

The Environmental Lawyer's Role in an Environmental Crisis



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ENVIRONMENTAL EMERGENCIES such as a large spill of petroleum or toxic waste, leaching of substances into a public water supply, explosions, or significant injuries resulting from exposure to hazardous substances most often require immediate attention in numerous areas. Although a popular professional concept involves the prioritizing of responses, in real life this distinction is often negligible because the institution undergoing the emergency quickly has to evaluate the effects of each response whether taken at the same time or sequentially.

There is a tension that permeates an institution's response to an environmental emergency: the potential conflict between protecting the environment and protecting the institution from untoward liability. The experienced environmental lawyer can contribute greatly to reducing that tension.¹

RESPONSES TO AN ENVIRONMENTAL EMERGENCY • Responses to such environmental emergencies

¹ The New York Times Sunday Magazine for January 10, 2016 described an environmental lawyer's prior training that it believed well qualified him to successfully handle an environmental disaster: "[He] was asked to determine which companies contributed which toxins and hazardous wastes in what quantities to which sites. He took depositions from plant employees, perused public records and organized huge amounts of historical data....became an expert on the Environmental Protection Agency's regulatory framework, [the Safe Drinking Water Act, Clean Air Act, and Toxic Substances Control Act]....mastered the chemistry of the pollutants, despite the fact that chemistry had been his worst subject in high school." Nathaniel Rich, *The Lawyer Who Became DuPont's Worst Nightmare*, N.Y. Times, Jan. 10, 2016 (Magazine), at 39-40. Sound familiar?

cut across disciplines. However the core issues have significant environmental regulatory compliance components and require an understanding of the dangers presented by hazardous materials, which we suggest places the environmental lawyer in a unique position to assist a client experiencing an environmental emergency.

Corporate America and the government have reacted to the possibility of environmental emergencies by promulgating plans and procedures designed to cope with eventual emergency.² However, the role of the environmental lawyer seems to be “overlooked” in the drafting of those plans—perhaps because the plans are drafted by technically inclined persons and consulting firms. In any event, the environmental lawyer, trained as a problem solver and exposed to the interplay of regulation and science, can make important contributions to planning and executing the response.

Institutional clients usually have established procedures to deal with environmental problems but often they are not well suited to deal with a significant environmental emergency, and are ill coordinated at best. Moreover, triggering events, more often than not, occur on weekends or at other times when the client's in-house environmental staff are not on site.

The client's responses are often complicated by an uncoordinated response from federal, state, and local authorities, with the Fourth Estate clamoring for information and often all too eager to exaggerate the potential environmental harm caused by the releases or spill.

Moreover, the criminalization of environmental regulation has emerged as a major undertaking at all levels of government. Recently, the Department of Justice has added the element of pinning criminal responsibility on individuals in addition

to the business organization.³ This added element can handicap the environmental lawyer's attempt to manage the environmental crises.

All of this occurs while the client may be under siege, with no time for time-consuming analyses. Indeed, the client must react to varying emergent problems that make inconsistent demands.

INITIAL EVALUATION • Commentators all agree that there must be a command and control system, ad hoc or otherwise, to manage an environmental emergency or crises; one person has to be in charge.⁴ Although some environmental lawyers may fill that role quite well, they are more obviously suited to advising the “on-site commander.” However, the environmental lawyer is particularly well equipped, due to his day-to-day work, to move beyond a passive advisory role, and should do so where there is a need. Accordingly, the environmental lawyer regularly representing an institutional client, or one that is called in to deal with the environmental crises would be well served to think about implementing the following tasks:

- The need to secure adequate technical assistance to abate the harm;
- The competing need to take charge and to structure the remedy in cooperation with the regulators;
- Implementing the client's spill prevention and remedial plans;
- Complying with regulatory notification requirements;
- Identifying the cause or causes of the immediate harm;
- Determining if there will be long-term harm;

² See, e.g., Federal Emergency Management Agency (FEMA), National Incident Management System, (2008), available at https://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf.

³ See, e.g., Memorandum of U.S. Deputy Attorney General Yates, Sept. 9, 2015, available at <http://www.justice.gov/dag/file/769036/download>.

