

# Major Accident Response

## Legal Perspectives

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# The Incidents

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# The Stakes

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- High profile incidents continue to drive focus on crisis response and liability management
- “Stakes” are higher than ever
  - Accidents are increasingly criminalized
  - Significant potential for lasting reputational harm
- Pose challenges unlike any most organizations have faced
- Coordinated, well-managed response is essential
- The 3 “Cs” of crisis management
  - Commitment to Communicate
  - Commitment to Cooperate
  - Commitment to Customers

# The Potential Government Response

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- Federal
  - Investigating agencies
    - The Chemical Safety Board
    - The National Transportation Safety Board
  - Regulatory / enforcement agencies
    - Federal Occupational Safety and Health Administration
    - U. S. Environmental Protection Agency (civil and/or criminal)
    - U. S. Coast Guard
    - U. S. Department of Transportation, including PHMSA
- State and Local
  - Regulatory / enforcement (e.g., state and local environmental agencies)
  - Law enforcement

# BP Texas City (2005)

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- Explosion and fire during restart of ISOM unit; 15 contractor fatalities and over 170 injuries
- CSB, OSHA and EPA investigations
- Settled OSHA PSM violations; \$21 million fine (2005)
- Guilty plea to knowing RMP violations; \$50 million fine (2007)
- Settled EPA RMP civil violations; \$12 million (2010)



# PG&E San Bruno (2010)

- Natural gas pipeline explosion and fire resulted in 8 public fatalities; devastated a residential neighborhood (38 homes destroyed)
- NTSB, CUPC (PHMSA delegation) investigations
- Regulators seeking civil penalties in excess of \$2 billion
- State prosecutors declined to proceed, but federal criminal investigation is on-going





# Deepwater Horizon (2010)

- Fire and explosion on drilling rig operated by Transocean in Gulf of Mexico; resulted in 11 fatalities, largest offshore oil spill in US history
- BSEE, CSB, DOJ investigations
- Transocean agreed to pay \$1.4 billion for violations of the Clean Water Act; BP paid \$2.4 billion and faces penalties up to \$20 billion
- Federal criminal investigation is on-going



# Incident Time Line

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- Rapidly unfolding events with significant legal implications
  - Day 0: Fire occurs at approx. 1830
  - Day 0: EPA Criminal Investigator on-site that evening
  - Day 1: OSHA On-Site / OSHA Opening Conference / Order Prohibiting Use issued
  - Day 1: CSB Site Preservation Letter / 1<sup>st</sup> CSB Document Request
  - Day 1: Company Investigation Team convenes
  - Day 2: CSB On-Site / CSB Opening Conference
  - Day 3: 1<sup>st</sup> OSHA interviews / 1<sup>st</sup> CSB interviews
  - Day 7: 1<sup>st</sup> OSHA Document Request
  - Day 7: EPA Civil Investigation Team arrives / 1<sup>st</sup> EPA Document Request
  - Day 9: Personal injury case filed



# Primary Legal Issues

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- Evidence Preservation
- Interacting with the Government Agencies
- Document Collection and Production
- Witness Interviews
- Site Preservation Agreement
- Internal Investigations and Experts

# Evidence Preservation

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- Preventing claims of spoliation and obstruction are critical
- Change log for incident site
- Preserving electronic data (e.g., SCADA, DCS, data historians)
- Procedures for collecting physical evidence
- Procedures for securing critical hardcopy documents (e.g., operator checklists, control room logs, IC scribe notes)
  - Establish secure record storage and control access
  - Chain of custody is key
- “Preservation Order” for record retention
- Employees must understand consequences of spoliation

# Interacting with the Government

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- Single points of contact with dedicated legal support
- Understanding on process for requests for interviews and documents
- Control of and access to incident site
- Notice to agencies on site stabilization activities
- Memorialize consents (or lack of objection) by agency
- Recognize that correspondence with agencies is discoverable
- Exercise firm, but reasonable controls
- Do not be afraid to say "No" -BUT
  - Have good reasons and recognize potential for consequences

# Document Collection and Production

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- Insist all document requests be in writing
  - Clarify any unclear document requests
  - Object to and negotiate overbroad document requests (e.g., “any and all...”)
- Identify main custodian (should not be legal counsel)
- Establish process for collection, review and production
- Assign responsibility for each document request to one person
- Review for privilege and withhold privileged documents
  - Include language in cover letter on issue of inadvertent disclosure
- Review and label documents as appropriate
  - Confidential Business Information (Freedom of Information Act)
  - Sensitive Security Information (Maritime Transportation Security Act)

# Document Collection and Production

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- Bates label any document that is produced
  - xxxx-EPA 00001
  - xxxx-NTSB 00001
  - xxxx-OSHA 00001
- Maintain log of document production
- Maintain secure documents log
- Always produce documents using cover letters
  - Note exceptions or limitations
  - Identify which documents are responsive to which document requests
- Retain multiple copy sets

