An Attorneys Perspective on Combustible Dust Compliance

Insights
7.13.18

I handled my first combustible dust case in the late 80s and long before I worked at the Imperial Sugar plant event, I had learned about the fickle and never-to-be-taken lightly risks associated with combustible dust. Explosions and deflagrations may be rare but when they occur, people die and millions of dollars in damages occurCombustible Dust compliance is a constant source of worry for the outhouse counsel. After an employer has experienced an incident or OSHA combustible citation at a site, it is on notice that it may have issues at other similar sites. Even if the employer can throw money at the compliance issues, it takes time to determine how to abate the hazards and then to line up skilled contractors and complete the work. And all the while, the attorney worries and hopes that no incident occurs until compliance is achieved.

Moreover, every combustible dust compliance issue presents multiple compliance approaches, and only a properly conducted Process (Dust) Hazard Analysis will provide the guidance needed to determine the proper approach.

Combustible Dust presents unique challenges to employers and their labor counsel. Compliance costs are usually high – some surveys claim that the average abatement cost per site is $1,000,000 after OSHA citations – and often take months to complete.

Once employers are on notice of combustible issues because of an incident or OSHA citation at any of their facilities, OSHA may treat future violations as **willful**, and civil liability increases.

An employer must triage and manage achieving compliance as swiftly as possible – perhaps at multiple sites – while balancing available resources and production needs – ensuring interim protective measures - and avoid the creation of facts that will be (mis)used against you.

There is no general OSHA Combustible Dust Standard and employers must analyze a host of National Fire Prevention Association (NFPA) and other consensus standards to determine effective compliance actions.

- Those Consensus Standards have not been adopted as OSHA standards, but are recognized as a source of compliance strategies.
- OSHA may take a “Prescriptive” or checklist-type approach and cite an employer for items which may not be applicable or where there may be multiple acceptable abatement approaches.

- Given time and other limitations, OSHA is unlikely to conduct a Hazard Analysis and determine whether the cited actions are in fact required.

Although awareness has increased since the 2008 Imperial Sugar Planet explosion, expect that employers, and local, state and federal governmental entities may lack adequate knowledge.

1. Industries may not recognize Combustible Dust hazards.
2. Equipment manufacturers may not consider Combustible Dust issues – or may be unaware how a manufacturer configures and uses its equipment.
3. Fire Inspectors or Insurance Auditors may not look for Combustible Dust issues, which lulls an employer into a false sense of security.
4. We have, however, seen an increase in local governments raising combustible dust questions in the approval and permitting process for new manufacturing facilities.

It is best to be cautious and even a bit paranoid in determining if you have exposure.

1. We learned from events such as the Imperial Sugar Plant explosion and deflagration that even minor changes in a manufacturing process, work environment, or raw materials may create a hazard when none has been present for years.
2. Start by looking at your Safety Data Sheets (SDSs) and then consider whether you have dust accumulation, bag houses, vacuum systems, or visible processes like hammer mills which reduce particle size.

The Key is a Defensible Dust Hazard Analysis.
Obtain an experienced professional to conduct a site-specific Process Hazard Analysis (similar, but not the same as a Process Safety Management PHA analysis) – we'll call it a Dust Hazard Analysis.

1. 1. If you have not conducted a defensible analysis to justify your compliance decision, OSHA can go down a checklist and argue that you should have taken every step.
   2. The Analysis includes:

      1. Identification of types of combustible and processes which involve combustible dust;
      2. Places where combustible dust can accumulate;
      3. Ways dust may be dispersed into the air;
      4. Potential ignition sources;
      5. Potential effect of a combustible dust incident and of mitigating safeguards;
      6. Developing "what-if" scenarios and an evaluation of risk.

3. The Analysis includes talking to employees and review of operating history.
4. The employer then determines how to eliminate or mitigate the factors set out in 4 a-e. There are multiple points at which to mitigate risk and an employer may eliminate some areas and the related obligations under consensus standards.
5. The Risk Matrix may be the most important analysis to in-and out house counsel, and may dictate priorities.

There are Many Ways to Comply.
An employer's Compliance strategies may include:

1. 1.
   - Building and manufacturing process;
   - Controlling fugitive dust;
   - Ignition source central;
   - Deflagration and explosion protection;
   - Effective and consistent housekeeping;
   - Maintenance, PM, and inspections; and
   - PPE, Hazard Communication, and Training

Many of the greatest costs are associated with Electrical Compliance and eliminating the need for Class II electrical environments.

Solutions are seldom black-and-white. Your goal is to be able to justify your choices based on a credible analysis.

The Role of Counsel and Privileged and Work Product Protected Material.

1. 1.
   - Combustible dust compliance usually requires significant time, and even if OSHA agrees to a lengthy Abatement period for an individual site, that period will not generally protect other employer sites during that period.
   - Once the employer learns of compliance issues, it possesses knowledge of the hazard… the clock is ticking to get in to compliance.
   - Public policy encourages employers to conduct self-critical analysis to determine how to eliminate workplace hazards. However, if an employer knows that its expert's report will be used or misused against it while it assiduously works to get into compliance, this risk may reduce a rational employer's willingness to robustly do such analysis.
   - Therefore, some third party and/or internal evaluations should be directed by or associated with counsel's provision of legal guidance.
   - An employer cannot magically protect documents as Privileged or Attorney Work Product by cc'ing the attorney or having audits sent to counsel.

- Often such audits or reports are in fact Work Product Protected materials where counsel set up the process with initial guidance, ongoing consultation, and evaluation and incorporation of results into legal guidance.
- Plaintiffs and some regulators have attacked materials commissioned and used by in-house counsel by arguing that the General Counsel was serving primarily as an executive or in operations, rather than as legal counsel. It may be wise to involve outhouse counsel.

Common Issues with OSHA Combustible Dust Inspections.

1. 1. • Individual OSHA CSHOs may collect unrepresentative dust samples and their Salt Lake City lab tests may be unreliable or using dated and inadequate testing processes.
   - OSHA may not properly analyze dust accumulation, even under OSHA's 2015 revised approach to determining combustible dust accumulation.
   - If the employer has failed to prepare a Dust Hazard Analysis, OSHA may not consider whether an unacceptable risk is genuinely presented. "Hazard" and "Risk" are different terms and absent an Analysis, it is difficult to focus OSHA on Risk.
   - Many employers find out too late that their vendors and contractors did not consider all interrelated compliance issues when they assisted the employer with dust control measures – i.e., the employer often does have problems.

RESOURCES.
OSHA Combustible Dust page.

Combustible Dust National Emphasis Program. OSHA Directive CPL 03-00-008, (March 11, 2008).
Great source to show what OSHA considers.

National Fire Prevention Association (NFPA) Standards.

NFPA develops, publishes, and disseminates more than 300 consensus codes and standards intended to minimize the occurrence and effects of fire and other risks. Virtually every building, process, service, design, and installation in society today is affected by NFPA documents. These standards may be viewed online at NFPA Codes and Standards. Those related directly to combustible dust explosion hazards are:

1. 1. • 61, Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities
   - 484, Standard for Combustible Metals
   - 654, Standard for the Prevention of Fires and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids
   - 655, Standard for Prevention of Sulfur Fires and Explosions

- 664, Standard for the Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities

Related People

Howard A. Mavity
Partner
404.240.4204
Email