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# Responding to an Environmental Disaster

## The First 48 Hours

**Z**ero Hour: You are the assistant general counsel (actually, one of two lawyers in a very small legal department) of a web-based distribution company that buys various products wholesale and then resells them online directly to small businesses. You are in your office working one Saturday morning. Your phone rings. It is the company's president, calling because he had been unable to reach your boss that morning. He is in a panic.

The company had just decided to enter the motor vehicle fuels business and had recently purchased a large volume of gasoline for resale. The distribution company had contracted with a pipeline company to transport the gasoline from the refinery to a storage facility. Earlier that morning, the pipeline delivering the gasoline had ruptured, spilling thousands of gallons into a creek near a residential neighborhood. The gasoline had ignited, causing a huge fire that had killed two children, injured dozens, and destroyed many homes. Although the pipeline company is responding to the incident, its personnel could use some assistance.

You immediately recall that state law imposes strict liability on the owner of oil that enters the waters of the state and causes injury or damage.<sup>1</sup> Furthermore, gasoline is a hazardous material under some state laws.<sup>2</sup> You also remember that this particular shipment of gasoline had already been "pre-sold" to a number of customers who were awaiting delivery. You attempt to call your boss but suddenly remember that she has just boarded a nonstop flight for Fiji and will be out of touch for the next 12 hours. You then realize that, unlike the general counsel, you have no expertise in environmental law. At that point, you also start to panic.

Fortunately, your boss had had the foresight to prepare an environmental disaster response plan for the company. She had also had the good sense to put the plan on the company's intranet so that it could be easily updated, accessed, and executed. You activate your browser, access the company's home page, and click open the icon marked "Environmental Disaster Response Plan." Here's what you find, and why:

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## ENVIRONMENTAL DISASTER RESPONSE PLAN

### Keep in Mind Some Basic Principles

#### *Start to Do the Right Thing Right Away*

It is a natural tendency for human beings to avoid unpleasant situations and look to others to respond to a problem that they did not personally create. But in an incident in which immediate action is needed, this tendency itself is the first thing that has to be overcome. Taking immediate action to assess the environmental disaster, contain or remove the source of the release, remediate the contamination, and make the environment whole again may be costly and resource-intensive in the short term. But for a company intent on making it through the crisis, doing the right thing right away is the only course of action that will permit survival beyond the disaster.

Recent corporate history is replete with examples of the importance of doing the right thing right away. Johnson & Johnson's quick actions following the Tylenol poisoning incident in 1982 not only pre-

vented more deaths but also caused the public to feel that the company had done everything that it could to respond to the tragedy.<sup>3</sup> By contrast, Perrier's nonchalance and delay in responding to reports in 1990 that its product contained benzene levels in excess of FDA standards accounts in part for the company's inability to regain the large market share that it had formerly enjoyed.<sup>4</sup>

### *Focus on Minimizing Liability and Maximizing Recovery for the Company*

Perhaps the most important responsibility of in-house counsel during an environmental disaster is advising the company to take steps that will minimize liability and maximize recovery after the crisis is over. Thus, you should advise the company to take action that will accomplish the following goals:

- Mitigate damages.
- Cultivate a public perception that the company is working hard and fast to remedy the situation.
- Engage the government in an effective working relationship to achieve, in the short term, a penalty that is appropriate to the current crisis and, in the long term, legislation that is responsive to the needs of the business.

### *Stress Information and Communication*

Many companies are often unprepared for crises, especially ones that involve the environment, and need basic information on how to respond internally, as well as externally. Moreover, companies also need basic techniques for communicating with and coordinating all the staff members who are responding to the incident.

Misinformation distributed during a crisis can only aggravate an already difficult situation. Thus, the company must put a premium on the development of a consistent and coordinated message regarding the company's response that can be communicated to company personnel, the public, the media, the government, and, perhaps most important, the people directly affected by the disaster.

One example cited by commentators of how not to communicate with the public is the behavior of Dow Corning regarding the health risks of the company's silicone breast implants. Dow initially vigorously denied any health risk but ultimately released internal documents that acknowledged some potential ill effects. Despite a later change of

top management, the corporate name has become permanently associated with the crisis.<sup>5</sup>

#### *Don't Discount a "Mea Culpa" Defense*

Many companies fear that taking immediate action in an environmental disaster is tantamount to an admission of liability. Like the homeowner who fixes the front steps after a guest has fallen down them headfirst, many executives often deny that a problem exists on the theory that such denial is the only way to minimize legal exposure. But such an approach can be shortsighted.

In the August 26, 2002, issue of *Business Week*, reporter Mike France observed that companies may be overestimating the costs of apologies and underestimating their benefits.<sup>6</sup> "For one thing, juries weigh the fact that a company has faced up to its problems when assessing punitive damages."<sup>7</sup> To encourage such actions, many states have enacted or are planning to adopt laws that would prevent such public apologies from being entered into evidence in litigation.<sup>8</sup>

With these basic principles in mind, a company can prepare a plan for responding to an environmental disaster.

#### **Prepare and Implement a Company Plan for Responding to an Environmental Disaster**

One approach to consider when preparing an environmental disaster response plan is the Incident Command System ("ICS"), an organizational process used by certain government agencies, such as the U.S. Coast Guard, as well as fire departments and emergency response agencies, for responding to emergencies. (See the sidebar at right for a list of websites containing information about the ICS.) The most notable feature of the ICS is its method of breaking an emergency down into its individual components, addressing each one separately, and managing all components in a coherent manner.