# Witness Interviews

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- Inform employees of their rights and employer's expectations
  - Whether to submit to interview is employee's decision
  - Can have someone accompany them during the interview, take notes, etc.
  - If interviewed -
    - Imperative to tell the truth
    - Listen carefully to the question and then answer only that question
    - Request that employee not speculate
  - Cautions regarding request for written statement
    - Do not have to sign statement
    - If you want to sign – read carefully for accuracy and completeness

# Witness Interviews (cont.)

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- Use talking points to prevent mischaracterization of effort
  - Imperative that no one intimidate employees or improperly influence their testimony
- Imperative that employees understand that company counsel does not represent them individually
  - Admonitions before employee interviews or debriefs by legal team (document!)
- Consider “Upjohn” warning to employees if appropriate
  - Statement that conversation is subject to privilege but privilege belongs to employer
  - Make clear that company is cooperating with government and may decide to waive privilege and disclose substance of conversation to government
- Document admonitions in interview memoranda



# Site Preservation Agreement

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- Common for agencies to request agreement regarding preservation of evidence and changes to incident site
- Carefully consider proposed “exclusion” zone
- Agency often wants zone based on simple geography as opposed to specific considerations
  - May adversely affect work to repair and restart process units damaged by incident but unrelated to its cause
  - Promised flexibility by agencies may not last
- Make sure agreement does not represent consent to agency’s jurisdiction
- Anticipate that the agencies will pull employee representatives into the process

# Experts and Internal Investigations

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- Establish internal teams to conduct investigation
  - PSM-mandated investigation
  - Privileged and confidential investigation at direction of legal counsel
- Imperative to reinforce controls on both investigations
  - Guidelines on document preparation and retention
  - Limitations on collecting documents outside of formal process
- Act as if everything that is written is discoverable
  - May be inadvertently disclosed or company may waive privilege
- Protect consultants and experts
  - Issue of consulting vs. testifying experts
  - Anything given to expert who testifies is discoverable

# Regulatory Change: PSM Reform and Public Reporting

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- OSHA released RFI on Dec. 9, 2013; seeks comments on 17 potential policy changes to PSM standard
- Several relate to the scope of PSM standard's coverage
  - Removal of the oil- and gas-well drilling and servicing operations exemption
  - Expanding coverage of reactive chemicals
  - Updating list of highly hazardous chemicals
- Other potential changes to substantive PSM provisions
  - Additional management system elements (e.g., CCPS / BSEE SEMS)
  - Expanding mechanical integrity requirements to any safety-critical equipment
  - Requiring third-party compliance audits or more frequent audits
  - Defining RAGAGEP

# PSM Regulatory Reform

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- OSHA also seeks comment on changes to PSM enforcement
  - Resuming enforcement at oil- and gas-production facilities
  - Revising guidance on retail-facilities exemption
  - Conforming to EPA's Risk Management Program policy to determine whether mixtures containing HHCs exceed the threshold quantity
    - Calculated weight of chemical in a concentration rather than “commercial grade”
- Comment period closes March 10, 2014
  - RFI could grow into major rulemaking
  - Coincides with efforts by CSB to remake regulation of process safety

# Public Reporting of Workplace Safety Records

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- OSHA proposed rule requiring changes to reporting of workplace safety records on November 8, 2013
  - No changes to recording criteria or definitions
- Proposed rule requires electronic submission of OSHA Forms 300 / 300A
- Proposed rule would also increase public availability of data, public data would include:
  - Number of cases (deaths, recordable, etc.)
  - Number of days (away from work and requiring job transfer or restriction)
  - Injury and illness types
  - Establishment information (SIC, employment information)
  - Signature (company executive sign off including telephone number)

# Public Reporting of Workplace Safety Records (cont.)

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- Who reports:
  - Establishments with 250+ employees – quarterly
  - Establishments in certain industries with 20+ employees – annually
  - Any establishment that receives notification from OSHA
- Concerns:
  - Public access to OSHA numbers
  - May not provide a complete picture of workplace safety
  - May be used out of context by certain entities
  - Potential for data inaccuracy (think EPA ECHO database)
- Comment period closes March 8, 2014

# Live Project: Employee Admonitions

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- Admonitions provided to employee prior to agency or internal interviews
- Elements of an employee admonition
  - *Upjohn* warning
  - Participation is employee's decision
  - Right to have someone present during the interview, take notes, etc.
  - Company's expectations with respect to the employee's conduct (e.g., telling the truth)
- Agency-specific considerations
  - EPA: criminal investigators may contact employees at home
  - OSHA: cautions regarding employee protection and written statements
  - CSB: non-enforcement agency, but currently subject of DOJ subpoena



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