VIRTUAL EHS COMPLIANCE

24 JUNE 2020

Presented by:
Paul Jacobson, Spencer Fane LLP
David Peal, Ramboll
EHS RISKS REMAIN

- Employees remain exposed to hazards.
  - Indeed, Covid-19 is yet another H&S exposure.
  - Need we amend every last PPE hazard assessment to include Covid-19?
- Environmental emissions continue to flow.
- Governmental EHS compliance and reporting obligations continue to apply.
- Executives and Board Members remain accountable for EHS compliance.
- Activists have time on their hands.
RISKS OF COMPLACENCY

• Falling into bad practices
• Potential for criminal enforcement
• Must comply, even during bankruptcy
EHS TOPICS PURSUED VIRTUALLY

- **EHS Compliance Audits:** Comprehensive regulatory compliance audits to evaluate client status with local, national and regional environmental and occupational health and safety laws and regulations.

- **Transactional Due Diligence:** Evaluating the EHS risks associated with business transactions, from straightforward acquisition, divestiture, refinancing and insurance placement to more complex merger, restructuring, buyout, public offering and bankruptcy situations.
AUDIT AND DUE DILIGENCE: THREE WAYS TO GATHER INFORMATION

• Physical inspection – walking around and looking at conditions.

• Interview – talking with workers, business managers, and EHS professionals.

• Document and records review – looking at the paperwork.
PHYSICAL INSPECTION

• Still photo uploads.

• Video uploads.

• Cell phones or tablets interactively with Facetime.

• Cell phones or tablets interactively with MS-Dynamics 365 Remote Assist.

• Advanced options.

... OK to mix and match!
# PHYSICAL INSPECTION

Still Photos or Recorded Video Uploads

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cheap</td>
<td>Privacy concerns</td>
</tr>
<tr>
<td>Easy</td>
<td>Proprietary information concerns</td>
</tr>
<tr>
<td>Familiar hardware and software</td>
<td>ITAR concerns</td>
</tr>
<tr>
<td>Unaffected by noise</td>
<td>Lack of spontaneity</td>
</tr>
<tr>
<td>Not very distracting</td>
<td>Ordinary cameras/smartphones not</td>
</tr>
<tr>
<td></td>
<td>intrinsically safe</td>
</tr>
</tbody>
</table>
**PHYSICAL INSPECTION**

Cell phones or tablets with Facetime or Other Video Sharing Applications

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allows spontaneity</td>
<td>Privacy concerns</td>
</tr>
<tr>
<td>Modest cost</td>
<td>Proprietary information concerns</td>
</tr>
<tr>
<td>Modest effort</td>
<td>ITAR concerns</td>
</tr>
<tr>
<td>Written and drawn guidance available in noisy areas</td>
<td>Perils of photographer distraction</td>
</tr>
<tr>
<td>Only slightly distracting</td>
<td>Ordinary cameras and tablets not intrinsically safe</td>
</tr>
<tr>
<td>Familiar hardware</td>
<td>Unfamiliar software</td>
</tr>
</tbody>
</table>
**PHYSICAL INSPECTION**

Smart Glasses, e.g., HoloLens Augmented Reality or RealWear HMT-1 headsets that enable virtual collaboration.

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allows spontaneity</td>
<td>Privacy concerns</td>
</tr>
<tr>
<td>Intrinsically safe, used in refineries</td>
<td>Proprietary information concerns</td>
</tr>
<tr>
<td>Written and drawn guidance available in noisy areas</td>
<td>ITAR concerns</td>
</tr>
<tr>
<td>Heads-up display</td>
<td>Somewhat expensive</td>
</tr>
<tr>
<td>Technological sizzle!</td>
<td>Unfamiliar hardware, unfamiliar software</td>
</tr>
<tr>
<td></td>
<td>Distracting for everybody – funny-looking</td>
</tr>
</tbody>
</table>
OUR SERVICES

Specific to COVID conditions:

• Live video site tours from drones

• "Digital Twin" high-resolution 3D model

• High-resolution aerial mapping and digital inspections

• Aerial 360 panorama views of sites
INTERVIEW

Probably the easiest to replicate remotely
• Phone call – Tried and true

• Video conference – Pretty easy, thanks to Skype and MS-Teams
DOCUMENT REVIEW

Highly dependent on document storage method.

- EHS Management Information System (EMIS)
  - Gensuite
  - Enablon
  - Intelex
  - VelocityEHS
- Electronic files in a central directory – Ask for access
- Electronic files in various places – Compile into shared location
- Paper-based records – Start scanning!
NEW AUDITING TECHNOLOGIES: LEGAL CONSIDERATIONS

- FAA regulations on drones: 14 CFR Part 107
- Employee privacy concerns
  - Labor contracts
  - Warn employees
- Consider potential for the same tools to be used against you
  - Government agencies and concerned citizens
KEYS TO VIRTUAL EHS COMPLIANCE

• Document roles, responsibilities, processes, and tasks like never before more than you think necessary. – Schedule, schedule, schedule!

• Mix and match technologies:
  • Even if you use VR goggles, you can still ask for still photos from a smartphone!
  • Even if you use Skype videoconferences, you can still do a quick interview on a phone call!
GENERAL DISADVANTAGES

- Hosting effort increases. Data gathering, especially in a paper-based environment.
- Physical inspection suffers. The best cameras provide just a fraction of the information gathered in person.
- Interviews suffer. Spontaneous conversations disappear.
- Document review suffers.
- Coaching suffers.
- Involve attorneys early if auditing under attorney-client privilege.
GENERAL ADVANTAGES

• Continued EHS operations.
• Travel costs are eliminated. No hotels, rental cars, airlines, or travel time.
• Covid-19 transmission concerns are avoided. The audit team’s germs and viruses stay safely off site.
PROTECTIONS FOR SELF-AUDITING AND SELF-DISCLOSURE

- Protection for voluntary efforts to discover and correct
- EPA and some states
- Under utilized
EPA’S AUDIT POLICY

• 9 eligibility criteria
• Protections
  • Reduction of gravity-based penalty component
  • Protection against criminal enforcement
KANSAS CIVIL DISCOVERY PRIVILEGE AND PENALTY IMMUNITY

• Environmental Audit Reports
• Burden on party asserting privilege
• 6 months or less
• Protection against testimony
• Penalty immunity
  • Applies to voluntary disclosures
  • Rebuttable presumption of immunity
  • Eligibility
MISSOURI PROTECTIONS

• No specific law, regulation, or policy in place
• MDNR regulations allow for consideration when calculating penalties
• Correct quickly!
ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

- Legal doctrines that protect against government regulators and civil litigants
- Work product is broader, but qualified
- Often valuable, even if self-discovery/correction protections are in place
AGENCY COVID-19 FLEXIBILITY POLICIES

- EPA
- MDNR

regulatory.inquiry@dnr.mo.gov
OSHA AND COVID-19

- COVID-19 is recordable, if work-related
- May 19 Memo
- 29 CFR Part 19
- June 18 Guidance on returning to work
- Retaliation
- Pre-existing OSHA regulations
CLOSING COMMENTS AND QUESTIONS

- Comments?
- Questions?
THANK YOU

Paul T Jacobson  
Spencer Fane LLP  
Office 816.292.8314  
PJacobson@spencerfane.com

David Peal  
Ramboll  
Mobile +1 (913) 406-1371  
dpeal@ramboll.com