In ICS, issues that arise in an environmental disaster are grouped into three broad categories:

- Immediate response to the disaster, such as rescue, spill containment, remediation, and so forth.
- Larger perspective, such as media interaction, community and investor relations, subsequent government enforcement and legislation, and so forth.<sup>9</sup>
- Recovery and continuation of the company's business and operations that have been affected by the incident.

To conform to this three-way division of issues, a company's disaster response plan should incorporate three separate teams:

- Incident Response Team ("IRT") to handle the immediate response issues.
- Crisis Management Team ("CMT") to deal with the media and community and political leaders.
- Business Recovery Team ("BRT") to solve business and operational problems resulting from the disaster.

Each of these teams should be staffed by people who not only are familiar with the company and its business partners but also are capable of making important decisions under pressure. The personnel appointed to each of these teams are a function of the particular operations in which a company sees itself as vulnerable.

Having established the need for a three-tiered approach, the company then needs to identify those areas of the business that are particularly susceptible to an environmental incident and evaluate the degree of vulnerability in each of these areas. For example, if the company is involved in the manufacturing, use, storage, handling, transportation, treatment, or disposal of materials or products that are defined as "hazardous" or "ultrahazardous" under federal or state law, the company's assets that are involved in such manufacturing, use, and storage, including refineries, factories, pipelines, storage facilities, and delivery vehicles, must be evaluated for the kind of environmental disaster that could occur, such as pipeline rupture, the likelihood and location of such a disaster, and the extent of the probable harm to the environment. This risk assessment should extend beyond the company's own assets and should include the assets of vendors and service providers on whom the company depends. The third-party facility to which a company sends its manufacturing waste, surplus equipment, or used motor oil, for example, should be examined to determine whether the company is exposed to a significant risk of liability if an environmental incident occurs at that facility.<sup>10</sup>

When the different areas of vulnerability have been identified and assessed, the company should prepare individual response plans addressing each of these areas. Response plans could be either incident-specific (the substance released is hazardous because it is petroleum) or broad (the sub-

From this point on . . .

Explore information related to this topic.

#### ONLINE:

- ACCA's committees, such as the Environmental Law Committee, the Legal Department Management Committee, and the Small Law Departments Committee, are excellent knowledge networks and have listservs to join and other benefits. Contact information for ACCA committee chairs appears in each issue of the *ACCA Docket*, or you can contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or [windley@acca.com](mailto:windley@acca.com) or visit ACCA Online<sup>SM</sup> at [www.acca.com/networks/ecommerce.php](http://www.acca.com/networks/ecommerce.php).
- Vincent M. Gonzales, *Environmental Disaster Response*, a forthcoming ACCA InfoPAK soon to be available on ACCA Online<sup>SM</sup>.
- Incident Command System ("ICS"), at [www.911dispatch.com/ics/ics\\_checklist.html](http://www.911dispatch.com/ics/ics_checklist.html).
- Incident Command System ("ICS"), at [www.norcalscan.org/fire/monitor/ics.html](http://www.norcalscan.org/fire/monitor/ics.html).
- Incident Command System in Oil Spill Response, at [www.uscg.mil/d1/staff/m/rrt/ics.html](http://www.uscg.mil/d1/staff/m/rrt/ics.html).
- National Interagency Incident Management System, Glossary of Terms for the Incident Command System ("ICS"), at [www.acadia.net/mdisar/icsgloss.html](http://www.acadia.net/mdisar/icsgloss.html).
- New York State Incident Command System, at [www.nysemo.state.ny.us/ICS/explain.htm](http://www.nysemo.state.ny.us/ICS/explain.htm).
- *Risky Business*, GLOBAL COUNSEL, available at [www.practicallaw.com/A11400](http://www.practicallaw.com/A11400).
- Ann H. Whitmore, Thomas E. Schick, and Kenneth M. Kastner, "Liability from Hazardous Materials Transportation: Are You Protected?" *ACCA Docket* 20, no. 10 (November/December 2002): 90–107, available on ACCA Online<sup>SM</sup> at [www.acca.com/protected/pubs/docket/nd02/hazmat1.php](http://www.acca.com/protected/pubs/docket/nd02/hazmat1.php).
- David B. Zoffer and John J. Donlon, "Developing a Crisis Management Plan," *ACCA Docket* 18, no. 8 (2000): 18–31, available on ACCA Online<sup>SM</sup> at [www.acca.com/protected/pubs/docket/so00/crisis.html](http://www.acca.com/protected/pubs/docket/so00/crisis.html).
- JEFFREY R. CAPONIGRO, *THE CRISIS COUNSELOR: THE EXECUTIVE'S GUIDE TO AVOIDING, MANAGING AND THRIVING ON CRISES THAT OCCUR IN ALL BUSINESSES* (Michigan: Barker Business Books Inc., 1998).
- KATHLEEN FEARN-BANKS, *CRISIS COMMUNICATION: A CASEBOOK APPROACH* (New Jersey: Lawrence Erlbaum Associates, 1996).
- RENE A. HENRY, *THE COMPLETE GUIDE TO CRISIS AND RISK COMMUNICATIONS . . . YOU'D BETTER HAVE A HOSE IF YOU WANT TO PUT OUT THE FIRE: PROFESSIONAL TIPS, TACTICS, DOS, DON'TS AND CASE HISTORIES* (California: Gollywobbler Productions, 2000).
- IAN I. MITROFF WITH GUS ANAGNOS, *MANAGING CRISES BEFORE THEY HAPPEN: WHAT EVERY EXECUTIVE AND MANAGER NEEDS TO KNOW ABOUT CRISIS MANAGEMENT* (New York: American Management Association, 2001).
- IAN I. MITROFF, CHRISTINE M. PEARSON, AND L. KATHARINE HARRINGTON, *THE ESSENTIAL GUIDE TO MANAGING CORPORATE CRISES: A STEP-BY-STEP HANDBOOK FOR SURVIVING MAJOR CATASTROPHIES* (New York: Oxford University Press, 1996).
- Kenneth A. Rubin, Ralph N. Albright Jr., David M. Hibey, and Brian M. Privor, *Legal Response to Catastrophic Spills: A Step-by-Step Guide for Corporate Counsel, Senior Management and Environmental Engineers*, ENVIRONMENTAL DESKBOOK 2002 (Morgan, Lewis & Bockius LLP, 2002), at 1.

