Legal 911:

Emergency Response and Privileged Investigations following Industrial Accidents
Agenda/Outline

• Introduction
• Emergency Response
• Investigations
• Crisis Management
Emergency Response
Emergency Response: Timeline

1. Emergency Incident
2. Evidence Preservation / Incident Reporting
3. Internal Investigation / Agency Investigation
4. Enforcement Action / Lawsuit
What is the difference between an emergency and a crisis?
Emergency Response:
2 Roles of Legal Counsel

• Ensuring timely compliance
  o Incident reporting
  o Evidence preservation

• Ensuring reasonable steps to protect legal rights
  o Preparing for government investigations
  o Investigations
  o Safeguarding legal privileges
  o Make certain communications are accurate, not represent admissions
Emergency Response: Timeline

- Emergency Incident
- Evidence Preservation / Incident Reporting
- Internal Investigation / Agency Investigation
- Enforcement Action / Lawsuit
Emergency Response: Environmental & Safety Statutes Implicated

• Unpermitted release of pollutants
  o Clean Water Act
  o Clean Air Act
  o Resource Conservation and Recovery Act
  o Comprehensive Environmental Response, Compensation and Liability Act (Superfund)
  o Safe Drinking Water Act
  o Analogous state statutes

• Accident prevention programs
  o Clean Air Act – General Duty Clause (112(r)), Risk Management Program (40 C.F.R. pt. 68)
Emergency Response: Incident Reporting

• Company should have Emergency Response Plan or Environmental Health and Safety Supervisor

• Example notifications:
  - National Response Center (releases of oil or hazardous substances in excess of threshold quantity);
  - State emergency or environmental regulatory agencies;
  - Local Emergency Planning Committees or other community emergency response organizations;
  - Occupational Safety and Health Administration (fatalities or multiple hospitalizations); and
  - Department of Homeland Security
    • U.S. Coast Guard (waterfront facilities)
Emergency Response:
CAA General Duty Clause

• “It shall be the objective of the regulations and programs authorized under this subsection to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to paragraph (3) or any other extremely hazardous substance.

• The owners and operators of stationary sources producing, processing, handling or storing such substances [i.e., a chemical in 40 CFR 68 or any other extremely hazardous substance] have a general duty [in the same manner and to the same extent as the general duty clause in the Occupational Safety and Health Act (OSHA)] to identify hazards which may result from (such) releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur.”

• CAA 112(r) (emphasis added)
Emergency Response: CAA General Duty Clause

• To establish GDC violation, EPA must prove
  o Owner or operator did not maintain facility free of hazard
  o Hazard recognized by owner or operator, or recognized by industry
  o Hazard was likely to cause harm
  o Owner or operator could have eliminated or reduced hazard
Hypothetical: GDC issue-spotting
Dear Associate,

As you know, ABC Client experienced a release of a hazardous substance at their Texas facility yesterday. ABC Client is confident they followed their CAA Risk Management Program (RMP) protocols, but we need to understand what liability, if any, the company faces under the CAA General Duty Clause (GDC) (112(r)). Regulators have just started using this provision as an enforcement tool, so we need to quickly to get up to speed. Let’s start with the following:

1. What exactly is the duty imposed by the GDC and how does it reconcile with the RMP?
2. What triggers enforcement? Are there elements to a GDC claim?
3. I vaguely recall this provision being a national enforcement priority (or something to that effect) under the Obama Administration. What does that mean practically? Is it still such a priority?
4. Does EPA have an enforcement policy for GDC claims? If so, does it state the range of civil penalties and how those penalties will be calculated?

No need for a full research memo at this point. Summarize your findings under each topic and attach/link supporting documentation, like EPA policy documents.
Emergency Response:
Site and Evidence Preservation

• Maintain the incident scene
  o Reasonable efforts to minimize changes (e.g. limit access, barriers)
  o Review preservation directives from governmental agencies with site personnel
  o Maintain “access log” and “change log”

• Document incident scene
  o Some changes during emergency response
  o Require operations/emergency personnel to promptly document scene and changes

• Evidence and site control agreement
  o With investigating agencies
  o Protocol for preservation, collection, storage and available of testing
  o CAN negotiate form agreements

• Electronic data
“Good document hygiene” pep talk from counsel

- Be thoughtful in whether/how take notes
- Do not email about the incident unless absolutely necessary
- Be thoughtful about drafting “work papers”
- Discuss how to write drafts of the report with counsel to preserve privilege
- Be aware that everything they may prepare may be made public because of discovery, inadvertent disclosure, purposeful waiver of privilege to demonstrate cooperation
Emergency Response: Document Control – Litigation Hold

