

Morgan Lewis

*The First 48 Hours: Critical
Decisions to Get Right During an
Environmental Crisis*

John McAleese
Jon Snare
Ron Tenpas

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Today's Speakers



Jon Snare — partner in Morgan Lewis's Labor and Employment Practice in the Washington, D.C. office. Prior to joining Morgan Lewis, Mr. Snare served in several senior positions at the U.S. Department of Labor including Acting Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA) (2005 to 2006), during which he was responsible for leading the agency in its mission of promoting safety and health on jobsites across the country in all program areas including enforcement, regulatory agenda, education/outreach, and cooperative/state programs; Deputy Solicitor of Labor from 2006 to 2009; and Acting Solicitor of Labor in 2007.



Ron Tenpas – partner in Morgan Lewis's Environmental Practice; Mr. Tenpas is the former Assistant Attorney General, Environment Division, U.S. Justice Department (2007-09); former United States Attorney (2005-07). As AAG oversaw all federal government enforcement actions, criminal and civil, brought under the environmental laws, and represented client agencies such as the EPA and Coast Guard.



John McAleese – partner in Morgan Lewis's Environmental Practice ; Mr. McAleese has been practicing environmental law at Morgan Lewis for more than 20 years. He has advised clients in connection with many environmental crises and their aftermaths, including counseling clients during environmental emergencies, litigation of enforcement actions and toxic tort suits relating to accidental releases and preparation of emergency response plans for use during environmental crises.

Background

- Environmental crises take many forms
 - Cause many different problems
 - *Human health*
 - *Environment*
- Goals should be:
 - Minimize events
 - Minimize health and environmental impacts
 - Minimize business impacts
 - *Corporate*
 - *Individual*

What We Will Cover Today

- Basic Response Actions
 - What is legally required?
 - What should be done?
- Legal Planning Requirements
 - Spill and Release Response Plans
 - Process Safety Management
 - Emergency Action Plans
 - HAZWOPER/Emergency Response Plans
- Hypotheticals

What to Do When an Emergency Occurs

Notification

- Notification of Authorities
 - National Response Center
 - 1-800-424-8802
 - *Has there been a reportable release?*
 - *What information must be provided?*
 - State Agencies
 - *Release reporting*
 - *Permit requirements*
 - Local Authorities
 - *Fire, Police, EMS*



Sources of Notification Requirements

- CERCLA, Clean Air Act, Clean Water Act, EPCRA
- Hazardous waste regulations
- State analogues
- Permits
- Environmental Spill Reporting Handbook:
<http://west.thomson.com/productdetail/159601/16624898/productdetail.aspx>

Response Action

- On-Site
 - Employee safety
 - Contain and minimize release
- Off-Site
 - Notification of affected areas
- Plan in Advance
 - Response plan
 - Specific personnel responsibilities
 - Back-up personnel and back-up to the back-ups
 - Different persons responsible for notification and response



Spill Prevention, Control, and Countermeasure Plan (40 C.F.R. Part 112)

- Facilities that store 1,320 gallons of oil in aboveground storage tanks must prepare a Spill Prevention, Control, and Countermeasure (SPCC) Plan.
- An SPCC Plan must contain the following:
 - Written description of any spills and corrective actions within the previous 12 months, and plans for prevention of future spills;
 - Predictions of direction, flow rate, and quantity of discharge for each major type of failure where reasonable potential for equipment failure exists (e.g., overflow, rupture, leakage);
 - Details of appropriate containment or diversionary structures used to prevent oil from reaching navigable waters;
 - A contingency plan and a written commitment to the expeditious control of oil discharges if installation of containment or diversionary structures is not practicable;
 - Documentation that the facility design, construction, operation, and maintenance conforms with the requirements of 40 C.F.R. §112.7(e); and
 - Certification by a Professional Engineer (PE) and appropriate management approvals.
- Facilities have until November 10, 2010 to amend (or prepare) and implement SPCC Plans that comply with revisions and amendments to the SPCC rule promulgated in 2002 and 2005.