#### AT ACCA'S 2003 ANNUAL MEETING:

- Are you looking for even more information on this issue? If so, plan to attend ACCA's 2003 Annual Meeting October 8–10 at the San Francisco Marriott. Visit [www.acca.com/education03/am](http://www.acca.com/education03/am) to learn more about the meeting and register by August 29 to save \$\$.

*If you like the resources listed here, visit ACCA's Virtual Library<sup>SM</sup> on ACCA Online<sup>SM</sup> at [www.acca.com/resources/vl.php](http://www.acca.com/resources/vl.php). Our library is stocked with information provided by ACCA members and others. If you have questions or need assistance in accessing this information, please contact Staff Attorney and Legal Resources Manager Karen Palmer at 202.293.4103, ext. 342, or [palmer@acca.com](mailto:palmer@acca.com). If you have resources, including redacted documents, that you are willing to share, email electronic documents to Managing Attorney Jim Merklinger at [merklinger@acca.com](mailto:merklinger@acca.com).*

#### ON PAPER:

- JEFFREY R. CAPONIGRO, *THE CRISIS COUNSELOR: THE EXECUTIVE'S GUIDE TO AVOIDING, MANAGING AND THRIVING*

stance released is toxic, explosive, radioactive, and the like). Response plans can focus on the part of the environment affected by the incident, such as the release of a hazardous material to soil, air, or water, or the place where the incident occurred, such as a company-operated facility, an offsite location, an urban setting, a residential neighborhood, and so forth.

**WHEN PREPARING CRISIS MANAGEMENT PLANS, MANY COMPANIES OFTEN NEGLECT TO CONSIDER THE LEVEL OF COOPERATION AND ASSISTANCE THAT THEY MIGHT BE ABLE TO OBTAIN FROM COMMUNITY LEADERS AND GOVERNMENT AGENCIES AND REPRESENTATIVES.**

Each response plan must also include the appropriate government notification protocol, such as contacting the National Response Center, the Office of Emergency Services, and/or the U.S. Coast Guard, together with a checklist of the necessary information to convey when notifying the government. Finally, each response plan must contain both specific instructions on how to assess, contain, and clean up a release of toxic material, as well as general guidelines on how to proceed in the long term. Many companies often rely on outside environmental consultants to help them develop such plans.

When preparing the response plans, the company needs to consider allocation of its resources and decide whether it would be more cost-effective and efficient to retain outside contractors to provide the necessary emergency services and response actions in the event of an environmental disaster. In certain situations, companies with varying strengths and weaknesses can come together and enter into a mutual aid agreement that allows them to help one another when responding to an environmental disaster.<sup>11</sup>

When preparing crisis management plans, many companies often neglect to consider the level of cooperation and assistance that they might be able to obtain from community leaders and government agencies and representatives. By the same token, a company can also neglect, at its peril, the potential

of such community and government leaders to impede, criticize, and chastise the company and its response efforts, regardless of how effective the company's response to the environmental disaster may be. As a consequence, a company might successfully respond to an environmental disaster but suffer considerable consequences in terms of subsequent government enforcement, media inquiries, public reproach, and the inevitable legislative "fixes" designed to prevent future environmental disasters. Examples of such situations include the Union Carbide release in Bhopal, India, followed by the enactment of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA") and the Exxon Valdez oil spill followed by the Oil Pollution Act of 1990 ("OPA 90").<sup>12</sup>

After the IRT, CMT, and BRT have been staffed and the individual response plans have been prepared, the company must be vigilant about updating the staff rosters and materials periodically to reflect not only changes in the company's personnel and assets but also changes in the company's business, operations, and long-term goals. In some cases, changes to response plans are triggered by the enactment of new laws or the amendment of current ones.

Some judgment can be exercised with updates, because modifying the rosters every time a new person is hired or a current team member moves on to something else can be administratively burdensome. A good guideline is to update these personnel lists and plans quarterly or annually, depending on the size of the teams and the changes in applicable government regulations.

*Ensure That the Plan Is Immediately Accessible and User-Friendly*

Obviously, any company emergency response plan is effective only if the company's management and employees are aware of it and are able to use it. Typically, environmental disaster plans reside in three-inch-thick binders that are filed away in an employee's office, cubicle, or locker. When disaster strikes, finding the plan is the first obstacle. Then, using the plan—given its sheer bulk—becomes another. And if updates are in the form of page inserts that can easily be tossed into the wrong part of the binder, the plan becomes worthless.

A better approach to disseminating and implementing a company's environmental disaster plan

would be to maintain the plan on the company's intranet so that employees and managers will know exactly how and where to access the plan. The plan can also be updated and maintained more frequently and immediately without wasting time and paper. The plan itself should be in a format that could be downloaded onto a laptop, Palm Pilot, or Pocket PC to facilitate its use by people in the field.

