

FINAL TRANSCRIPT

Thomson StreetEventsSM

****ACC - Preparing For And Responding To An Accidental Environmental Release**

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PRESENTATION

Bill Messner - ACC Environmental Law Committee - Chair

Let's begin. First of all, let me welcome everybody to our webcast today by the Environmental Committee, which is titled Preparing For and Responding To An Accidental Environmental Release, and our presenters today with great appreciation, today on Morgan Louis, the firm of Morgan Lewis.

Before we begin I want to give a little introduction to the Environmental Committee and remind everyone of the annual meeting, which is coming up or fast approaching on October 24th. And the Committee has put in many tireless ours preparing the programs for you this year and some of those programs include "The Sleeping Giant Awakes - How States and Plaintiff Lawyers Are Transforming National Resource Damages".

Another title is also Incorporating Science To Environmental Policy and Rulemaking. And we also have a program entitled "The Top Ten Environmental Enforcement Actions - Are You Prepared", as well as many other programs that we have for you this year. So we hope that you can participate in those and if you have any questions about that, please let Karen Palmer know, or myself. Again, it's Bill Messner and my email address is on the webcast information.

In addition, the Environmental Committee will be having a dinner at the event of the annual meeting and information about that will be forthcoming as well, so please look for that information.

Now, let me go through the format of how the program will work today. I will do a brief introduction of our two speakers, then we'll have approximately a 45-minute presentation, then we'll have Q&A answers at the end. Please send your questions to me. My email address is william.messner@sce.com and I will ask those questions of our presenters at the end of the presentation.

Let me first begin by introducing Mr. Kenneth A. Rubin, who is a partner at Morgan Lewis, who graduated from Cornell Law School. Mr. Rubin practices exclusively in the area of environmental law and has handled litigation throughout the United States involving many issues, including water issues and Superfund. He has specialized in the Clean Water Act, the Oil Pollution Act, RCRA, the Safe Drinking Water Act and the Caustic Substances Control Act, along with many other laws in this arena. In addition, he is an active writer and lecturer. For 10 years he has been the principle outside lecturer to the U.S. Army Corps of Engineers on environmental law and is now a visiting lecturer at Cornell University Graduate School of Management.

Our other speaker today is Mr. Wade B. Wilson, who is an associate at Morgan Lewis, who graduated from the University of Maryland Law School in 2001. Mr. Wilson also practices in the litigation practice group and he has counseled clients on CERCLA, the Clean Water Act, and RCRA, as well as NESHEF (ph) issues. Prior to becoming a lawyer, Mr. Wilson was also a senior field engineer with James & Moore (ph) and specialized in industrial and domestic water treatment systems. He also owned and operated his own environmental firm, which contracted with petroleum companies and the federal government in removing and remediation of regulated hazardous waste.

With that, I believe we are ready to proceed.

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Wade Wilson - *Morgan Lewis - Associate*

Thanks for that introduction, Bill. This is Wade Wilson. Today's webcast concerns preparing for and responding to accidental releases. Now, accidental releases come in all shapes and sizes and we've used the term "release" intentionally to include both liquid spills and also releases that can go straight to the atmosphere. And these types of releases can implicate a number of different environmental laws.

What are some of the examples? We're on slide 2 of the webcast that you can pick up either in HTML or PDF on the website. Well, there are explosions, of course, that can result in -- will result in atmospheric releases that can also result in spills of liquids from tanks. There are the oil spills, both onshore, offshore and inland. There are chemical spills and chemical releases, which would just be atmospheric releases. If you're prepared for the worst-case scenario, the lesser magnitude of release should not pose any kind of problem.

Now, before we begin, I want to make one note about how we organized the info pack. We tried to include in every section of the info pack a special section for the role of counsel since this is, after all, the Association of Corporate Counsel. So I encourage you -- we will touch some of these suggestions for counsel during the webcast, but I encourage you to look at the complete info pack, which is listed on the website, and to see the role of counsel after each section.

Now I'd like to turn it over to my colleague, Ken Rubin, for an overview of today's webcast. Ken?

Kenneth Rubin - *Morgan Lewis - Partner*

Well, I've listened to many webcasts myself and I know it's kind of boring just to hear the speaker repeat exactly what's on the PowerPoint on the web screen, so we're going to try to add some things as we go along and emphasize certain things.

Now, on page 3 of your slide we talk about the basic elements of what happens in a spill event and there are four listed there, but there's also a fifth. The best thing to deal with a spill is to be prepared for it and to undertake actions that actually are designed to prevent a spill from ever happening.

So the first thing to do is be sure that your staff, your engineers, your lawyers, your management, your contractors are doing everything possible to prevent a spill from ever happening by identifying things that could cause a spill and then to be prepared to respond quickly if a spill event should happen. And then, as lawyers, to know what to do after a spill happens in terms of government investigations, enforcement of federal laws and also a fifth item, private party litigation, litigation by people who have been impacted by the spill and maybe by people who have caused the spill, subcontractors (inaudible).