“Preservation orders” or “hold orders”

- Requires the company to preserve all data that may relate to legal action; ensures available for discovery later
- Issue immediately
- References document retention policy
- Understand audience
- Re-issue hold as a reminder
Investigations
Internal Investigation:
Timeline

1. Emergency Incident
2. Evidence Preservation / Incident Reporting
3. Internal Investigation / Agency Investigation
4. Enforcement Action / Lawsuit
Investigations: Dual Investigative Tracks

• Track 1: Regulatorily Required Investigation
  o Required under OSHA Process Safety Management (PSM) Standard (29 C.F.R. 1910.119) and CAA Risk Management Program (RMP) (40 C.F.R. 68.81)
  o Reports made available to investigating agencies, employees, other stakeholders
  o Technical focus, but counsel still plays a role (i.e. protect privilege)

• Track 2: Privileged Internal Investigation
  o Sole purpose of preparing for litigation, develop information necessary for counsel to provide legal advice
  o Conducted at the direction of counsel
If you’re prepping employees for an agency investigative interview, what do you say?
Agency inspectors are conducting an inspection, and have selected you for an employee interview. It is entirely your decision whether you want to be interviewed. Neither the company nor the agency may improperly influence your decision whether to be interviewed.

- Be polite and professional
- Answer all the questions truthfully and succinctly
- Answer the question that is asked and not volunteer information; be certain you understand the question asked.
- Not guess or speculate about information they do not personally know to be true
- Avoid statements that might be construed as an admission of noncompliance
- You can stop the interview at any time
- Do not bring documents, drawings, or other records unless requested in advance
- OSHA inspectors often transcribe notes into a “witness statement” – your decision whether you want to sign it. If you do, recognize that notes prepared by OSHA, review notes for accuracy, obtain a copy before signing it.
Investigations: Track 2 Internal Interviews—*Upjohn* Warning

Counsel MUST make clear who they represent:

• I am a lawyer for Corporation A. I represent only Corporation A. I do not represent you personally.

• I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A on how to best proceed.

• Your communications with me are protected by the attorney-client privilege. But the privilege belongs solely to Corporation A, not you. That means Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties—such as federal or state agencies—at its sole discretion without notifying you.

• In order for this discussion to be subject to the privilege, it must be kept in confidence. So, with the exception of your own attorney, you may not disclose the substance of this interview. You may discuss the facts of what happened but you may not discuss the discussion.

• Do you have any questions?

• Are you willing to proceed?

Investigations:
Track 2: Other Considerations

• Technical experts to conduct investigation
  o Testifying v. consulting
    • Testifying: must produce all work papers
  o Keep their work independent, non-influenceable

• Communications
  o Do not want to admit liability
  o Talk about what an admission looks like
Emergency Response Preparedness/Investigations: Internal Audit

1. Internal Audit
2. Emergency Incident
3. Evidence Preservation / Incident Reporting
4. Internal Investigation / Agency Investigation
5. Enforcement Action / Lawsuit
Emergency Response Preparedness/Investigations: Internal Audit – Texas Audit Privilege Act

• Texas Environmental, Health, and Safety Audit Privilege Act
  o Tex. Health & Safety Code ch. 1101

• Perform an audit → get immunity
  o Property Notice of intent to conduct an audit to TCEQ
  o Prompt, voluntary disclosure of violations
  o Violations corrected in a reasonable amount of time
  o Disclosed violations granted immunity from administrative or civil penalties
Crisis Management
Some Fundamental Truths about Crises

In the age of interconnectivity, complexity and transparency, periodic crisis is the new normal
The Spectrum

CRISIS MANAGEMENT

Emergency / Accident Response

Risk Management and Transfer

Liability Mitigation Response
& Getting Others to Pay

Procedures

Systems

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Crisis Management in the New World

Crisis Follow Recognizable Patterns

So how do we deal with them and get others to pay for the response costs?
Assemble Your Crisis Management Team (Trusted Advisors)

Core Team
- Designated management
- General Counsel
- Crisis Advisor (outside counsel)
- Crisis Coordinator (outside counsel reporting to Crisis Advisor)

Board subcommittee and/or management

- Litigation Counsel & Practice Specialists
- Insurance Recovery & Risk Transfer
- Government Relations
- IT Team
- Subject Matter Experts
- Crisis Communications
Iterative Crises Management Process
Role of Counsel during a crisis:

- Preserving Attorney-client privilege
- Preserving Work product doctrine
- Evidence preservation
- Interacting with the investigative agencies
- Document collection and production
- Employee interviews
- Site preservation agreement
- Internal investigations and experts

Legal counsel should serve as part of core crisis management team.
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