## **DESIGNING AND DISTRIBUTING A PLAN ARE NOT ENOUGH. A COMPANY'S EMPLOYEES AND MANAGERS MUST ALSO KNOW HOW TO USE IT.**

### *Conduct Tabletop and Field Exercises as Often as Possible*

Designing and distributing a plan are not enough. A company's employees and managers must also know how to use it. Under OPA 90, for example, companies involved in the storage and transportation of oil and petroleum products must have annual "spill drills" to ensure that the companies are ready to respond in the event of an actual oil spill.<sup>15</sup> These drills or exercises do not always have to occur out in the field under simulated disaster conditions. Conducting tabletop exercises are often quite effective in keeping company employees and managers ready and able to respond in the event of a real environmental disaster.

Now that the company has organized its teams, assessed its areas of vulnerability, and prepared a plan for allocating its resources, the company is ready to respond to a disaster on an hour-by-hour schedule as follows:

### **Hour 1: Define and Report the Environmental Disaster**

#### *Who, What, When, and Where?*

The first task is to obtain immediately available and reasonably reliable facts regarding the environmental disaster, keeping in mind that the information that you gather will almost immediately be forwarded to the government. Thus, you will immediately want to determine the following facts:



- What happened.
- Date and time of the incident.
- Location of the incident.
- Entities involved in the incident, including personnel, facilities, vehicles, and equipment.
- Most likely cause of the incident, to the extent known.
- Weather conditions at the incident location.
- Any other information that may help emergency personnel respond to the incident.

### *What Is the Effect on the Environment?*

In addition to the basic information, you will need to ascertain the following specific environmental information:

- Type(s) and approximate quantity(ies) of material(s) released or spilled into the environment.
- Types of media in which the release occurred, such as air, water, or soil.
- Preliminary assessment of the danger or threat posed by the release or spill to the environment.
- Preliminary assessment of the environmental damage caused thus far by the release or spill.

### *Does the Environmental Disaster Threaten Life and Property?*

In some cases, an environmental disaster can include a threat of harm or actual damage to human life and to property. When ascertaining the details of an environmental disaster, it is critical to obtain any information regarding such threats or injuries so that emergency personnel can be deployed accordingly.

### *Initiate Government Reporting Protocol*

Many companies take the position that the government must be notified right away regardless of whether there is sufficient information regarding the release or spill. By notifying the government immediately, the company can better avoid accusations of failing to notify authorities in a timely manner. Alternatively, other companies feel that a certain level of information-gathering needs to occur before notification so that meaningful and useful information can be conveyed to the government. The best approach is somewhere in between: notify the government immediately of the release but reserve the right to supplement or modify the notification as more facts are gathered. Consider

providing multiple notices to the government as additional information is obtained.

The choice of which government agency to contact in the event of an environmental disaster is a function of the nature of the incident itself, defined generally in terms of the following factors:

- Material released, such as oil, toxic gas, or metals, such as lead.
- Environment into which the material was released, such as water, air, or soil.
- Quantity of material released.

Some incidents must be reported to both federal and state governments, and others must be reported only to state authorities or only to federal authorities. For example, in California, the release of oil off the coast will trigger OPA 90 and involve immediate federal notification via the National Response Center (“NRC”),<sup>14</sup> while the same release occurring inland may involve only state notification via the Office of Emergency Services (“OES”).<sup>15</sup> Releases that occur on California’s interstate highways trigger immediate notification of the California Highway Patrol.<sup>16</sup> At the very least, when a company has no basic information on whom or where to call to report an environmental disaster, calling “911” is a good start.

Companies should take steps to ensure that all appropriate government agencies are notified as close to simultaneously as possible. Agency relations have been known to sour on just this point at the very outset of a disaster response.

#### *Initiate Company “Phone Tree” Notification*

After all of the necessary government agencies have been notified, alert the necessary company personnel. Often, an old-fashioned “phone tree”—notifying a group of people, each of whom is responsible for calling a predetermined list of other people—can be highly effective for providing notice of the crisis. Design and organize the company phone tree so that all of the necessary internal notifications can be made within one hour.

#### **Hour 2: Activate and Deploy the IRT** *Set Up the Incident Command Center*



As soon as the members of the company’s IRT have been notified, they must be deployed immediately to the site of the environmental disaster. One vital member of the IRT is local counsel who can

assist the company in securing a suitable location for setting up the incident command center (“ICC”) where the IRT will be operating on a 24-hour-a-day basis, at least initially. This ICC could be a large conference room in local counsel’s offices, a series of rooms on one floor of an office building, a hotel room, a warehouse, or even a truck trailer. The key requirement for an ICC is the availability of phone lines, as well as electricity for computers and communication equipment. (See the sidebar at right for the security guidelines that should be in place at the ICC.)

#### *Make Sure That You Have the Right Mix on Your IRT*

How a company constitutes its IRT can vary, but generally it is advisable to have at least six different work groups or individuals on the IRT:

- **Onsite response management.** This group or individual has overall responsibility for responding to the disaster and may also have a deputy, a secretary, and an attorney on the team. In environmental disasters in which government agencies become involved in the response, the representatives from these agencies become ex-officio members of the onsite management group.
- **Operations.** This group or individual is responsible for all activities and operations that are directed towards the environmental disaster itself: search and rescue activities, medical treatment and transport; assessment of all environmental and property damage; containment or abatement of the release or spill; removal, handling, and treatment of contaminated substances; hazardous materials handling and disposal; and implementation of other corrective actions. Generally, this group or individual manages or oversees contractors who are doing the actual response work. This group should be staffed by company employees with management or operational experience, as well as employees with environmental or health and safety expertise. In some cases, this group could request and obtain emergency response assistance from certain government agencies, such as the U.S. Coast Guard, the Environmental Protection Agency, the National Transportation Safety Board, and local fire and police departments, among others.
- **Planning.** This group or individual is responsible for conducting periodic assessments of the state

of the environmental disaster, as well as the progress of the response. Part of the responsibility of this group or individual is analyzing and planning the sequence of steps in the overall response effort. This group will issue situation assessments and planning reports anywhere from once a day to every four hours, depending on the nature of the disaster and the effectiveness of the response plan. The company should staff this group with employees who have environmental expertise, particularly in the area of remediation.