Now, on the next page we again emphasize that you need to have proper training and training of your personnel and also perhaps training with government people coming in and doing a desktop exercise that they are familiar with your facility. And they can comment on your preparation so that if you ever have a spill and the government could not accuse you of being unprepared because you could say, "Hey, you were there. We had a desktop drill with you. You saw what our procedures were. If you thought they were inadequate, why didn't you tell us that at the time?"

Now, on page 5 we have the fundamental elements for prevention. And the first thing is design and construction. If things are built properly, hopefully they won't cause a spill later on. But you also have to train your people to properly operate these facilities to prevent a spill from happening. You also want to install spill detection equipment and make sure that it's properly maintained and again, that the operators know how to use it. You want to follow several different kinds of written manuals and procedures for being sure these equipment are properly operated. You might have a leak detection repair procedure, certainly a risk management plan, SBCC plans, facility response plans, things of that type.

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Wade Wilson - Morgan Lewis - Associate

Now, moving on to slide 6, there are various statutory planning requirements and the common elements in the various statutory requirements are that you have contingency planning that you document your contingency plan and that you have training.

Now, moving on to slide 7, there are many different contingency planning requirements under federal environmental laws, which we will cover in a moment, but first a note about integrated contingency planning. To ease some of the regulatory burdens of developing individual plans to meet regulatory requirements, there's been devised the One Plan and we provided the National Response t Team link on the website. If you're developing -- this eases some of the regulatory burdens of developing all the different contingency plans and pulls them into one integrated plan.

Let's move on to slide number 8 and talk about explosions for a moment because explosions involve the unique characteristics of airborne releases and also possibly liquid releases as well. One note about the Clean Air Act, section 112(r), and specifically 112(r)(1) versus 112(r)(7). Under 112 (r)(1), which has the general duty clause, it's important to note that this statutory section can be a trap for the unwary because there are no regulations that go along with 112(r)(1), but it is a general duty to stationary sources that produce, process, handle or store extremely hazardous substances. And the general duty is to identify the hazards that could result from a release, design and maintain safe facilities to prevent releases, and to minimize the consequences of accidental releases.

Now, that's in comparison to the 112(r)(7) requirements that you see on slide 9, which is probably known to most of you, the risk management plan requirements which require that you do hazard assessment, that you do an offsite consequence analysis of a worst-case scenario. There is a very comprehensive regulatory system that supports 112(r)(7), but it's important to note that the general duty clause remains in the background for air releases. We provide there on slide 9 a link to the threshold quantities and the regulated substances that would trigger 112(r)(7) risk management planning.

And, by the way, the risk management plan regs have been recently updated and if you look in the info pack on footnote number 11 on page 7, you'll see a link to the website that will give you the updates.

Now, moving on to other statutory contingency planning requirements. There are planning requirements under the Resource Conservation and Recovery Act, RCRA, including the appointment of an emergency coordinator, a single employee that would be called in the case of a release, requirements under the Clean Water Act, the SPCC, and facility response plan requirements. And there are also requirements under the Occupational Safety and Health Act to prevent exposure to workers if there's a catastrophic release. For example, the process safety management plans, the HAZWOPER Rule that deals with training for first responders and the emergency action plan that has to do with notification of employees in an emergency.

Now, I'd like to turn it over to Ken for the DOT and DHS requirements.

Kenneth Rubin - Morgan Lewis - Partner

DHS, that's the Department of Homeland Security, a new player in this game that wasn't around a few years ago. Many of you are familiar with the requirements under the U.S. Coast Guard for a facility response plan, which is their end of the requirements under the Oil Pollution Act, to deal with potential spills of oil into the nation's major waterways. That requirement is now handled under the Department of Homeland Security, still by the U.S. Coast Guard.

And the Department of Transportation, their Research and Special Program Administration has comprehensive regulations for dealing with the transportation of hazardous materials in pipelines, such as oil, ammonia. And they also have comprehensive regulations for how to transport hazardous materials in any type of vehicle, airplane, train, car, truck.

Now training. We cannot overemphasize the importance of training all your personnel and how to inspect and maintain equipment to avoid the possibility of spills and releases. They need to identify the release detection equipment, make sure it's

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properly maintained, properly calibrated. They also need to be trained in how to report a spill, how to deal with the chain of command internally within the company and how to report directly to regulatory authorities. We'll talk about this in more detail in a few minutes.

And they also need to deal with the government and have regular training with government and contractor participation. In the event there's a spill, the first time a contractor's (inaudible) will be responsible for the cleanup. It's not just after the spill happens but it's been there beforehand, it's work with your personnel so they know how to work together. We also likewise want you to develop a management structure that can work both internally and with contractors and with the government in the event of a spill. A finely tuned machine is what you need to have in place. You don't want to start to create it the first time just after a spill.