Facility Response Plan (40 C.F.R. Part 112)

- Facilities that could reasonably be expected to cause “substantial harm” to the environment by discharging oil into or on navigable waters are required to prepare Facility Response Plans (FRPs). FRPs are extensions of SPCC Plans.
- A facility may pose “substantial harm” if it has a total oil storage capacity greater than or equal to 42,000 gallons and it transfers oil over water to or from vessels; or has a total oil storage capacity greater than or equal to 1,000,000 gallons and meets one of the following conditions:
 - The facility lacks sufficient secondary containment for each aboveground storage area;
 - The facility is located at a distance such that a discharge from the facility could cause “injury” to fish, wildlife, and sensitive environments, or would shut down a public drinking water intake; or
 - The facility has had a reportable discharge greater than or equal to 10,000 gallons within the previous five years.

Facility Response Plan (40 C.F.R. Part 112) (cont'd)

- If the EPA Regional Administrator determines that a facility poses “significant and substantial harm” to the environment by discharging oil into or on the navigable waters and adjoining shorelines, the FRP must be reviewed and approved by EPA. This is determined by factors similar to the substantial harm criteria, as well as the age of tanks, proximity to navigable waters, discharge frequency, or other information.
- Key elements of the FRP include:
 - Emergency response action plan;
 - Emergency notification, equipment, personnel, and evacuation information;
 - Identification and analysis of potential spill hazards and previous spills;
 - Discussion of discharge scenarios and response actions;
 - Description of discharge detection procedures and equipment;
 - Detailed implementation plan for response, containment, and disposal;
 - Description and records of self-inspections, drills and exercises, and training;
 - Description of facility’s security (e.g., fences, lighting, alarms, guards, emergency cut-off valves, and locks).

Hazardous Waste Contingency Plan

- Facilities that generate, store, treat, or dispose of hazardous waste must prepare a hazardous waste contingency plan.
- Contingency plans may be amendments to SPCC plans, but must be submitted to state and local emergency response teams.
 - Hazardous Waste Contingency Plans must contain the following:
 - Description of actions to be taken in response to fires, explosions, or any unplanned release of hazardous waste;
 - Description of arrangements agreed to by local police and fire departments, hospitals, contractors, and emergency response teams to coordinate emergency response services;
 - An up-to-date list of names, addresses, and telephone numbers of primary and alternate emergency coordinators;
 - List of emergency and decontamination equipment, location, description, and outline of capabilities; and
 - Evacuation plan for facility personnel, including procedures and routes.

Risk Management Plan (40 C.F.R. Part 68)

- Section 112(r) of the Clean Air Act requires stationary facilities that produce, use, handle, process, distribute, or store a threshold quantity of certain regulated substances develop and implement a Risk Management Program, prepare a Risk Management Plan (RMP), and submit the RMP to EPA.
- The RMP program was modeled in large part on OSHA's Process Safety Management (PSM) regulations, which were promulgated to address workplace safety issues.
- RMP requirements typically are included in a facility's Clean Air Act Title V operating permit.

Risk Management Plan (40 C.F.R. Part 68) (cont'd)

- The RMP includes the following elements:
 - Worker notification;
 - Procedures for handling an accidental release;
 - Coordination with local emergency agencies;
 - Assessments of risks to neighboring communities; and
 - Periodic audits.

OSHA Regulatory Requirements

- PSM of Highly Hazard Chemicals (29 C.F.R. §1910.119)
- Emergency Action Plans (29 C.F.R. §1910.38)
- Hazardous Waste Operations and Emergency Response (29 C.F.R. §1910.120)

OSHA Regulatory Requirements (cont'd)

- General OSHA workplace requirements
 - design and construction requirements for exit routes (29 C.F.R. §1910.36)
 - maintenance, safeguards, and operational features for exit routes (29 C.F.R. §1910.37)
 - medical services and first aid (29 C.F.R. §1910.151)
 - portable fire extinguishers (29 C.F.R. §1910.157)
 - employee alarm systems (29 C.F.R. §1910.165)
- BE AWARE of additional OSHA requirements that may be applicable to you depending on the nature of your operation and the types of substances used or stored on site
- Example: Fire Prevention Plans (29 C.F.R. §1910.39)