- **Logistics.** This group or individual is responsible for ensuring that the IRT has sufficient support to do its job: equipment and supplies for containing

the release and remediating the contamination, communication equipment and services, computers, transportation, response personnel (contractors and employees), food and lodging for the IRT, and other vital materials. It is advisable to staff the logistics group with people from the company's procurement department.

- **Finance/administration.** This group or individual is responsible for handling all of the funding and administrative issues relating to the response activities, including funding purchase orders and payroll, processing travel and expense reports, handling any workers compensation claims, and retaining the necessary expenditure documenta-

## SECURITY GUIDELINES FOR UNAUTHORIZED PERSONNEL AT THE INCIDENT COMMAND CENTER ("ICC")

### PROCESS SERVERS

- If a process server arrives at the incident command center seeking to serve legal papers on the company, a company employee, or a contractor, security should refuse service and immediately inform the process server that no one at the Incident Command Center is authorized to receive any service of process on behalf of the company, any company employee, or any contractor.
- Security should inform the process server that, if the party being served is "\_\_\_\_," "\_\_\_\_," or a \_\_\_\_\_ operating company, subsidiary or affiliate, then the process server should be directed to take the document being served to \_\_\_\_\_'s agent for service of process.
- If the process server insists on leaving the document, security should contact in-house counsel and tell the process server: "Leaving the document here does not constitute proper service of process and does not mean that the company has been served."

### MEDIA

- Members of the media should not be allowed anywhere on the premises unless they are accompanied by a member of the information records group.
- Security should give members of the media a phone number to contact the company spokesperson.

### VOLUNTEERS

- Members of the public who arrive at the incident command center offering their services for free in the incident response effort should be asked to leave their name, phone number, and other relevant information and instructed that they will be contacted if their services are needed.
- Security should then forward the volunteers' information to logistics for handling and disposition.

### PROTESTERS

- Protesters should not be allowed anywhere on or in the vicinity of the premises.
- Security should immediately inform the incident commander, the deputy incident commander, or any other member of the incident command staff of their presence and await further instructions.
- Security should continuously monitor the protesters' actions and whereabouts.
- If the protesters engage in actions that pose a clear and present danger to the safety of response personnel at the incident command center, if they interfere with rescue or recovery operations, or if their actions could lead to the damage or destruction of private property, then security should immediately dial "911" and summon the appropriate law enforcement agency.

tion for later use. This group should be staffed with accountants from the controller's office. Once the insurers have been notified and have arrived at the ICC, the finance and administration group works with the insurance adjusters to make sure that the necessary documentation is prepared and recorded as early contacts are made and settlements reached with victims of the disaster. For smaller companies, both the logistics function and the finance and administration function could be handled by one individual or group.

- **Information/records.** This group or individual has a number of critical responsibilities. First, it works with the CMT to manage contacts with and updates to the media. Second, it is responsible for ensuring that necessary information is communicated not only between the different IRT work groups but also to the company's CMT and BRT. Third and perhaps most important, it must work with each of the IRT groups to collect, maintain, and preserve all records, documents, reports, and work papers related to the response. A good first step for this group to take when it arrives on the scene is to immediately set up briefing sessions for the media at certain times during the day to facilitate the schedules of the morning, noon, and evening news shows. It is not necessary to prepare press releases for each of these sessions. Instead, it is often easier and less confusing during these sessions to use bullet points, as well as charts and graphs, to provide updates on such topics as the number of personnel responding, amount of contaminant released and amount recovered thus far, total area contaminated and total area remediated thus far, current dollar estimate of damage done, current dollar estimate of the response costs thus far, and so on.

Although the IRT is primarily responsible for the incident response, it reports directly to and works under the supervision of the CMT.

### **Hour 3: Activate the Crisis Management Team** *Set Up the Crisis Management Center*



Once the IRT has been activated and deployed, the company's CMT should leap into action. The crisis management center needs to be set up and activated, preferably at the company's headquarters or primary business location in order to have immediate access to necessary company personnel, resources,

and information. The CMT should not be at the disaster site itself because the IRT is already there.

### *Make Sure That You Have the Right Mix on Your CMT*

The CMT should consist of a number of groups, each with a certain area of responsibility:

- **Executive management group.** This group has the overall responsibility for managing the crisis on a broader scale. Chaired by a senior company executive, the executive management group would also include representatives from each of the other groups in the CMT. It is advisable to avoid including the CEO (unless the company is too small) and anyone who was in charge of operations associated with the environmental disaster. The company's general counsel or other senior legal officer would be an ex officio member of this group. Unlike the IRT's management group, the CMT management group should not have representatives from the government present or participating in its activities.
- **Liability assessment.** This group would consist primarily of lawyers and accountants charged with accurately determining the extent of the company's liability for the disaster, evaluating the company's defenses, and ascertaining the extent to which third parties may have contributed to the crisis. This group also plays a role in any subsequent internal investigation into the disaster. Note that the attorney-client privilege, as well as the attorney work product doctrine, will clearly apply to communications and work product involving the liability assessment group; however, the same cannot be said for communications and work product involving the IRT, the BRT, and the other components of the CMT. Consequently, all team members need to be mindful of this fact and should exercise great discretion and careful judgment when engaged in internal and external communications or when generating work product, including memos, spreadsheets, correspondence, maps, and the like.
- **Strategic planning.** Unlike the planning group in the IRT, the CMT strategic planning group's role is to address the long-term effects of the environmental disaster on the company's operations, relationships with customers, investors, and vendors, and the regulatory and political framework within which it operates. For example, the strategic planning group's response to the fact pattern at the

beginning of this article would include a consideration of whether the company should continue its foray into the buying and selling of motor vehicle fuel in light of the pipeline rupture.