Documentation. As lawyers, you recognize the importance of documents. You want to have documentation that shows that you were properly prepared for a spill so no one can say that you were negligent in terms of your planning. You also need to be aware of the fact that emails can pop up after a spill that can raise questions about whether or not you were properly prepared for all eventualities. If an employee sends an email to somebody else saying, "Boy, we need to take a look at that tank", the government investigator may say after the fact, "Well, did you ever follow up on that email? Did they ever inspect that tank? What did they find?" All those kinds of things will come up. This also includes videotapes. The government will use satellites to look for the scope of damage and to look for planning beforehand.

One thing we like to see people do is double-check all the manuals required under the Oil Pollution Act or other federal laws, make sure those manuals are complete, they contain all the materials that the table of contents say they contain, that the manuals have been distributed to all the key personnel responsible for implementing those manuals, the manuals are properly revised and updated when required to by changes in the operating procedures, by changes in the law or regulations, by changes in the personnel. And you also might want to consider taking the manuals, in addition to paper copies, and putting them on your Internet so that people can read them, wherever they may be, they don't have a paper copy on hand.

Wade Wilson - *Morgan Lewis - Associate*

Now, moving on to slide 15 of the webcast, documentation is very important. Memorialize all of your training; memorialize all of your maintenance activities. Any kind of inspections that you perform, any kind of drills that you perform, it's good to keep those in a safe place and document everything.

Now, let's turn onto the subject of contractors on slide 16. This is another thing that's important to do before a spill. Either you have employees or you may have contractors that you regularly work with on your facilities or you may want to line up a kind of contingency contractor in case of a spill. And you want to put in place some sort of sample, some sort of standby emergency response agreement. We've included one of those in the info pack in section 7, Form A, just as an example of one such standby agreement where you have an outside contractor that has the properly OSHA trained employees, it has the proper specialized equipment, who can mobilize very quickly and help the first responder.

As we'll address in a few moments, if you don't have the forces to be first responders for your emergency releases, the government will provide those first responders. Of course, everyone works together, but it's important to think ahead to what resources you may need if a spill occurs.

Turning to slide 17, you also want to develop a media relation strategy. I'm sure most of you have this in place already for routine press releases, but this goes into the various groups that we mention in the info pack. This is part of the crisis management team efforts to deal with the media after a release occurs because you certainly will have the media at the gate almost immediately and you want to have a spokesperson. And that's spokesperson will likely not be the CEO, although the CEO will be expected to make certain statements, but you want to dedicate a person that's able to provide that interaction with the media and also

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to be able to interact with politicians. The government will also provide media relations and will sometimes hold town hall meetings after release to try to educate citizens as to the potential hazards in the area.

Turning to slide 18, you want to develop a community relation's strategy. And one of the best ways to do this is to participate in your Local Emergency Planning Committee, or LEPC, that was set up under the (inaudible) statute. If you work with the LEPC you will know the way that your neighbors to a facility will be contacted in the case of a release, you'll know the process of providing an all-clear, you'll get to know the first responders, the fire, the police and others that will come to your assistance and the public's assistance in the case of a release. And after a spill, working with the LEPC to help develop better processes for warning neighbors as to potential hazards.

Now, let's turn to sheet 19. And you want to develop a legal response strategy. And I know we have in-house counsel on the call. You want to identify the lawyers in your legal department that are going to be the immediate responders to such an incident, those that will perform internal investigations, those that will get involved if you have government enforcement, and also those that can help if you have private litigation.

And this is a point in time when you may want to consider the use of outside counsel and outside specialists that know about the substantive environmental laws because the -- after a major release you can have myriad agency investigations, civil actions and also potential for criminal investigations and actions.

Ken, turning to slide 20, what about site security issues?

Kenneth Rubin - *Morgan Lewis - Partner*

Well, those are important issues, but what I just want to add one point on slide 19, and that would be for the lawyers who are getting ready for a spill response. Check with your internal team of auditors to make sure that they have a checklist to make sure that they're ready for a spill. EPA has on its website, they actually have an oil spill response page, a checklist of things to look for to make sure that you have everything that you need in place and make sure your auditing team is looking for that.

Now, since September 11th, security concerns are an important thing. Federal law now requires public water systems in particular to conduct vulnerability assessments to see where a terrorist could come in and cause harm to their system either by the release of the gas, such as chlorine, by adding a toxic agent to the water system, by upsetting their computer system, by interfering with their power sources by which they provide water, and also likewise by interfering with wastewater discharges. The same concerns that affect the public water systems that they conduct vulnerability assessments for are the same types of concerns that should apply to any major manufacturing operation.

You might take a look at EPA's website and the Department of Homeland Security to see just how they conduct these vulnerability assessments. Hopefully, you will not find the vulnerability assessments themselves on the web because they're supposed to be exempt from disclosure so that potential terrorists do not have that information available to see where the weak links are. Congress is considering similar legislation to apply to all manufacturing industries, particularly the chemical industry, but so far nothing like that has passed. But EPA has a lot of information on its website dealing with counter-terrorism.