⁴ See, e.g., Clifford J. Villa, *Law and Lawyers in the Incident Command System*, 36 Seattle U. L. Rev. 1855, 1865-66 (2013); see also FEMA, National Incident management System, *supra*, at 9-10.

- Controlling the client's public responses;
- Involving the political leaders of the affected community;
- Providing appropriate assurances to the affected community;
- Assuring the surrounding community that they will be protected, etc.;
- Conducting an investigation, which will include gathering relevant documents, instituting a "litigation hold" and otherwise preventing spoliation, interviewing relevant personnel, and investigating off site observations or complainants;
- Identifying potential "targets" in a criminal investigation and structuring the legal representation so as to avoid recusal;
- Informing the client's insurance carriers.

The phasing of these tasks should not obstruct the primary task of ensuring that threats to public health and the environment are eliminated or minimized to the greatest extent feasible.

THE CRITICAL ELEMENTS • There are four critical elements in the management of the environmental emergency or crisis:

- Quickly mobilizing the right people to analyze the extent of the harm and effectuate the remedy;
- Getting the facts straight in the beginning;
- Prompt implementation of the mitigation; and
- Controlling the institution's interaction with the public and with government agencies.

Securing the right technical people is often a sensitive endeavor because the client may have in-house or long-standing outside technical personnel. They possess extensive knowledge of the facility and its operations but are they can also have been the cause of the harm. The environmental lawyer is uniquely qualified to assist the client in assembling

the response team due to his experience in selecting experts and evaluating scientific data.

Public safety and relieving the public's concern are primary undertakings. A certain amount of emergency work will get underway because of the existence of various spill-prevention and similar plans. However, the home team may not be technically adequate and or may not be deemed to be adequate by the regulators. In either instance, it is often prudent to assemble a team of outside consultants. Here, the problem goes beyond coordination between in-house and outside personnel. Quick digestion of available facts will allow the environmental lawyer to structure the outside assistance and ensure that the new technical team doesn't run amok.

Once the technical abatement team is in place, the lawyer's role would appear to be a secondary one. However, coordination, dissemination, insuring technical data is translated into readily understandable language, and resolving jurisdictional disputes may well benefit from the efforts of the environmental lawyer.

INTERACTION WITH THE CIVIL REGULATORY AGENCIES • Spills, releases, and severe accidents involving hazardous materials will attract regulators ranging from the local fire department to the U.S. Environmental Protection Agency. The arrival of such outside help is important but the environmental lawyer's task is to make sure that the agencies retain confidence in the client's ability and willingness to remedy the problem, or to effectively integrate the public support for abatement of the problem. Relatively simple actions such as setting up an accommodating meeting space, arranging for communications among the participants, and making sure that all data is available, will go a long way toward maintaining control.⁵

⁵ Of course, there will be instances when the client and the environmental lawyer will decide that other entities such be the lead and welcome the control of others.

INTERACTION WITH THE PUBLIC • As indicated, environmental emergencies often generate basic conflicts. One of them is the tension to assure the public that the necessary remedial actions are being taken, and on the other hand not to make any critical admissions that might be revisited by government enforcers or private plaintiffs' tort lawyers. Corporate public relations officers are trained to play it safe and will often recommend a "no comment" response to the press. This can be disastrous; people want to be assured that the company is doing all that can be done, and want to be informed as to the precautions that may be necessary. Here the environmental lawyer's training will be useful in making an appropriate response that reflects the client's efforts or an evaluation of the danger or lack thereof.

The point here is that the public and their elected local representatives will resent being kept in the dark on issues that may affect their health and safety. Some commentators posit that an appropriate information meeting be held in the first 24 hours of the beginning of the emergency.⁶ The practical point is that information should be disseminated as soon as useful information can be evaluated and should be made known to the public.⁷

Dissemination of information to the local officials is an important distinction between press releases and press conferences. Local officials do not want to appear to be blindsided and ineffectual, therefore they should be given the special attention that their positions warrant.

