
PLANNING FOR ENVIRONMENTAL CRISES

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An environmental crisis is every environment, health, and safety (EHS) manager’s worst nightmare, with the potential to harm the local environment and the surrounding community, and the certainty of exposing the company—and potentially management—to legal, regulatory, and reputational risk. Accordingly, being prepared for environmental crises is a critical responsibility for companies. A well-designed emergency response plan should allow a company to quickly and effectively respond to the emergency at hand, ensure that the response complies with all applicable legal and regulatory requirements, and minimize the potential damage to the environment, the community, company personnel, and the company itself. Conversely, a poorly designed emergency response plan can make a bad situation worse, creating confusion in responding to the emergency and potentially increasing liability.

Pre-Crisis Planning

Before a company can be prepared to handle a crisis, it must be confident that it is in compliance with its environmental obligations, including those under the Emergency Planning and Community Right-to-Know Act (EPCRA), which requires companies that use, store, or release certain hazardous chemicals to disclose the type, quantity, and location of those chemicals to state and local agencies or the EPA. 42 U.S.C. § 11022. In addition, EPCRA requires releases of toxic chemicals to be reported to EPA for inclusion in the Toxic Release Inventory, a publicly available database of toxic chemical releases and other waste management activities. 42 U.S.C. § 11023.

Pre-crisis planning is a good time to review and assess the company’s environmental compliance generally—regulators and other government

officials will be involved in responding to an environmental crisis, and non-compliance is likely to draw their attention, particularly if it is at all related to the crisis itself, even tangentially. Accordingly, the pre-planning stage should include a thorough review of all material environmental compliance obligations arising under federal, state, or local laws or regulations.

Assignment of Responsibility

An important component of being prepared for an environmental crisis is to identify key personnel who will make up the crisis management team to rapidly mobilize and respond to an emergency situation. This team could include top executives (including the CEO), the general counsel, or other in-house counsel, the EHS manager, facility managers, security managers, public and government relations, investor relations, and risk management personnel. In addition, alternates for each role should be identified in the event that one or more members of the team are unavailable.

Risk Assessment

“Environmental crisis” is a broad category that could include a chemical release, an explosion at the facility, or the discovery of unpermitted exceedances of a discharge permit. Every company has a different risk profile, and it is critical that the crisis management team take time to thoroughly understand the company’s risks. Key areas to consider include hazardous materials used, stored, generated, or transported by the company; volatile or explosive chemicals; potential sources of releases; employee safety; aging equipment; the discharge location for facility storm water and wastewater; any sensitive or endangered species or water bodies near a company facility; and the surrounding community, including whether the community contains residential housing.

Emergency Action Plan

The heart of crisis planning is a clear but detailed plan of action with responsibility clearly assigned to members of the crisis management team. The plan should be a counterpart to the risk assessment, such that each action is designed to minimize and mitigate the risks that have been identified in advance. The action plan likely should include, at a minimum, the following considerations:

- **Notifications**—The plan should include local, state, and federal government agencies that must be notified in the event of each type of crisis identified in the risk assessment, the department or individual at each agency to be notified, and the information that should be provided to that individual. In addition, the plan should include notification of any contractors, consultants, or counsel that the company anticipates being involved with any crisis response.
- **Human Safety**—The plan should provide for orderly evacuation of employees from dangerous areas, and coordination of rescue personnel and first aid services to any injured persons, whether employees or members of the community.
- **Containment**—The plan should address how to promptly contain any spills or releases of hazardous chemicals or unpermitted discharges in a safe, legal, and detailed manner. For example, the plan should address potential releases of all hazardous materials used, stored, disposed of, generated, or transported by the company, and should describe the containment and safety procedures for each hazardous material under different scenarios (i.e., depending on the location and volume of the release).
- **Facilities and Equipment**—Although equipment is a secondary consideration to human health, the plan should include procedures for minimizing damage to the facility itself, including company equipment, documents, and data. The plan should also provide for the rapid shutdown of any equipment or process that creates an additional

risk during the crisis (equipment that could cause a released chemical to ignite, for instance).

- **Communications**—In addition to required notification of government agencies, the company should be prepared to provide accurate and timely information to other stakeholders, including suppliers, customers, outside contractors, and the public and press.

Fact Gathering

A key responsibility of the crisis management team will be to gather facts on an expedited basis so that the company can promptly mitigate any human health or environmental concerns and coordinate the emergency response, but also with an eye to protecting the company's legal position in potential litigation or regulatory action after the crisis has subsided. The first order of business should be to investigate the cause(s) of the incident, including the personnel involved, as these facts will be at the center of any government investigation. The company's legal team should manage and coordinate evidence gathering, witness interviewing, and collection of relevant physical evidence and documents, in order to ensure proper preservation of evidence and to maximize the company's ability to assert privilege over the non-factual elements of the investigation. Employees should also be informed that their verbal and written communications regarding the crisis may be subject to discovery by litigants or regulators, and regular document destruction protocols relevant to the crisis should be temporarily suspended. In addition, all personnel should be careful of any public statements until the facts are determined.

Liaising with Regulators

To the extent possible, the company should proactively provide information and support to government regulators, both on-site during the crisis and afterwards. Employees should be informed of their responsibility to cooperate with investigators, and a member of the legal team should accompany investigators to ensure

cooperation, but also to make note of any documents, samples, or other evidence collected. Any samples collected by government investigators should be duplicated for independent testing, and the manner of collection should be noted and documented.

Conclusion

Environmental crises create a multitude of risks for companies. In addition to the damage caused by the incident itself, the company may have to deal with injured employees or other individuals, business interruptions, and reputational damage. Moreover, the company may be subject to increased litigation or regulatory action if it does not respond properly to a crisis and a post-crisis government investigation may lead to additional compliance actions. In short, it can put every aspect of a business at risk. No company is immune to environmental accidents, and therefore all businesses should be prepared to respond to and address an environmental crisis.

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