Now, the next page, immediate response to an event; you have a spill, what do you do? You just heard a spill happened. Well, the first thing that you do is you set in place a parallel process of calling key people. The first people to call are the federal regulatory agencies because one of the things that the Justice Department has on its checklist of legal response to a spill is was it reported properly, was it reported accurately. And the government thinks that if a spill is not reported within 15 minutes, it was not reported properly and some courts have agreed with that.

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Then what do you say in the report? You say we've had a spill. And you tell them the location of the spill, the source of the spill, the time of the spill, type of material that was spilled, the quantity of the spill, and the impacts of the spill, both to human health and the environment, was anybody injured and they will ask you what have you done to respond to this spill.

And who do you provide these reports to? Well, the first people you report to, and it's listed on page 24 of the slides here, is the National Response Center. They have an 800 number. It's staffed by the Coast Guard, they have an office here in D.C. in northern Virginia, and they have a set of a dozen questions. They'll ask you those questions I just mentioned to identify where the spill is.

Depending upon your response, they will notify EPA, local government officials to come in and help you with a response or take charge of the response. You should also notify the State Emergency Response Commission and depending upon whether it's oil or hazardous material, the Local Emergency Planning Committee, the local fire department if that's not the LEPC itself, and although it may not be required by law, it makes good sense to contact other local agencies. Time to identify who those agencies are before a spill, not when a spill happens.

At some point you want to notify your insurance carriers. They don't need to be notified within the first 15 minutes, but you want to notify them relatively early on. Possibly certain lenders. And at some point, the quarterly reports to the Securities and Exchange Commission if the spill liabilities are considered to be material.

Now, what triggers a report? It has to be a reportable quantity. The focus of this phone call is on major events and you can just automatically assume any major event is reportable. But by law for oil, reportable quantity is that which is sufficient to cause a sheen upon the surface of the water. (inaudible) courts have determined that a single drop of oil is sufficient to cause a sheen so, therefore, any oil discharge is reportable.

For most chemical spills, EPA has defined a reportable quantity in the (inaudible) regulations is an amount that is measured over a 24 hour period. EPA has published a list of lists and we have a link to that in this document where you can see all the various chemicals and what the reportable quantity is and you can determine whether or not that's been exceeded over that 24-hour period.

Some states and localities add their own reporting requirements. Now, you also need to keep in mind that when you first have a spill, you may not know the quantity and quantity is a key question that all these regulatory authorities will ask you. It's best to say that you don't know what the quantity is and give them a range, say, "It may be as small as 1,000 gallons, it could be as much as 1 million gallons, I don't know at this point."

Why is a range important? Because if you report only what you see at the outset and it turns out there's a hidden leak and it's a much bigger spill, the government will say after the fact, months or years later, that you underreported a spill and because of that, we didn't send in the right personnel or right people. Therefore, give them a range and if the number turns out to be higher than you initially reported, call them back up and give them an updated report.

Wade Wilson - Morgan Lewis - Associate

Now, we tried to include in the info pack a sample call-in sheet that includes not only who to report to and the telephone numbers so that you'll have that ahead of time and your operators will have that ahead of time, but also the reportable quantities. And we also suggest that you work with your onsite engineers and convert the pounds to volumes because oftentimes it's difficult to estimate pounds of liquids and gases, but volumes are a little bit easier to get a handle on for the people in the field. So consider writing up a call-in sheet like we have on Form B on page 78 of the info pack.

Now, while you're reporting, many things are going on, many parallel paths should be followed right after release. You want to implement your risk management plan or your contingency plan right away and that means alerting your Incident Response

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Team, those first responders that have been trained to go out and respond immediately to a release. You also want to alert any downstream users, particularly drinking water utilities that may have intakes from rivers where a release may have reached the river and could impact drinking water supplies.

You also want to alert your medical authorities and that can take the form of calling 911 or when you call to the local fire department. You also want to notify your Crisis Management Team. The Crisis Management Team serves behind the lines, so to speak. They coordinate efforts and act as a liaison between the first responders of your Incident Response Team and the public and the agency officials so that you don't have to have your first responders dealing directly with outsiders and having to worry about support services. Now, you also want to involve your legal team right away and you want to maintain communication with your insurance coverage -- your insurance carriers.

On slide 27, what else? You want to make sure that your Business Recovery Team understands what's going on. Business Recovery Team makes sure that the operations of the company continue even though a release, for example, may have impacted a certain area of the plant and figure out how to use other resources to continue the ongoing business activities. You want to follow your plan and you want to ensure that everyone comes together and works in the roles that are predetermined.

Now, how do all the teams go together? On slide 28 we put down the various Emergency Response Coordinator, the qualified individual that's going to be the first responder. You have your structure. This structure and the structure we've laid out in the info pack must be customized to the size of the company and also the complexity of the facilities. In smaller operations, it's understandable that some individuals will wear multiple hats and act on different ones of these teams. But we've laid it out for a large operation, a large facility, a complex response. You want to have the immediate responders, Crisis Management Team and the Business Team, backing them up.