- **Public affairs.** The important role played by this group involves monitoring all legislative activities, both state and federal, that could directly or indirectly result in stricter regulation over the company and its industry as a result of the disaster. The group would also meet personally with legislators, as well as politicians and community leaders, to inform them about the company's response to the disaster and its efforts to prevent a similar event from happening again.
- **Media relations.** This group would work directly with the media and news commentators while maintaining close contact with the IRT's information and records group. This group would also be responsible for preparing media packets that would provide background information about the company, highlighting its commitment to the environment and to operating in compliance with all applicable environmental, health, and safety laws.
- **Investor relations.** This group is responsible for keeping the company's investors, including stockholders, board of directors, and creditors well informed about the environmental disaster.

#### Hour 4: Alert the BRT

*Assess the Effects of the Incident on Business Units*



Before an environmental disaster, the BRT would have prepared for such a possibility by studying and analyzing the possible crises and disasters—environmental or otherwise—that could befall the company, given the nature of its business and operations, and the likely effects of certain crises or disasters on the company's business and operations. For planning purposes, the BRT should assume that an environmental disaster would cause a significant disruption for an indefinite period of time.

Although this task can be approached from a company-wide perspective, it can be done more effectively from the perspective of a business unit or department. For example, the BRT should consider the methods that the company's manufacturing division could use to recover and continue in the event that a chemical release caused one of its factories to

shut down indefinitely. The BRT should also evaluate techniques that the distribution department could implement to recover and continue if a tanker truck accident and accompanying gasoline spill shut down a major highway indefinitely, causing the company to lose a key artery for its products. The marketing department's ability to recover and continue if negative public perception of the company's response to an environmental disaster results in cancelled orders and decreased market share should also be on the BRT's agenda.

#### *Develop Unit-specific Continuity Plans*

Each business unit or department would have its own unique set of issues and challenges in the event of an environmental disaster. Consequently, each unit or department must develop its own individual business recovery and continuity plan, custom-made to identify problems, assess strategies, and provide solutions for the set of problems that an environmental disaster could create. Not only should each department's plan address the kinds of business interruptions discussed above, but also the plan should provide for the following concerns:

- Alternative work sites or arrangements, including telecommuting options, in the event that an environmental disaster prevents the use of a company facility.
- Securing, backing up, and providing access to data, records, and documents necessary for that department's continued operation.
- Website or telephone number to access or call on a daily basis to receive further instructions.

Once the IRT and the CMT have been activated, it is important to alert the BRT about the environmental disaster so that it can begin doing some preliminary assessment and planning.

#### Hours 5–24: Winding Up That First Day

*Establish a Planning Cycle*



As soon as the IRT has been set up in the ICC, its planning group needs to establish the planning cycle. Start with a current assessment of the environmental disaster: extent of any deaths or injuries, the scope of the contamination, as well as damage to property, whether the contamination source still needs to be contained or abated, the migration of the contaminant plume, weather and wind conditions, and so on. Conclude with the development and implementation

of a response action plan. If the company has done its homework and has established procedures for disaster response before the disaster, this first planning phase will proceed quickly and efficiently.

The IRT planning group's next task would be to schedule subsequent assessments to ascertain the effectiveness of the response and to gather information to use to modify the existing response or to develop a new one. The development and use of a planning cycle not only ensures that the IRT remains focused on the disaster response but also allows the company to constantly assess the disaster and continually evaluate the level of its response while keeping the government, its investors, and the media informed on a regular basis.

As the planning cycle is being set, the IRT planning group's environmental experts should focus on characterizing the contamination, delineating both the lateral and vertical extent of the contaminant plume, if any, and obtaining samples periodically for analytical testing. These experts also need to determine whether and to what extent natural resources have been affected by the contamination and what is needed to make the environment "whole" again.

#### *Initiate Response Action Plan*

Once a response action plan has been developed, it is handed over to the IRT operations group that implements the plan, working closely with the logistics group to make sure that adequate resources are available and are ready to be deployed. Flexibility and creativity play important roles when implementing a response action plan.

Imagine a plan that calls for the rapid containment and removal of crude oil floating on water near a wildlife preserve or endangered species' habitat. Then imagine that enough equipment with sufficient capacity to take up the oil can't be found in the immediate vicinity. In such a case, the operations and logistics groups will need to come up with creative solutions to the problem. The group will have to find the next closest supply of equipment and arrange for its immediate transport to the area or deploy vacuum trucks along the shore or on barges to help recover the floating oil. Perhaps, instead of deploying the scarce amount of boom to contain the oil spill, the group might decide to redeploy the boom to seal off and protect the wildlife preserve or endangered species' habitat. But without fail, the group must devise and implement a

plan that demonstrates the company's commitment to fixing the problem quickly and effectively.