⁶ Debra Sabatini Hennelly et al., *Responding to an Environmental Disaster, The First 48 Hours*, 21 No. 7 ACCA Docket 21, 25-26 (Jul./Aug. 2003).

⁷ The institution should be able to disseminate "useful" information under almost any circumstances. For example, the Southern California Gas Company, faced with an ongoing release of gas that was adversely affecting a Los Angeles Suburb informed CNN that "it's working as quickly and safely as it can to stop the leak and that in the meantime it relocated over 2,290 households and would continue to work with affected homeowners." (CNN, January 7, 2016).

Just as important as the initial disclosure is the ability of the public to be updated on an ongoing basis. In all instances, there should be one well-prepared spokesperson.

REPORTING REQUIREMENTS • Releases and spills often require prompt reporting even when the governmental authority is aware of the release or spill.

Federal, state, and local environmental laws contain reporting requirements that should be built into incident response plans. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) designates a list of hazardous substances that require notification when released above certain threshold reporting quantities (RQs).⁸ The Emergency Planning and Community Right-to-Know Act (EPCRA) likewise designates 360 extremely hazardous substances (EHS), the release of which triggers the requirement to notify state and local authorities.⁹ The RQs

⁸ 42 U.S.C. § 9602 requires the EPA Administrator to publish a list of hazardous substances and their RQs; 40 C.F.R. § 302.4 provides the list. The specific requirements for notification to the National Response Center are set forth in 42 U.S.C. § 9603(a), which states: "Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C. §§ 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State."

⁹ 42 U.S.C. § 11002(a) requires the EPA Administrator to publish a list of EHS; 40 C.F.R. § 355, App. A provides the list. The specific requirements for notification to local and state emergency planning bodies are set forth in 42 U.S.C. § 11004.

(b) Notification.

- (1) Recipients of notice. Notice required under subsection (a) shall be given immediately after the release by the owner or operator of a facility (by such

for the extremely hazardous substances are based on the substance's acute lethal toxicity.¹⁰ Releases of reportable quantities of hazardous substances on the CERCLA Section 103 list also trigger the reporting requirements of EPCRA.¹¹ If a chemical release does occur and exceeds the applicable RQ, the facility must notify its Local Emergency Planning Committee (LEPC), State Emergency Response Commission (SERC) and the National Response Center (NRC) for any area likely to be affected by the release.¹² The facility must provide a detailed written follow-up as soon as practicable, and information about accidental chemical releases must be made available to the public.¹³ Both CERCLA and EPCRA provide for civil and criminal penalties (including fines of up to \$117,500 per day and imprisonment for up to 5 years).¹⁴ Other federal laws such as the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), Toxic Substances Control Act (TSCA), and Occupational Safety and Health Act contain their

means as telephone, radio, or in person) to the community emergency coordinator for the local emergency planning committees, if established pursuant to section 11001(c) of this title, for any area likely to be affected by the release and to the State emergency planning commission of any State likely to be affected by the release. With respect to transportation of a substance subject to the requirements of this section, or storage incident to such transportation, the notice requirements of this section with respect to a release shall be satisfied by dialing 911 or, in the absence of a 911 emergency telephone number, calling the operator.

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¹⁰ EPA, CERCLA and EPCRA Continuous Release Reporting, <http://www.epa.gov/epcra/cercla-and-epcra-continuous-release-reporting>.

¹¹ 42 U.S.C. § 11004(a)(3).

¹² 42 U.S.C. § 11004(b)(1); 42 U.S.C. § 9603(a).

¹³ 42 U.S.C. § 11004(c).

