in place: consistent corporate policies; procedures for hazard identification, risk assessment, and controls; clear management structure with established responsibilities; excellent communications with shareholders, regulators, and other stakeholders, as well as timely notifications; established operating procedures, document control measures, and performance indicators; investigations of process safety incidents and near misses, and documentation of findings and corrective actions; and an audit system, management reports, and management reviews;
- Communicate process safety policies and their importance as well as the crucial role of workers in risk identification and management;
- Establish strong Board visibility, including site visits, presentations, and board-level training initiatives including health and safety training courses, as well as the creation of company-specific programs with an emphasis on process safety;
- Discuss with the chief executive and senior management the state of the entity's enterprise risk management (ERM) and provide effective oversight as needed;
- Use effective leading and lagging safety indicators to allow for continual monitoring of the company's performance and implemented policies to ensure they take appropriate actions and achieve anticipated results;
- Institute a cross-industry approach to the learning and sharing of lessons from significant process safety incidents.

Observations on Applicability, Scope, and Timing of the Guidance:

Why is this guidance being directed toward boards/executives instead of environmental, health and safety staff? The guidance speaks specifically to corporate boards and executives and not facility

management or safety personnel. There is a sense that boards and executives are not paying adequate attention to these issues and are simply delegating it to environmental and safety professionals. This is based on the finding that process safety is one of the least discussed topics at corporate board meetings, whereas financial performance and regulatory compliance are among the most discussed topics. The least discussed topics in addition to process safety include asset integrity/liability, contractor management, and supply chain.

Why have boards struggled with process safety? Jack Welch, the late former-CEO of General Electric in its heyday and where the authors of this article worked for many years on process safety issues, used to preach to us: What gets measured gets done! He was so right. Companies rightfully focus on regulatory compliance, due to its obvious importance for liability, and also because it is easier to measure, assess, and report to a board. There are bright lines, like number of notices of violations/citations, amount of penalties paid for noncompliance, and the like—metrics that boards routinely use to assess performance and to make corrections where needed. For safety, there is one metric—OSHA recordable injuries and illnesses—but this is not a leading indicator. It tells you what happened but it does not indicate what is going to happen and how to best manage risk going forward.

And, process safety is simply a different animal—it involves a performance-based continuous improvement that translates less easily to measurement. That may explain why it is less discussed at the board level. It is not that oil and gas company boards don't value safety; they unquestionably do. In responding to Jack's challenge—companies have struggled with the fact that measurement and application of leading safety indicators are hard. This is true for many safety professionals and plant managers, not just board members. Companies need to recognize that there is an expectation to address these issues and companies should consider that there are leading indicators that can be measured. We've done it with clients. Because the CSB is saying to focus on it, boards and executives need to realize that it is important.

Why is this guidance relevant to onshore facilities? The principles articulated in the CSB guidance for offshore operations arguably apply with equal force to onshore facilities, indeed to any manufacturing facility to properly manage risks, in that these principles are in no way unique to offshore facilities or at least that is the argument that companies not following these guidelines should expect when facing an accusation that an onshore accident violated the general duty clauses under the OSH Act and the Clean Air Act's Risk Management Program (RMP) regulations. Regulators will likely point to the fact that offshore and onshore facilities have analogous equipment including separators, pumps, compressors, pipelines, meters and manifolds. Operation of offshore and onshore facilities have analogous hazards such as fires and explosions. Operation of offshore and onshore facilities have analogous safety processes and procedures, including operating procedures, maintenance procedures, mechanical integrity inspections, hazard identification, control measures, investigations and safety performance indicators. These procedures and processes are hallmarks of an effective safety process for both offshore and onshore facilities.

How might CSB and other regulatory agencies use this document? CSB will use this document in conducting its investigations. The responsibilities and authority of a CSB Investigation Team include "reviewing pertinent federal and state laws, regulations, codes, industry standards, and other good practice guidance; determining whether a company complied with such authorities; and analyzing those authorities for effectiveness or potential gaps in coverage." [3] OSHA, its state counterparts, and EPA could use the guidance in enforcement actions.

In its Field Operations Manual for enforcing occupational health and safety standards, OSHA

provides the following enforcement policy in determining violations of the OSHA General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act of 1970 for hazard recognition – “although evidence of recognition by an employer’s similar operations within an industry is preferred, evidence that the employer’s overall industry recognizes the hazard may be sufficient.” [4] Here, OSHA may look at the overall oil and gas industry and not just the onshore or offshore industry in determining if the hazard is recognized.

EPA states that owners and operators must comply with the RMP general duty clause in the same manner and the same extent as employers must comply with the Occupational Safety Health Act administered by OSHA. [5] Companies conducting Process Safety Culture Assessments [6] that require an evaluation of the effectiveness of process safety leadership can use the guidance as part of the assessment to evaluate leadership at the board level. An aggrieved shareholder bringing a derivative suit against board members or executives may use the guidance to establish a cause of action.

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In addition to companies with offshore operations, those with onshore operations should take heed and use the CSB guidance to evaluate their board charters, committees, subcommittees, communications, and procedures in light of the guidance. They should consider if there are effective safety management systems in place to properly manage risks in place at the board of directors and executive levels and that they can document that the board and executives are tracking process safety leading indicators. CSB is telling us that the tone for an effective Process Safety Management program needs to be set from the top.

[1] DuPont Sustainable Solutions, “Lack of Internal Alignment and Commitment of Resources to Manage Risk Threaten Corporate Business Performance: Global Survey of Executives Exposes Critical Areas of Concern for CEOs and Their Management Teams,” Figure 5 at 5, available at <https://www.consultdss.com/global-operational-risk-management-survey-report/>.

[2] CCPS, “The Business Case for Process Safety,” at 8 (2d ed. 2006), available at <https://www.aiche.org/ccps/business-case-process-safety-pdf>.

[3] U.S. Chemical Safety and Hazard Investigation Board, Board Order 040 6.G, dated February, 2017.

[4] OSHA Directive Number: CPL 02-00-163, Field Operations Manual, p. 415, dated September 13, 2019.

[5] EPA Guidance for Implementation of the General Duty Clause Clean Air Act Section 112(r)(1), dated May, 2000.

[6] California Title 8 CCR § 5189.1(r) requires refinery employers to conduct a Process Safety Culture Assessment.

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