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Core Principles of Environmental Crisis Management

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Special to the Legal

Despite best efforts, environmental accidents happen to good companies. When they do, the results can be catastrophic to public health and the environment, to a company's reputation, and to its ability to survive and prosper.

Most companies prepare and maintain elaborate emergency response plans to address the harm to public health and the environment caused by an environmental crisis, but few are prepared for the strategic and management challenges that follow. This is where most post-crisis mistakes are made and where effective planning can help. To prepare, a company must first understand the core principles of legal crisis-management and then develop a management response plan to guide it through the crisis. Several of the more important principles are set out below.



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PRINCIPLE 1: KNOW THE STAGES OF AN ENVIRONMENTAL CRISIS SCENARIO

Major environmental crisis scenarios follow a similar life cycle. The first stage, and by far the stage with the highest priority, is the

response effort to bring the crisis under control. This may involve working with responsible local, state, and federal government agencies to stop the leak, cap the well, put out the fire, and take whatever action is needed to protect people and the environment.

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Second are efforts to mitigate and remediate the disaster's harmful impacts. Mitigation and remediation efforts often begin even before the spill, leak, or release has been controlled, and may extend long after the crisis has ended.

Third is the commencement of internal and external root-cause investigations into what went wrong, and why. The investigation stage also often begins while the crisis is still underway, and likely will continue well into the following stages.

Fourth, an environmental crisis scenario inevitably leads to multiple overlapping legal proceedings: civil toxic tort litigation in state and/or federal court, state and/or federal criminal investigations and prosecutions, securities litigation, insurance coverage litigation, agency and legislative hearings, and administrative penalty proceedings, just to name a few. A unified defense and legal communication strategy must be developed at the outset to address all related proceedings. Implementing the strategy requires consistent message discipline across all proceedings.

Fifth, environmental crises breed communication crises. Statements by legislators, the press and regulators will strain most public relations departments. Social media will magnify the damage. A sound communication plan and team are essential. Constituents will want some answers.

Finally, only after advancing through each stage is it possible for the company to eliminate, try, or settle discrete pieces of the many interrelated proceedings. This process should not be rushed; settlements must be considered and negotiated methodically so as not to disadvantage other proceedings, until all related matters eventually are resolved. In the interim, be mindful of the urge to offer to mitigate damage or to perform other unilateral programs to obtain public favor. Mitigation can be useful, but is rarely effective in improving a company's image mid-crisis, and mitigation may

or may not be helpful in legal proceedings over the longer term.

PRINCIPLE 2: HAVE A CRISIS-MANAGEMENT PLAN

The first hours and days of an environmental crisis are crucial. That is when mistakes most often are made, and the possibilities for missteps are endless. The high-pressure environment can lead to careless media statements by employees involved in the response effort, or the creation of inadvertently harmful discoverable documents, like damaging—and unnecessary—emails. Unless proper controls are immediately established, physical evidence or documents may be destroyed and, investigations unintentionally obstructed, leading to further, and entirely avoidable, claims.

At the same time, an environmental crisis turns a company's world upside-down. Familiar government regulators become relentlessly hostile. Internal information can be leaked to the press, "positive" information or behavior is ignored, and facts and public statements are mischaracterized. Social media will amplify the distortion, and will be used to great effect to marshal public opinion against you. Corporate employees must fulfill their usual tasks while now shouldering enormous additional responsibilities. A mistaken word in this context can have profound legal consequences.

Companies can minimize these risks by having a written crisis-management plan in place before a crisis occurs, and by training employees on the plan's key provisions. The plan should be drafted with outside counsel who will act as the company's legal crisis manager. An effective plan should include detailed, step-by-step instructions for in-house counsel to follow immediately

upon receiving word that a catastrophic event has occurred.

Those instructions should include, at a minimum, a rapid-reaction "management" team who can organize events both at the site of an incident and at all relevant levels at the company. The team will implement communication control, interface with government first responders, prevent employees from creating or destroying potentially relevant evidence such as text messages or social media posts and begin the process of evidence preservation and collection.