OSHA Process Safety Management (PSM) Standard

- PSM Standard was promulgated in 1992, following a series of major petrochemical plant explosions (examples: Pasadena, Texas in October 1989 with 23 fatalities and 132 injuries; July 1990 incident with 17 fatalities) and direction from Congress in 1990 Clean Air Act amendments
- PSM Standard is set forth in 29 C.F.R. §1910.119

PSM Standard

- PSM is designed “for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable or explosive chemicals” which “may result in toxic, fire or explosion hazards.”
- PSM applies to any process which involves specified chemicals at or above threshold
- Definition of process under PSM:
 - “...any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities. For purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process.”

PSM Standard (cont'd)

- PSM is a performance standard
- This performance standard sets forth what OSHA requires as to results, but leaves discretion to the employer as to the development of the means to accomplish the PSM requirements
- PSM requires a high level of employer sophistication and is a dynamic standard that requires constant compliance monitoring

PSM Standard—14 Elements of PSM

1. Employee Participation
2. Process Safety Information
3. Process Hazard Analysis
4. Operating Procedures
5. Training
6. Contractors
7. Pre-startup Safety Review
8. Mechanical Integrity
9. Hot Work Permit
10. Management of Change
11. Incident Investigation
12. Emergency Planning and Response
13. Compliance Audits
14. Trade Secrets

PSM Standard (cont'd)

- Under PSM, employers are required to comply with the following:
 - conduct a Process Hazard Analysis (PHA) for each process covered by PSM, and update and revalidate the PHA every five years
 - incorporate emergency shutdown actions and operations into the employer's written operating procedures for each process. Employer should include conditions that require emergency action and the qualified operator responsible for performing these procedures
 - implement an Emergency Action Plan for the site as required in §1910.38
 - maintain the mechanical integrity of PSM emergency systems and alarms
 - if employees are expected to handle an emergency release rather than promptly evacuate, the employer must implement an emergency response plan as required by §1910.120 (q), and provide proper response and personal protective equipment for emergency responders under the plan

PSM Standard (cont'd)

- Under PSM, employers must comply with the following training requirements:
 - review PSM emergency shutdown and response procedures with employees
 - provide additional training to employees who provide response actions covered by §1910.120(q)
 - As host employer, clearly communicate emergency action plans with contractors; contract employers must ensure that their employees are instructed in potential fire, explosion, or toxic release hazards related to their jobs.

OSHA Emergency Action Plans

- This regulation requires employers to prepare emergency action plans if required by another OSHA standard (OSHA standards which require emergency action plans—29 C.F.R. §1910.119; 29 C.F.R. §1910.120; 29 C.F.R. §1910.157; 29 C.F.R. §1910.160; 29 C.F.R. §1910.164; 29 C.F.R. §1910.272; 29 C.F.R. §1910.1047; 29 C.F.R. §1910.1050; 29 C.F.R. §1910.1051)
- These plans are intended to address contingencies and emergencies such as toxic chemical releases, fires, hurricanes, tornadoes, floods, etc.
- Emergency Action Plans must be in writing (unless you have 10 or fewer employees), kept in the workplace, and available to employees for review (C.F.R. § 1910.38(b))

OSHA Emergency Action Plans (cont'd)

- At a minimum, the Emergency Action Plan must include—
 - fire and emergency reporting procedures
 - emergency evacuation procedures, including the type of evacuation and exit routes
 - procedures for employees who remain to operate critical operations prior to evacuation
 - procedures to account for employees after evacuation
 - procedures for employees performing rescue and medical duties
 - name or job title of every employee who may be contacted by any employee for additional information or explanation of this plan

29 C.F.R. §1910.38(c) (1) to (6)

OSHA Emergency Action Plans (cont'd)