¹⁴ 42 U.S.C. § 9609 and 42 U.S.C. § 11045 provide penalties of up to \$75,000 for every day that a repeat violation continues. EPA has increased these penalties to \$117,500 per day, 40 C.F.R. § 19.4.

own reporting requirements, so planners need to be aware of many overlapping reporting requirements. States and localities often have additional reporting requirements in addition to those required under federal law.¹⁵

In some instances, advanced spill prevention planning for a facility or activity may be required by law. Such plans may be contained within or may stand apart from an overall incident response plan, but should be consistent with and support the incident response plan. For instance, the Clean Water Act requires facilities that store any kind of oil over particular volumes to prepare and implement Spill Prevention, Control, and Countermeasure (SPCC) Plans to prevent the discharge of oil into navigable waters or adjoining shorelines.¹⁶ SPCC Plans require mitigation measures including adequate secondary containment (such as trays, berms, or dikes) around oil tanks to prevent a release to the environment in the event of a spill. EPCRA requires facilities that maintain Extremely Hazardous Substances (EHS) on-site in quantities greater than corresponding threshold planning quantities to identify the person who will act as facility emergency coordinator and to cooperate in the preparation of local emergency plans.¹⁷ State permits (both general and individual permits) such as stormwater permits or construction permits may also require spill prevention plans.¹⁸ Environmental laws outside

¹⁵ See, e.g., New York State reporting requirements for releases of hazardous materials, N.Y. Comp. Codes R. & Regs. tit. 6 § 597.4.

¹⁶ 40 C.F.R. § 112.1.

¹⁷ 42 U.S.C. § 11002, 11003(d).

¹⁸ See, e.g., North Carolina Stormwater General Permit No. NCG170000, at 6-9 (requiring preparation of Stormwater Pollution Prevention Plan with Spill Prevention and Response Procedures) available at <https://deq.nc.gov/about/divisions/energy-mineral-land-resources/energy-mineral-land-permits/stormwater-permits/npdes-industrial-sw#tab-3>; New York State General Construction Permit, No. GP-0-15-002, at 18-28 (requiring Preparation of Stormwater Pollution Prevention Plan documenting all controls put in place

of the United States also contain planning requirements, some more comprehensive than domestic planning requirements.¹⁹

Diligent attorneys will ensure that incident response plans are updated, readily available, and that response personnel are well trained on them and will arrange for auditing of plans and additional training if necessary. This is particularly important when changes in key personnel take place. The chances of achieving successful response and recovery phase operations drop if incident response plans are inaccessible or out of date (for example, if internal/external points of contact have changed), or if key personnel have not been trained in their roles.²⁰

COPING WITH THE CONSEQUENCES OF THE INCIDENT

At some point after the environmental problem has emerged, the environmental lawyer may have to face the need to investigate the cause and responsibility for the cause of the environmental event. A conflict between the public need and the institutional need may become very apparent at this point. When the cause of the harm

is not yet known or where there is an ongoing threat of harm, the insights of a formal investigation may have to be subordinated to the need to quickly ascertain the basic facts. However, the environmental lawyer will be aware of the possibility that the physical abatement issues will be followed by government inquiry and private tort actions. Accordingly, an investigation must be promptly initiated to gain the necessary strategic position. The elements of the investigation will include such basic steps as instituting a litigation hold on relevant documents, guarding against spoliation by the improper handling of samples, avoidance of attorney recusal, and perhaps most important of all, avoidance of secondary liability from making misleading statements to government investigators or obstructing justice by an improper interaction with employees.

Moreover, environmental emergencies, other than those caused by natural causes, frequently give rise to criminal proceedings. This occurrence, or even the probability of it occurring, also sets up a conflict—the conflict of getting the basic facts regardless of the niceties of confidentiality concerns and protecting the client and its employees from prosecution.

That conflict is reflected in the need to immediately determine the cause and extent of the environmental harm, and the most effective method of mediation, regardless of individual or corporate liability. This effort will conflict with the traditional compliance counsel's careful attention to explanations against self-incrimination, and parsing of potential liability. The environmental lawyer is indispensable in this fast-moving scenario because, at a minimum, she should be able to quantify the risk of liability arising under federal, state, and local environmental law.

Speed, preservation, and confidentiality should be the hallmarks of the corporate response to a criminal environmental investigation. A fair degree of speed is required to stay ahead of the government's inquiry. Preservation is necessary to protect

on site) available at http://www.dec.ny.gov/docs/water_pdf/gp015002.pdf.