PRINCIPLE 3: IMPLEMENT A UNIFIED LEGAL AND COMMUNICATIONS STRATEGY

Significant efforts must also be made to control and to manage the flow of information and documents to ensure that statements and document productions are controlled, accurate and consistent. Regulatory agencies and legislative committees follow a standard game plan. Almost immediately after word of an environmental crisis hits the media, subpoenas and information requests will pour in from state and federal legislators, and from agencies such as the Occupational Safety and Health Administration (OSHA), the U.S. Environmental Protection Agency (EPA), the U.S. Department of Justice, Environment and Natural Resources Division (ENRD), the National Transportation Safety Board (NTSB), local and state regulatory or law enforcement agencies, and state and congressional legislative committees.

The overlapping subpoenas, information requests and interviews will command the company to produce massive volumes of documents and to answer questions going to the

very heart of the case. All of the subpoenas and information requests will impose impossible deadlines. This is no accident.

Collecting documents, responding to information requests and interviews often begin before the company has had a chance to establish an organized quality-control system. As a result, the company may make damaging admissions, inadvertently turn over privileged documents, provide inconsistent answers, or provide answers that turn out to be wrong and must be corrected. Such mistakes can have devastating legal consequences for the company. Every document produced and response provided will be discoverable in subsequent litigation. And providing incorrect information to Congress or an agency could lead to criminal prosecution for obstruction of justice, among other things.

An effective crisis-management plan will include steps for turning over to the outside legal crisis manager as soon as possible the process of receiving and responding to agency and legislative information requests. The crisis manager's job is to ensure consistency across all responses, and to take on the responsibility for witness preparation, document collection, processing, and production, and narrative responses. Most importantly, the crisis manager must ensure that all responses to information requests are accurate according to the best available information at the time. While responses to information requests should never give the appearance of stonewalling, it is far more important to be right than to be fast.

PRINCIPLE 4: DEVELOP YOUR TEAM

Post crisis-management, a classic multi-headed hydra will spawn a

myriad of investigations, lawsuits, enforcement proceedings and legislation. Recognize this reality early and take steps to staff accordingly, including not only counsel, and testifying and consulting experts, but in-house staffing as well. Post crisis-management work is resource intensive, but you should fight the urge to assign all of your best human resources to the crisis at the expense of operations. You still have a company to run.

PRINCIPLE 5: PLAN FOR THE LONG HAUL

It is natural for any manager to want to put an environmental disaster in the rearview mirror as soon as possible and to begin rebuilding the company's reputation. But the hard truth is that there is no quick and easy route to the exit. Litigation after an environmental crisis is nothing like ordinary commercial litigation, and settlements will prove elusive until much later than anyone would hope. The agencies driving the litigation have statutory mandates to fulfill—they will have no appetite for resolution until their investigations are complete. Private plaintiffs take their cues from the government agencies and will wait for investigative reports to be released before initiating negotiations in earnest. The company therefore must be prepared to dig in and develop a trial-ready defense. There will be a time and place for settlement.

For much the same reasons, there is great pressure for company managers to do something in response to a crisis to improve the company's standing with the public and the press. Programs such as free

services, no-strings-attached payments or reimbursements, or other giveaways are common responses. The hard truth is that, while giveaways can be useful (and sometimes necessary), very little can be done to improve the company's public image. Indeed, in many cases these programs backfire and can create more problems for the company. Often, the better course is for the company to address and contain any environmental impact, and consistently communicate that it understands it is accountable for the environmental crisis, that it is working to fix the problem, and that it will make those harmed by the incident whole as the law requires.

CONCLUSION

There can be new life for a company after an environmental crisis. The rigorous investigation and review following an environmental crisis can lead to improved internal processes and controls, and a leaner, more efficient, and more safety conscious organization. But to increase the likelihood that the company makes it through the gauntlet of an environmental crisis to emerge stronger on the other side, steps should be taken now to engage an experienced crisis manager and develop a crisis-management plan tailored to the needs of the individual company. It is hard to see light at the end of the tunnel in the days after a crisis, but they do pass, and advance planning can ease your journey. •