- Employer must have and maintain an employee alarm system (which must have a distinctive signal and otherwise comply with section 1910.165) (§1910.38 (d))
- Employer must provide training to employees who are designated to assist in any evacuation (§1910.38 (e))
- Employer must review the emergency action plan with each employee when the plan is developed or the employee is initially assigned to his/her position; when employee's responsibilities change; and when the plan is changed (§1910.38 (f))

OSHA Hazardous Waste Operations and Emergency Response (HAZWOPER) (29 CFR 1910.120)

- OSHA promulgated its HAZWOPER standard in 1989 as directed by the 1986 Superfund Amendments and Reauthorization Act (SARA)
- Like PSM, HAZWOPER is a performance-oriented standard that allows the employer flexibility to develop the program suited to its particular operation. This standard requires the employer to consider both the overall performance at the particular site as well as certain specified elements to comply

OSHA HAZWOPER Standard (cont'd)

- HAZWOPER applies the following three categories
 - 1) Three general waste clean-up operations
 - 2) operations conducted at treatment, storage, and disposal facilities, as permitted by the Resource Conservation and Recovery Act (RCRA)
 - 3) any emergency response to hazardous substance releases not otherwise covered

29 C.F.R. §1910.120 (a)(1)

OSHA HAZWOPER Standard (cont'd)

- Requirements in category one: three General Waste Clean-up Operations
 - Clean-up operations required by a governmental entity involving hazardous substances conducted at uncontrolled hazardous waste sites
 - Corrective actions involving clean-up operations at facilities covered by RCRA
 - Voluntary clean-up operations at sites recognized by governmental entities as uncontrolled hazardous waste sites

These operations must comply with §1910.120 (b) through (o) [and/or §1926.65]

OSHA HAZWOPER Standard (cont'd)

- Requirements for categories two and three
 - Operations at RCRA permitted treatment, storage and disposal facilities must comply with section 1910.120 (p) [and/or section 1926.65]
 - Emergency response to hazardous substance releases must comply with section 1910.120 (q) [and/or section 1926.65]

HAZWOPER Requirements - 1910.120 (b) Through (o)

- HAZWOPER requirements for employers involved in the three general clean-up operations, as set forth in sections 1910.120 (b) through (o), include:
 - employer must develop and implement a written safety and health program for employees who are involved in hazardous waste operations, and shall be designed to identify, evaluate, and control hazardous waste and provide for emergency response for hazardous waste operations or accidental release of hazardous waste or substances
 - this program shall include the following: (a) organizational structure; (b) comprehensive work plan; (c) site-specific safety and health plan; (d) safety and health training program; (e) medical surveillance program; (f) employer's standard operating procedures for safety and health; (g) and any necessary interface between the general program and site-specific activities
 - employer must develop an emergency response plan to handle anticipated emergencies prior to commencement of hazardous waste operations, as set forth in sections 1910.120 (l)

OSHA Hazardous Substance Release - 1910.120 (p)

- HAZWOPER requirements for employers involved in RCRA permitted treatment, storage and disposal facilities, as set forth in section 1910.120 (p), include:
 - employer shall develop and implement a written safety and health program for employees involved in hazardous waste operations, and this program shall be designed to identify, evaluate, and control safety and health hazards; to provide for emergency responses; and to address site analysis, engineering controls, maximum exposure limits, hazardous waste handling procedures, and use of new technology
 - employer shall implement a hazard communication program, medical surveillance program, decontamination program, new technology program, material handling program, and training program

OSHA Hazardous Substance Release - 1910.120 (q)

- Employer shall develop a written Emergency Response Plan for emergencies that will include:
 - preemergency planning and coordination with outside parties
 - personnel roles, lines of authority, training, and communication
 - emergency recognition and prevention
 - safe distances and places of refuge
 - site security and control
 - evacuation routes and procedures
 - decontamination
 - emergency medical treatment and first aid
 - emergency alerting and response procedures
 - critique of response and follow-up
 - PPE and emergency equipment

OSHA Hazardous Substance Release - 1910.120 (q) (cont'd)