#### *Hold First Official Press Conference*

Although there are likely to be statements made to the press before the first formal press conference, the information and records group, working in conjunction with the CMT's media relations group, should nonetheless plan on conducting an official press conference during the first 24 hours of the response even though information regarding the disaster might be skimpy. The focus of this first press conference should be on the steps taken by the company to respond to the disaster, including a short summary of what is known thus far. The company spokesperson can announce a list of the government agencies that have been notified and that are working with the company to respond to the disaster, the number of company personnel, includ-

### **EACH UNIT OR DEPARTMENT MUST DEVELOP ITS OWN INDIVIDUAL BUSINESS RECOVERY AND CONTINUITY PLAN, CUSTOM-MADE TO IDENTIFY PROBLEMS, ASSESS STRATEGIES, AND PROVIDE SOLUTIONS FOR THE SET OF PROBLEMS THAT AN ENVIRONMENTAL DISASTER COULD CREATE.**

ing contractors, who are working on the problem, and the number and kinds of vehicles, including trucks, boats, and aircraft, that are being mobilized for the response. (Providing statistics regarding the response over and over helps satisfy the public's need for information.) The spokesperson can also call for calm and cooperation from the general public so that the company can respond to the disaster as quickly and as effectively as possible. Finally, the spokesperson should avoid discussing issues for which he or she does not have any confirmed information, such as the underlying cause of the disaster or the company's role in causing the crisis.

#### *Provide Security*

One element that is often overlooked in responding to an environmental disaster is security at the

ICC. Because of the intense focus on the response, many companies forget to secure the ICC from the unauthorized entry of reporters, protesters, and even volunteers looking to help with the cleanup. One can only imagine the havoc that could result from an unescorted reporter or unsupervised volunteer wandering into the ICC and interacting directly with unsuspecting IRT members. It is, therefore, critical for a company to increase security at the ICC, as well as develop a security policy (see sidebar on page 31) for dealing with third parties.

### **Hours 25–48: The Day After**

#### *Notify Insurers*



Many companies often wait several days or longer after having begun a response to notify their insurers. Other companies that have lived through environmental disasters, however, have found that the immediate notification of insurers, followed by the rapid arrival of adjusters to the disaster site, often both speeds up the claims process and diminishes the urge by affected persons to initiate litigation against the company. Consequently, it is advisable for a company to notify its insurance carriers sooner rather than later so that the insurers can participate in the resolution of claims.

## **IT IS ADVISABLE FOR A COMPANY TO NOTIFY ITS INSURANCE CARRIERS SOONER RATHER THAN LATER SO THAT THE INSURERS CAN PARTICIPATE IN THE RESOLUTION OF CLAIMS.**

Getting insurers involved early can also result in getting insurers' counsel involved early, as well. To avoid any misunderstanding about the relationship between insurers' counsel and the IRT and the appropriate role of insurer's counsel in the response, the company should work out these issues with the carriers beforehand or have the CMT's liability assessment group work directly with the insurers' counsel.

#### *Begin Long-term Response Planning*

After the initial 24 hours of the response, the IRT is usually in a better position to assess the situation from a long-term perspective and to determine whether a more sustained response effort, extending anywhere from several days to

several weeks or months, will be necessary in order to fully remediate the contamination and to make the environment whole again. This long-term response plan will often require substantive contributions from the environmental agency that will be overseeing the long-term remediation effort; therefore, the planning group needs to work very closely with the government as it prepares its long-term response plan.

#### *Activate the BRT*

After the first 24 hours of a response, the IRT will also be in a position to determine whether important business units or departments have been negatively affected by the disaster to the point that the BRT, currently on alert, will have to be activated. The IRT and CMT will need to consult with each other regarding the current state of affairs at both the incident response level and the crisis management level before the company decides to activate the BRT and have the affected business units implement their respective business recovery plans.

#### *Initiate Internal Investigation*

The CMT's liability assessment group should initiate as early as the second 24-hour period after the disaster an internal investigation into the underlying cause of the disaster, focusing on what the company may have done to aggravate or mitigate the situation. Initiating the investigation early allows in-house counsel to interview people while their memories are fresh and their impressions are immediate. This time is also good for the company to begin identifying, retrieving, and securing vital records or documents in the course of the internal investigation before the records or documents are seized by the government in the course of its own incident investigation. During such an investigation, in-house counsel will be addressing a number of issues, including separate counsel for employees and management, joint defense agreements, criminal liability, and so on.

#### **Postresponse Debriefing, Followup, and Closure**

##### *Evaluate Response*

Eventually, the response to the environmental disaster can be decreased to something below the emergency level, and the IRT can begin shutting down the ICC and leaving the affected area. Before

such departure, it is important to debrief each of the IRT members about the emergency response itself. Ideally, the company's in-house counsel should conduct these sessions with limited participation by the company's management so that the individual IRT member can speak freely and candidly. The debriefing will allow the company to identify areas in which improvement is needed and areas in which resources can be adjusted. In addition to getting information about a specific response, it is also important to get impressions from IRT members about the company's overall environmental disaster response plan.

**WHEN EVALUATING THE IRT'S RESPONSE TO THE DISASTER, IT IS IMPORTANT TO BE AWARE OF POOR PERFORMANCE AND TO ACKNOWLEDGE OUTSTANDING PERFORMANCE BY TEAM MEMBERS.**

*Lessons Learned*

A number of incident response evaluation forms and checklists, available from various government agencies and websites, can be used to help the company evaluate its response and come up with lessons learned that can be applied in future response actions or used to modify the overall response plan. (See, for example, ACCA's Virtual Library on ACCA Online<sup>SM</sup> at [www.acca.com/vl](http://www.acca.com/vl) in general and ACCA's forthcoming InfoPAK on responding to an environmental disaster in particular.) A company may choose to have a discussion of lessons learned conducted under the attorney-client privilege although such protection may eventually be waived if the lessons learned eventually become incorporated into a new and improved environmental disaster response plan that in itself is not a confidential document or procedure.

*Recognize IRT, CMT, and BRT Members and Acknowledge Good Performance*

When evaluating the IRT's response to the disaster, it is important to be aware of poor performance and to acknowledge outstanding performance by team members. This acknowledgment could occur at a meeting with IRT members to conduct a post-

mortem discussion of the response and to provide an update on developments related to the legal, legislative, and technical aspects of the disaster.

