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*presents*

# **Environmental Emergencies: Legal Strategies for Managing Risk**

## **Mitigating Liability and Meeting Regulatory Requirements Before, During and After an Environmental Crisis**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

John J. McAleese, III, Partner, Morgan, **Lewis & Bockius**, Philadelphia  
Jonathan L. Snare, Partner, Morgan, **Lewis & Bockius**, Washington, D.C.  
Ronald J. Tenpas, Partner, Morgan, **Lewis & Bockius**, Washington, D.C.

**Thursday, March 4, 2010**

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**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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Morgan Lewis

*Environmental Emergencies:*  
Legal Strategies for Managing Risk

John McAleese  
Jonathan Snare  
Ron Tenpas

March 2, 2010

# Today's Speakers



**John McAleese** is Co-Chair of Morgan Lewis's Environmental Practice, resident in the Philadelphia office. 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.



**Ron Tenpas** – is Co-Chair of Morgan Lewis' 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.



**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.

# 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.
- 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.

# Emergency Response Plans

- 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 an SPCC Plan.
- Facility Response Plan (40 C.F.R. Part 112)
- Hazardous Waste Contingency Plan
- Risk Management Plan (40 C.F.R. Part 68)

# 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.

# 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.

# 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.
- 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 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

# Process Safety Management (PSM)

- PSM is designed to prevent or minimize catastrophic release of "toxic, reactive, flammable or explosive chemicals"
- PSM applies to any process involving specified chemicals; "process" is the "use, storage, manufacturing, handling, or the on-site movement" of any such chemical
- PSM is a performance standard and has 14 required elements including Process Safety Information, Process Hazard Analysis, Operating Procedures, Training, Mechanical Integrity, and Management of Change

# 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

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

- 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

# 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

# One Plan

- The National Response Team's Integrated Contingency Plan Guidance
- EPA Guidance allowing for combination of several plans into one facility-wide response plan
- Guidance can be found at 61 Fed. Reg. 28,642
- Much more convenient and useful than having multiple plans
- Eliminates inconsistencies

# 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

# 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:
  - Several carbon steel storage tanks holding sulfuric acid
  - Several carbon steel storage tanks holding benzene



# Scenario No. 1 (cont'd)

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



## Scenario No. 1 (cont'd)

- Refinery 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 one of the 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. in a panic and trying to tell you about two large vapor clouds
- At least two employees are dead, several are missing, and vapor clouds are blowing in direction of school and housing development
- What do you do?

## Scenario No. 1 (cont'd)

- First step: Notification
  - Who?
  - How?
  - When required?
- Next: Protect your employees
- Who protects the community?

# 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

## 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?**

# Differences from First Scenario

- 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



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