- Employer shall ensure that its Emergency Response Plan is compatible with other state or local emergency response plans
- Employer shall utilize the Incident Command System (ICS) to coordinate the response to the hazardous substance release. The senior emergency response official responding to the incident shall become the individual in charge of the ICS and shall take certain steps depending on the situation, as set forth in section 1910.120(q)(3)

OSHA Hazardous Substance Release - 1910.120 (q) (cont'd)

- These steps include:
 - This individual shall identify all hazardous substances or conditions present and shall address as appropriate site analysis, use of engineering controls, maximum exposure limits, hazardous substance — handling procedures, and use of any new technology
 - implement appropriate emergency operations and ensure that appropriate PPE is used
 - ensure necessary back-up personnel and first aid personnel
 - designate a safety official with specific responsibility to identify and evaluate hazards and provide direction with respect to the safety of operations for the instant emergency
 - employer shall train employees on an annual basis who work with the hazardous substance and who will be called upon to provide assistance in the event of a release
 - employer shall provide chemical protective clothing appropriate to the site hazard
 - employer shall provide medical surveillance to emergency responders in certain situations

OSHA Hazardous Substance Release - 1910.120 (q) (cont'd)

- Employer shall provide training to employees who will be participating in emergency response activities at one of the following levels: first responder awareness; first responder operations; hazardous materials technician; hazardous materials specialist; on-scene incident commander
 - As part of this effort, employers are required to ensure trainers are properly qualified
 - Employees shall receive annual refresher training

HAZWOPER Rules and Requirements

- Employers who evacuate their employees from the danger area of the hazardous substance release and who do not permit any of their employees to assist in participating in the emergency response, are exempt from section 1910.120 (q) if they provide an emergency action plan that complies with section 1910.38.

Combining the Plans

- To seek guidance on how to combine multiple plans, please see 61 Fed. Reg. 28,642.

Part II - Hypothetical Situations

Scenario No. 1



- Large refinery located on ship channel near Beaumont, Texas
- Schools and houses located across the ship channel
- Refining capacity: 300,000 barrels per day
- YOU ARE RESPONSIBLE FOR E, H & S FOR THE ENTIRE REFINERY

Scenario No. 1 (cont'd)

North side of refinery:

- Hydrocracker Unit refining petroleum products (produces high-quality fuel products such as diesel, gasoline, and jet fuel)
- Next to Hydrocracker Unit, large number of storage tanks including:
 - 20 carbon steel storage tanks holding sulfuric acid
 - 20 carbon steel storage tanks holding benzene



Scenario No. 1 (cont'd)

- Category 4 hurricane approaches East Texas Coast
- Refinery implements shut-down order
- Employer is relieved that storm weakens at last minute to Category 2 with some high winds and little rain with no storm surge



Scenario No. 1 (cont'd)

- Employer begins to implement turn-around procedures to refinery to get operation up and running
- During the turnaround, several employees notice a leak in at least one pipe system at the Hydrocracker unit due to storm damage; repairs initiated
- Also four storage tanks holding sulfuric acid and two storage tanks holding benzene were damaged during storm, and begin leaking

Scenario No. 1 (cont'd)

- Overnight, leak from Hydrocracker Unit gets worse and large vapor cloud of hydrocarbons from Hydrocracker Unit forms over north side of refinery, and then starts to head in direction of ship channel and schools and other populated sites beyond ship channel
- Additionally, leak from the four storage tanks with sulfuric acid and two storage tanks with benzene get worse and another vapor cloud forms
- Wind direction is north, blowing both vapor clouds toward schools and housing development

Scenario No. 1 (cont'd)

- You are E, H & S manager for refinery and you get emergency call from one of the operators on third shift at 3 a.m. screaming in panic and trying to tell you about two large vapor clouds
- At least two employees are dead, many missing, and vapor clouds are blowing in direction of school and housing development
- WHAT WILL YOU DO?????????