*Address Enforcement and Litigation Issues*

Long after the IRT, CMT, and BRT have been deactivated and staffers have returned to their regular jobs, in-house counsel will still have to deal with subsequent government enforcement action, as well as litigation, if any, initiated by parties affected by the environmental disaster.<sup>17</sup> Settling these various actions and claims, however, will be much less painful for a company that has followed an environmental disaster response plan that emphasized the need to do the right thing right away, the need to resolve claims as quickly as possible, and the need to communicate candidly with the government and with the public.

*Address Resource Issues*

As a result of the debriefing sessions conducted by in-house counsel, the company can determine its resource needs and the best allocation of resources for the next environmental disaster. For example, the company may learn that it does such a good job of managing its risks that it does not need to have an environmental response contractor on retainer. The company may also learn that entering into a mutual aid agreement with similar companies can be less costly and more effective in the long run than relying on the use of expensive outside contractors.

*Address Personnel Issues*

One possible finding from the confidential internal investigation by in-house counsel of the environmental disaster might indicate that actions taken by employees, managers, or contractors may have led to or caused the environmental disaster. Once it has been determined that such actions fell outside the scope of the individual's employment or engagement by the company, in-house counsel should then advise the individual accordingly, indicating the need for that person to retain his or her own attorney.

*Address Management Systems Issues*

Apart from employee and resource issues, the post hoc examination of an environmental disaster response should also disclose whether management and oversight systems in place could have prevented the disaster or mitigated its effects.

### *Address Follow-up Reports, If Any*

After the internal investigation has concluded and findings and recommendations regarding the company's resources, personnel, and management have been discussed and implemented, the company must prepare and submit follow-up reports to the various government and environmental agencies that had been initially notified. Many of these follow-up reports are required to be submitted within a certain amount of time, such as 30 days after the initial notification. Given the sensitive nature of the information and issues of privilege and waiver based on partial disclosure, in-house counsel must be continually involved in the preparation and distribution of such reports.

### **CONCLUSION**

As the sun begins to set that Sunday evening, you realize that, because of the general counsel's environmental disaster response plan, the company has made it through the weekend relatively intact. Your phone rings. It is your boss returning your calls and emails from somewhere in Fiji. You thank her for having prepared such a comprehensive response plan and then tell her what happened.

You tell your boss that, following the plan, you made all the notifications within the company, as well as all the required government notifications. You activated and deployed the company's IRT and helped the group set up an incident command center close to the site of the disaster. You also activated the company's CMT, assembling the team at the company's headquarters and advising the team as it went about monitoring the response, talking with the media, working with community and political leaders, and reassuring investors. You gave guidance to the company's BRT and made alternative arrangements with suppliers, vendors, and customers while ensuring that the unaffected departments went about their business as usual. And you also mention how the company's insurers appreciated being notified in a timely manner about the incident, allowing them to arrive on the scene and secure settlements efficiently and cost-effectively.

You discuss with your boss what you plan to do next: conduct an internal investigation of the disas-

ter and the aggravating and mitigating factors; debrief and recognize all of the IRT, CMT, and BRT members; prepare a list of lessons learned; and draft a memo summarizing the remaining issues involving government enforcement, litigation, management, and employee performance. Your boss interrupts and tells you to go home and take a much-needed break. You did a great job. 📧

### NOTES

1. See, e.g., Rev. Code of Wash. § 90.56.370; cf. Minn. Stat. § 115B.05; N.C. Gen. State § 143-215.93.
2. See, e.g., Cal. H&S Code § 2530(o).
3. See Harvey L. Pitt and Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 15 CARDOZO L. REV. 951, 952 (Jan. 1994).
4. See *id.* at 953–54.
5. See *id.* at 954–95.
6. Mike France, *25 Ideas for a Changing World—Corporation: 2. The Mea Culpa Defense*, BUS. WK., Aug. 26, 2002, at 76.
7. *Id.* at 78.
8. See, e.g., Texas (1999), California (2000), and Florida (2001).
9. For example, the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2761 (“OPA 90”), was the direct result of the Exxon Valdez oil spill.
10. Under RCRA, for example, the generators of hazardous waste are considered by the government to be liable for the environmental consequences of their hazardous waste “from cradle to grave,” regardless of the involvement of third-party TSDFs or transporters in the release of these hazardous substances into the environment. See 42 U.S.C. §§ 6921–6939(e).
11. Such mutual aid agreements are allowed by OPA 90. See 40 C.F.R. § 112.2 (defining “contract or other approved means” to include membership in a local or regional oil spill removal organization); 40 C.F.R. § 112.20 (h) (3)(ii). For an example of a mutual aid agreement, see ACCA's forthcoming InfoPAK on environmental disasters.
12. See, e.g., *Woodcrest Mfg., Inc. v. United States EPA*, 114 F. Supp. 2d 775, 776 (N.D. Ind. 1999) (discussing origins of the EPCRA); *Int'l Assn. of Indep. Tanker Owners v. Locke*, 159 F.3d 1220, 1221 (9th Cir. 1998) (discussing origins of OPA 90).
13. See 40 C.F.R. § 112.21.
14. See 33 U.S.C. § 1521(b)(4); 40 C.F.R. §§ 110.3, 110.6.
15. See Cal. H&S Code § 25507.
16. See Cal. Veh. Code § 23112.5.
17. See, e.g., Cal. Code Civ. Proc. § 348 (three-year statute of limitations for statutory liability and pollution violations); Cal. Code Civ. Proc. § 340 (one-year statute of limitations for state tort actions involving personal injuries).