Bill Messner - ACC Environmental Law Committee - Chair

Excuse me, gentlemen. Can you speak just a little louder during the presentation? Thank you.

Wade Wilson - Morgan Lewis - Associate

Okay. Now we get to the actual cleanup, which is on slide 29, and that -- if you have a large release you will know that this will be referred to as a Response Action Plan, or the RAP. This is where your first responders start the cleanup. It has agency officials get involved. You will find that this very quickly turns into a long term cleanup, especially if there's any sort of natural resource damages or there was any spill to soil where the chemical was able to percolate down to groundwater, contaminating soil. The RAP can take years to complete, but there are going to be different stages and it's going to be a very iterative process with the government officials.

And one thing to remember with any response, if you don't have employees or contractors that are properly trained under the HAZWOPER Rules, OSHA's HAZWOPER Rules, they will not be able to engage in the actual cleanup and you'll have to rely on other contractors that can. So it's important to know that a Response Action Plan cannot be performed by just anybody.

Now, let's turn to the role of counsel right after a release.

Kenneth Rubin - Morgan Lewis - Partner

Wait, wait, let me just add one thing about that HAZWOPER training. We've been involved in situations with companies that have thousands of employees available who could respond to a spill event, but those thousand employees didn't have HAZWOPER training to go and deal with an oil cleanup, for example. Had they been given that additional 24 hours or 40 hour training, they could have been first responders that could have bridged a gap until a major contractor arrived on-scene. So if you have an

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operation with lots of employees who could be available to be first responders until a more sophisticated contractor arrives that specialize in that type of thing, you might consider giving them that training so they could be available to respond quickly.

Wade Wilson - *Morgan Lewis - Associate*

Now, on slide 30 we have the role of counsel right after release. Counsel wants to make sure that there's immediate telephone reporting of the release and there's proper written follow-up with additional details to the various agencies. Counsel wants to make sure that they're aware of all the environmental laws that may be implicated by a certain release because it may not be all of them, but it may be a combination of several. Counsel should have input into press releases any sort of disclosure to the agencies or politicians. And again, counsel may determine that hiring specialized outside counsel may be appropriate and also to consider hiring outside consulting engineers and other experts to assist with the Response Action Plan.

One of the most important things is to ensure that there's the maintenance of an accurate chronology of all the events that led up to and the events subsequent to a release because these facts will be used over and over again in agency investigations and possibly civil litigation. Finally, counsel should interact with insurance carriers and other claimants.

Now let's turn to Part 3 of our presentation and that is definitely a stage where counsel gets involved probably to the highest degree other than planning and that is the internal investigation and the government investigations that follow a release.

Now, on slide 32 we have the fact that almost immediately government investigators will show up at the gate and try to seek out the critical facts as to what caused the release. And the company needs to be one step ahead in gathering facts or at least right there with the agencies as they gather facts. And the important balance that you want to hold is to get to the bottom of what was the cause of the release but also -- and to let those facts come out, but also to protect that acquired information from undesired disclosure. So priority one is learning what was the root cause of the release so that that can -- such releases can be prevented in the future. But that has to be -- that effort has to run parallel with maintaining privilege and business confidentiality.

Also, it's important to limit any sort of flow of information that may lead to the wrong facts getting disclosed. On slide 33, you want to prepare for immediate government access to witnesses because government will want documents, they'll want to inspect the area and they'll want to speak with eyewitnesses. Employees can be educated on their rights and the process of government investigations and it may be an option -- it definitely is an option and it may occur that you will retain individual counsel for some employees if needed.

Also, to perform an adequate investigation, you will want to have the best experts available. The government will bring in theirs, and we'll talk about some of the agencies that may come onsite to perform investigations, but the company may want to perform its own. For all of this, it's important to preserve documents and to preserve the site so that the facts will percolate out.

Now, on slide 34, here's the overview of the government investigation. We're going to talk about the agencies that are involved in the response, the types of investigations and claims that they can bring, how you respond to the requests and what is the overall role of counsel. So, Ken, which agencies should counsel expect to see at the gate right after a major release or spill?

Kenneth Rubin - *Morgan Lewis - Partner*

You know, Wade, I've had CEOs ask me that question; who's going to be involved here? And so as lawyers for a company, you need to prepare for that senior management ask you, who's going to be involved. And so on page 34 we have a list of these organizations and they're self explanatory; EPA, National Transportation Safety Board, the Office of Pipeline Safety and the Department of Transportation, basically involving spills of oil through major pipelines, the Coast Guard, the Occupational Safety and Health Administration, and something called the Chemical Safety Board.

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And of course the Chemical Safety Board isn't involved in the regulatory process. Many lawyers I've worked with say, "Who are they? Where did they come from?" It's an independent federal agency created under the Clean Air Act Amendments of 1990 that really didn't begin to get started until about 1998. And it gets involved in major explosions and fires involving tanks holding hazardous materials, most typically chemical plants. They do not issue enforcement actions, they don't issue citations, they don't impose fines.