Scenario No. 1 (cont'd)

- What are your first steps?????
- Notifications—who?
- How?
- Time table? When required?
- Protect your employees
- Protect the community

Initial Emergency – Vapor Cloud

- Contact local emergency response authorities
 - Who?
 - *police; fire; coast guard; homeland security*
 - Do you know?
- Need to make immediate decisions as to vapor cloud
 - Are there steps you can take to reduce risk?
 - *Create Incident Command System (ICS) and designate senior emergency response official to lead all efforts to resolve crisis*
 - *Provide appropriate level of personnel and resources to assist ICS team*
 - *Implement emergency response plan and/or emergency action plan as appropriate*

Issues After the Initial Vapor Cloud Emergency

- Manage investigations by federal and/or state government agencies
 - EPA
 - OSHA
 - CSB
 - DOT
 - U.S. Army Corp of Engineers
 - Other (e.g. TCEQ)
- Consider appointing a team or set of teams to be responsible for government investigations
 - Examples
 - *Evidence Team*
 - *Witness Team*
 - *Specific points of contacts for each government agency*

Issues After the Initial Vapor Cloud Emergency (cont'd)

- Internal investigation – sometimes required by statute or regulation
 - PSM
 - Other
 - Create appropriate team to conduct any such investigation (this PSM team should be separate from any other internal investigation team)
- Repair and/or turn around affected areas
- Create Business Recovery Team and/or Turnaround Team: responsible for resolving impact of vapor cloud release and bringing operations back on line
- Potential lawsuits

Other Considerations/Challenges

- Other considerations
 - Congressional interest
 - Press/Media
 - Create a Crisis Management Team and/or point person responsible for handling inquiries and managing responses
- You will need strategy to respond to all inquiries
- Be prepared to coordinate your staff and respond to inquiries in both the short term and long term

Steps for Dealing with Government Agencies

- OSHA
 - Know your area office
 - Is this process covered under PSM?
- PSM incident investigation requirements
- Manage OSHA requests
 - documents requested
 - witness interviews—difference between management employees and hourly employees
- Know CSB procedures for investigation –
 - CSB witness interviews
 - CSB document requests
- Potential friction between OSHA and CSB
- Need to negotiate an Evidence and Site Control Agreement with both OSHA and CSB (and possibly other government agencies)

Scenario No. 2

- Manufacturing facility that uses stored petroleum products
- Several large tanks as part of a tank farm
- Tanks are surrounded by a containment berm
- Adjacent to a major river



Scenario No. 2 (cont'd)

- Major storm arrives
- Water build-up within the containment berm
- Employees begin to notice a sheen on the surface

Scenario No. 2 (cont'd)

- Workers begin to notice a sheen on the river
- Also notice bowing on the berm but liquids have not overtopped berm
- One hour later, berm collapses, creating major leakage into the river
- Immediately downriver are other industrial facilities
- Two and five miles downstream are water intake plants for municipal drinking water

What Will You Do?

Agencies That Will Visit

- Likely agencies are many of those involved in scenario one
 - Potential for greater involvement by the Coast Guard
 - Less "emergency response" of fire departments
 - Greater need/opportunity for "containment"
 - Likely greater state participation

Scenario No. 3

- Company has owned and operated a factory in upstate New York since the 1960's
- Single shareholder wishes to sell the business and retire to Bahamas
- In connection with potential sale, buyer conducts Phase I and Phase II and determines that factory had historical release of degreasing solvent (trichloroethylene or TCE) to soils and groundwater

Scenario No. 3 (cont'd)

- Buyer's consultant reports findings pursuant to New York State Department of Environmental Conservation (NYSDEC) regulations
- NYSDEC samples nearby residential wells that show TCE contamination well above drinking water standards (5 ppb) in residential wells
- As counsel to company, what do you advise?

Conclusion

Questions



John McAleese
Philadelphia
215.963.5094
jmcaleese@morganlewis.com



Jon Snare
Washington, D.C.
202.739.5446
jsnare@morganlewis.com



Ron Tenpas
Washington, D.C.
202.739.5435
rtenpas@morganlewis.com