¹⁹ See, e.g., New South Wales Protection of the Environment Legislation Amendment Act 2011 (POELA Act) which requires the preparation and implementation of pollution incident response management plans. Guidelines further set out specific requirements regarding the preparing, keeping, testing and implementation of these plans. See New South Wales Environmental Protection Authority, Environmental Guidelines: Preparation of Pollution Incident Response Management Plans (2012), available at <http://www.environment.nsw.gov.au/resources/legislation/201200227egpreppirmp.pdf>.

²⁰ Thus, coping with the emergency reflects the efforts that the institution may have undertaken prior to emergency. Lawyers can also assist in hazard mitigation through arranging for environmental hazard auditing. Such audits help identify gaps in preparedness and identify measures that may be taken to prevent the release of hazardous materials. The implementation of pollution prevention measures such as secondary containment for the storage of hazardous materials may also be part of the planning required by environmental permits.

against charges of spoliation of evidence or obstruction of justice. Confidentiality is necessary to shield the conclusions of the investigations from the grand jury process. The knowledge of a possible criminal investigation should trigger the prompt deployment of counsel. Moreover, the corporation must make its employees aware that the investigating counsel is to receive their full cooperation. The job of the investigating counsel is both to find out what caused the harm and also who participated in the events that has led to the investigation.²¹

The need for control as soon as the investigation has commenced can be quickly grasped once the potential target understands the minefield of felonies that can be exploded by a clumsy response. This minefield is laid not just by the criminal provisions of the federal environmental laws, but also by numerous statutes that criminalize interference with government investigations and spoliation of evidence. A brief summary of such statutes follows.

Initially, making knowingly false statements to government officials on matters within their jurisdiction is a felony pursuant to Title 18, Section 1001 of the United States Code. These “1001” violations encompass knowingly false or misleading oral statements made to enforcement personnel.

Similarly, causing or counseling witnesses to mislead federal investors is a felony, punishable by

²¹ Perhaps, one of the earliest decisions that the corporation has to make is whether in house counsel should conduct the internal investigation. House counsel usually have the advantage of knowing the corporation, while outside counsel have to master a “learning curve,” before starting their crucial investigation which the corporation will have to pay for in fees and delay. Nevertheless, in situations where the triggering incident or the investigation is substantial, outside counsel have several advantages over inside or house counsel. Initially, the right outside counsel will have the specialized knowledge to deal with the investigation, and should be free to any conflicts arising from intra company relationships, or prior advice. In house counsel will normally play a critical role in directing the facilitating outside counsel’s work. However, the presence of outside counsel sends a clear message that the corporation is taking the triggering incident seriously.

fines and incarceration. The willful destruction of or failure to produce evidence subject to a lawful process is a federal crime under Section 1001. Similarly, altering, destroying, or concealing records, documents, or other tangible evidence that reasonably may be subject to a criminal investigation, or persuading another person to do so, even in the absence of the service of process, is a federal crime. It is also a federal crime to retaliate against a person who has provided evidence in the government

Careful attention should be paid to what is said to employees. Many prosecutors quickly assert that suggestions to non-clients that they have a right “not to cooperate” is tantamount to obstruction of justice. The crime of obstruction is based on influence through “corrupt” means. Nevertheless, target employees are entitled to counsel, and often need counsel to avoid unreasonable burdens imposed by onerous grand jury subpoenas and similar prosecutorial tactics.²²

CONCLUSION • Environmental lawyers are in a unique position to help guide their clients through the critical elements in the management of the environmental emergency or crises. By properly managing the crises, the lawyer will be able to help effectuate prompt abatement of the emergency and restoration of the client’s image, while avoiding unnecessary punishment and perhaps above all, preventing the same or similar event from happening again.

²² Careful attention should also be paid to advice on the Fifth Amendment. A lawyer’s good-faith advice that a client assert the Fifth Amendment privilege, of course, is proper. *Maness v. Meyers*, 419 U.S. 449, 465-66 (1975). However, one who advises another to invoke the privilege even if its assertion is absolutely valid, may commit a Title 18, Section 1503 violation if the motivation is corruptly to prevent the witness from disclosing information damaging to the adviser or another.