What they do is they make findings and recommendations that could be important to other regulatory agencies and also be important considerations in private party litigation as to who's at fault, what caused an accident. They can be the first people to take down testimony of key witnesses and it operates very much like the National Transportation Safety Board, but it's a totally separate independent organization.

Other government agencies involved to respond, of course, would be the local agencies, the fire department, the police department, emergency department, the health department. The National Response Team coming out of EPA, both on a nationwide basis and a local basis. NOAA if you're involved in a major waterway, the National Oceanic Atmospheric Administration will be there. Possibly the Fish and Wildlife Service, who could be the trustee for natural resource damages if there has been harm to natural resources. They'll come on-scene very quickly in the case of a major oil spill to assess the harm to natural resource damages.

The FBI and the Department of Justice can come on-scene. If they're there you want to have people -- lawyers involved that know how to handle a criminal investigation. EPA also has a squad that's similar to and sometimes cooperates with the FBI. Likewise, there might be enforcement agencies from the state and local governments involved. And then all of these federal agencies and state agencies sometimes use authorized contractors. EPA operates through its headquarters and operates through its regions and there are a wide variety of offices within EPA that can respond, depending upon whether it's a chemical spill, an oil spill, the magnitude of it, where it takes place. And likewise, the FBI can come on-scene and work with EPA's Environmental Crime section.

But the decision whether or not to seek a criminal prosecution, that rests solely within the Department of Justice. They may ask EPA for its opinion. EPA may seek to recommend what they call a referral to the Department of Justice for criminal investigation, but the Department of Justice makes the final decision. And sometimes after a spill event, the lawyers for a company might seek to have a meeting with the Department of Justice, either at headquarters or the local U.S. attorney, and talk about the event and explain why this is not a situation in which a criminal action should be initiated.

Turning to page 39, the National Transportation Safety Board, again, this is an independent federal agency. It is not part of the Department of Transportation. It investigates every civil aviation accident but only investigates the more significant accidents involving railroads, highway transportation, marine transportation and pipelines, typically those that involve enormous harm to the environment or a severe injury to human health.

The Office of Pipeline Safety, that's a part of the Department of Transportation. It has comprehensive regulations dealing with the transportation of hazardous materials and investigates and can bring enforcement actions involving a spill of oil from a pipeline. It holds a hearing, typically before a Hearing Officer who's basically a staff attorney, and there's a trial and formal rules of evidence that results in a recommended penalty. And people can challenge that penalty to further briefing and the issuance of a final penalty.

Dealing with officials. There are a large number of federal, state and local officials that can be involved with a spill. They may all come on-scene right after the spill. Some of them will come with TV cameras, press, thinking to get a few minutes on TV at night and you need to coordinate your legal department with your public affairs department to make sure that you're properly equipped to handle those visits.

And you also need to have a team of managers that coordinates with the government's team in responding to a spill. Have your own on-scene coordinator incident command structure to work with the government's structure.

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Wade Wilson - *Morgan Lewis - Associate*

Now, turning to slide 42, what are the specific requests that these federal agencies may give to you at the facility? First of all, they may come with search warrants and you want to look carefully at the search warrant as to the scope of what the search warrant entails, out of what court was it issued and which judge issued it. They could also request under the federal statutory provisions employee interviews and interrogatory type requests and also document requests. One of the more frequently used federal statutes is (inaudible) 104(e) (ph) request for -- request for information and documents.

They can be very expansive. These can be very burdensome so that while the response to the release itself may be a very daunting task, counsel has to realize that almost immediately it's going to be even a more daunting task of responding to all the information and document requests. That's the importance of separating the immediate responders from those that deal with the federal agencies.

Let's roll over slide 42, the role of counsel in the investigation. What you want to ensure the unhindered discovery of facts through documents and witness interviews, but that has to occur under protecting business confidentiality and protecting privilege. Counsel wants to coordinate all of the document flow to third parties, to the government and to third parties. If you have multiple agencies asking different questions, consider using a unique (inaudible) label identifier so that you can know what documents and which witnesses were interviewed by the respective agencies so down the line you will know exactly what information was given to them.

You want to serve as a liaison and you want to assist in witness interviews and you also want to work around developing the root cause analysis. And again, as I mentioned before, you may want to consider getting independent counsel for certain employees. And the point here is to try to discourage a "let's get to the bottom of this" or a "witch hunt" and to encourage finding out what was the root cause of the release and to get the facts out to the light of day. Understand, however, that disclosure to agencies of anything may constitute a waiver of privilege for any subsequent civil action.

Now to our final section, the enforcement of federal laws, Part 4. We're going to do a quick -- necessarily have to do a quick overview of federal environmental laws. I just want to say in the info pack we have an extensive analysis of federal environmental laws that would be implicated in any sort of release.

What are the potential claims that you could face after a release? Well, there are administrative sections of federal environmental laws, administrative enforcement by the EPA, for example. There's also civil enforcement provisions and there are criminal enforcement provisions of the environmental laws. And also understand behind all this are state laws that could be implicated as well. There are issues for individuals, employees and officers that have managerial authority. There's also the possibility of some sort of injunctive penalty such as the shutdown of a pipeline or a shutdown of a facility.

Then there are the follow-on -- the possibility of a follow-on civil litigation by private parties and class actions. Also I want to mention that there can be serious collateral consequences to a release, including suspension and debarment from government contracts, insurance premium increases, permit revocation for your environmental permits, and the SEC disclosures that Ken mentioned earlier.

Ken, what should counsel expect under one specific statute, the Oil Pollution Act?

Kenneth Rubin - *Morgan Lewis - Partner*

Well, it's an interesting statute added in 1990 after the Exxon Valdez oil spill. And it's unlike most federal environmental laws because it creates a private right of action for damages, for property damages and for lost profits. And you won't find that in other federal environmental statutes. It also provides fines based upon the amount of oil spilled per barrel and those fines go up if the government can prove gross negligence or willful misconduct.

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And like Superfund, it provides for collection of natural resource damages. And the provisions dealing with natural resource damages bar double recovery. This is a very important concept. If you have a (inaudible) spill and people downstream or neighbors have filed lawsuits or class actions for damages to them, maybe damages to their pier, damages to their boat, damages to their front lawn, you want to pay that just once. And so if you've already paid the government for harm to natural resource damages, you tell the public groups, "Get your money from the Department of the Interior." Likewise, if you've already paid the neighbors, you tell the Department of the Interior and their assessment of natural resource damages, "We've already paid for that. You cannot collect it as well." And they should agree.

Wade Wilson - *Morgan Lewis - Associate*

Now, there's a dizzying array of other statutes and on slide 48 we have the various environmental acts and again, if you look at Appendix B of the info pack at page 52, it goes through the various penalties that can come under these acts, the Clean Water Act, Clean Air Act, RCRA, CERCLA, EPCRA, Hazardous Material Transportation, Hazardous Liquids, Pipeline Safety Act and OSHA. But then on slide 49 there are even others that may be implicated, the Endangered Species Act and even TSCA. So it's important for counsel to know all the ones that can come into play.

I think Ken touched upon the private party damages of OPA, so let's move on to the role of counsel with regard to federal enforcement, which is slide 51. It's just important for you to familiarize yourself with the direct and collateral consequences of environmental releases. If it looks like the release is significant enough that you're drawing the attention of federal agencies, you want to make sure you prepare for an adequate investigation which will include retention of documents, production of documents, retention and production of emails, interviews with employees, consider hiring outside counsel if needed, and you just want to make sure that the proper resources are allocated to this effort because it can be daunting with federal agencies.

Of course you're going to keep management apprised of the enforcement action that may come about. You want to do this so that if the possibility of settlement arises that you have the proper authorizations. And also consider any mitigating circumstances and defenses that you have under the environmental laws because each one is different. And there are ways to get your penalties down and in some instances to use a supplemental environmental project to lower a penalty.

Finally, we've included in the back of the webcast a number of links and resources. These are also included in the info pack. But you can click on these; you'll see various links to EPA's website that we've mentioned. For example, 112(r) issues, the National Response Center is there, helpful information about that reporting right away when there's a release. The One Plan, the Integrated Contingency Plan guidance, the link is there. And on slide 53, the U.S. Coast Guard's Instant Command System is a very helpful resource for creating your own ICS for a facility.

I also want to note finally that the info pack contains an appendix of forms and sample letters. We've mentioned just a few, such as the standby of contractor agreement and the call-in sheet, but check the back of the info pack for other standardized forms.

So that concludes our presentation and I will turn it over to Bill.

QUESTIONS AND ANSWERS

Bill Messner - *ACC Environmental Law Committee - Chair*

Thank you very much. Again, if you have questions, please email them to me at william.messner@sce.com.

I have one question here which goes more to the practical end where we talked about dealing with the public. What is your advice when responding to public inquiry? What works well and what doesn't in light of still trying to protect the company and trying to gather facts at the same time?

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Kenneth Rubin - Morgan Lewis - Partner

I'm a big fan of providing as much information as possible to the public, that a spill has happened, we're not going to worry about fault right now, we're going to go out there and clean up the spill. And that reassures the public. It doesn't work for every situation, but that's my general approach towards it.

Bill Messner - ACC Environmental Law Committee - Chair

And have you seen that come back and hurt anyone when it comes to -- ?

Kenneth Rubin - Morgan Lewis - Partner

I have found it...

Bill Messner - ACC Environmental Law Committee - Chair

(inaudible - off-mic)

Kenneth Rubin - Morgan Lewis - Partner

I have found it only to be beneficial. I have found that the companies that are very risk averse in terms of litigation and really focused on the litigation downside of things and plan their response to the public that way at every stage, actually are hurt by it. They're too cautious, they don't get out in front of the problem quickly enough, too worried about the disclosure and that's not a good way to respond. You have to reach the right balance.

And this can be done beforehand by desktop drills. You have a desktop drill, and you might want to do this without the government being present, and you have managers there and lawyers there and public relations people and you say it was this type of spill of ammonia from a tank and it's going across the fence line and it's affected the community three-quarters of a mile away. What do we do? That's the time to address how you deal with the public and what you tell them so that when the spill happens you're not scrambling around saying, "Well, what should we disclose, what shouldn't we disclose?"

Bill Messner - ACC Environmental Law Committee - Chair

Okay. And here is another question regarding mutual aid agreement. Does the info pack actually have sample mutual aid agreements or is it strictly contractor related? And if it doesn't have mutual aid agreements, where would you find the sample language for those?

Wade Wilson - Morgan Lewis - Associate

Well, the info pack does not have a mutual aid agreement. Right off the top of my head, I don't know where a sample one would be located. Many areas, many highly industrialized areas have multiple facilities adjacent to one another and I do know several clients that work closely with other facilities in the case of an emergency and also work closely with them on the LEPC activities. But right here on the webcast I cannot suggest a place to get a sample of a mutual aid agreement.

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Bill Messner - ACC Environmental Law Committee - Chair

And in general, speaking of what is your opinion of mutual aid agreement?

Wade Wilson - Morgan Lewis - Associate

That's a good question. The responses to large releases involves very specialized equipment and very specialized forces. And I would say that it's complex to have one company assisting another with forces or specialized equipment. So I would say to be very careful between companies because the liability even in the response can be very large just because of the incidence of injury during emergency responses.

Kenneth Rubin - Morgan Lewis - Partner

But it makes a lot of sense as well. If you have industrialized harbor with lots of companies that are adjacent to each other, they need to work together and a mutual aid response can also have a provision for how they coordinate in case of a spill. So it is an essential feature. From a lawyer standpoint, you do want to consider liability but it's something that's not an option in many places, it's something that actually you just have to do it. But we don't have it in our template. I think that some federal agencies do have a template for mutual agreements. I think you'll find it also in some regional areas. Some port authorities will have provisions for mutual aid agreements, people in the port, some riverways.

Bill Messner - ACC Environmental Law Committee - Chair

Maybe what we can also do is add this to include it on the website, the ACCO website of some sample agreements that we could do after the call.

Here's another question. Generally, either the EPA or the Coast Guard plays the role of the lead agency at the Incident Command Center. If the environmental spill is suspected to be the result of a terrorist act, would the Office of Homeland Security become the lead agency at that Incident Command Center?

Kenneth Rubin - Morgan Lewis - Partner

I don't know. They are in the process right now of trying to coordinate things among themselves and right now they're supposed to be working with the Department of Homeland Security. The Department of Homeland Security is supposed to be given the lead on a terrorist event, but I don't think that DHS has the depth and experience of resources yet in every particular area that it can do it itself. So if it involves a waterway, it of course is going to go to the Coast Guard and the Coast Guard is now a part of the DHS. So to the extent that it's the Coast Guard, things really haven't changed except that the Coast Guard is now within DHS instead of within the Department of Transportation.

EPA, however, is not within DHS and there are a handful of statutes now assigning responsibilities between DHS and EPA. High level personnel from both agencies are meeting each other almost daily to try to assign responsibilities to one or the other and I've seen this shift back and forth in some areas. So I don't know.

It would make sense if you have a facility that could possibly be the target of a terrorist, that could cause harm if hit by a terrorist, that you'd want to coordinate with EPA and DHS now to find out who's in charge. And don't be surprised if each one says, "I am", or each one points to the other.

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Bill Messner - ACC Environmental Law Committee - Chair

One last question and then I think we're right -- finishing right on time. This one has to do with SBCC plans. In your experience with dealing with SBCC plans of a resulting spill, what has the agency -- to what extent have they reviewed that plan and have there been any fines associated with the SBCC plan?

Kenneth Rubin - Morgan Lewis - Partner

If there's a spill, one of the first things they're going to ask for is your facility response plan and your SBCC plan. And oftentimes they will find a problem with the SBCC plan or the facility response plan, the two coordinate, and they will seek to impose a fine for it. It's been my experience that that's to be expected almost 100% of the time.

Bill Messner - ACC Environmental Law Committee - Chair

And is that becoming more so with the result of the amendments or has that been consistent?

Kenneth Rubin - Morgan Lewis - Partner

That's been fairly consistent.

Bill Messner - ACC Environmental Law Committee - Chair

Okay. With that, that is our last question for this afternoon. If there are any other questions, please feel free to email them to me and I will definitely forward them on to Wade and Ken. And again, my email address is william.messner@sce.com. And, gentlemen, thank you very much for the presentation today. It was very excellent.

Wade Wilson - Morgan Lewis - Associate

You're welcome, Bill.

Kenneth Rubin - Morgan Lewis - Partner

Thank you.

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