

Top 10 Do's & Don'ts Of Environmental Crisis Response

Law360, New York (June 08, 2010) -- Major, adverse environmental events can be catastrophic to a company's reputation and viability. While most companies are in compliance with regulatory requirements regarding spill and release response and reporting obligations, many companies have not given sufficient attention to the practical implementation of these plans.

Juries frequently pivot in reaction to these practical considerations. Without question, the best advice is to plan ahead and be prepared. Developing the habit of working cooperatively and openly with the surrounding community will help immensely in the event a difficult situation arises later.

The discussion points that follow are primarily useful in the very early stages, when a critical problem first arises. First, we offer our "Top 10 Do List." Each of these steps are designed to preserve trust within the affected community while ultimately mitigating your potential risk.

1) Comply with all notification and other legal requirements.

Compliance with all notification and legal requirements is critical to maintaining control over an environmental crisis. Even an inadvertent stumble with legal requirements after the event can push a jury to consider willful or gross neglect. In the same vein, it is very important to keep the agency involved in all decisions and field efforts. Undertaking any field measures without agency oversight may violate legal requirements, and certainly forfeits an opportunity to validate efforts



Paul M. Bohannon
Andrews Kurth LLP



Johanna S. Coulter
Andrews Kurth LLP

to a jury. Be sure to consider all emergency response plans, including those filed with local agencies.

2) Establish an open line of communication with clearly defined contact persons.

Communication is essential in a crisis. You should have your communication plan in place long before anything happens. Identify necessary decision-makers, communicators and contact methodologies. Insist that other employees or contractors comply with the communication plan and make sure the plan is updated regularly. In dealing with local citizens, it is better to assign the initial communication task to a responsible plant-level person — someone known in the community. Save your corporate officers for critical moments.

3) Provide immediate environmental response measures, without regard to fault or allocation.

In the early stages of an environmental crisis, protection of the health and environment should be the paramount concern. Immediate, measured responses should be implemented, taking into consideration legal and practical considerations. If sampling protocol requires high-level protection (moon suits), visit with the neighbors and explain why the workers need the protection but they do not. We once had a case in which the agency sent a team to sample an area that included a kids' playground. The moon suits showed up, in the middle of a game, and started sampling. It was a media disaster for the agency.

4) Assess the immediate impact on nearby population and provide interim, substitute services for those affected.

Anticipate and identify potential adverse impacts. Discuss these with the neighbors and agencies. You will achieve a level of credibility that will assist you when difficult decisions have to be made.

5) Provide open access to information.

Forget about data validation. Citizens want and need to know information as it develops. You can qualify the data disclosures, if necessary. Consider immediate newsletters, websites, phone hot lines and other communication methods. In our experience, citizens who feel they are informed are less likely to support others who want to litigate. The Superfund Community Involvement Toolbox offers good suggestions on communicating with the public.

6) Notify insurance carriers and review contractual documentation for potential indemnification protections.

Older indemnities frequently have more strict procedural requirements. Assign someone to review these arrangements and perform these tasks, which will continue perhaps until litigation is completed.

7) Be realistic.

The goal is to mitigate risks. Providing frank and truthful information will build trust with the affected citizens. If citizens feel misled, they will be more inclined to litigate.

8) Segregate your strategic consultants from your expert witnesses.

Even though the paramount concern in an environmental crisis response is human health and environment, protecting the company from the inevitable litigation is still a legitimate business concern. The response team should consist of field implementation consultants and a separate set of strategic consultants. Use the strategic consultants to vet response measures and even communication efforts.

9) Preserve evidence in a judicially acceptable way and place litigation holds early.

Be sure the field efforts are conducted with proper quality control protocols. You may only have one chance to evaluate the technical causational conditions. Place early litigation holds. This is not a simple task, with so many employees, consultants and contractors involved. We once had a case in which the adverse party buried documents. We found them sixty feet in the ground, in molding burlap sacks. The jury was not humored, rendering a \$50 million punitive damages verdict.

10) If immediate, emergency compensation is appropriate, offer it on an unconditional, "you can sue me later" basis.

Many clients have a hard time with this advice. Let's face it. If you want any type of release, it looks like you are trying to sneak out of town on the cheap. Make your proposal as compensation for a specific purpose (i.e., out-of-pocket living expenses). In our experience, most juries will factor those payments in your favor.

Next, we provide our "Top 10 Don't List." Our experience indicates that tripping up on this list usually impairs our client's credibility with the affected community, and perhaps, the regulatory agencies.

1) Don't put lawyers in the forefront.

This is perhaps the most frequent and worst mistake. Putting your lawyer in the forefront creates the public perception that the company has something to hide.

2) Don't deny liability.

The best thing your public spokesperson or company representative can say is that the company is cooperating with the authorities to investigate the cause, and that in the meantime, the paramount concern is for the protection of human health and environment. If the company denies liability too soon, it creates the impression of being too quick to judgment.

3) Don't blame other people.

Let the facts do the talking. Administrative agencies are not hesitant to point the finger if they have sufficient facts. Placing blame too early can jeopardize your own credibility.

4) Don't offer compensation or other benefits to anyone not actually affected.

While you are encouraged to provide interim compensation benefits, specify the criteria required to receive the benefit. Paying everyone simply invites litigation claims.

5) Don't use your corporate president too early.

The usual plaintiff ploy is to trap the corporate president into saying something that can be attacked. Due to developing investigations, early statements may need to be modified or outright changed. Save the high-level corporate representative until the facts become more clear, or until a message needs to be delivered that requires a high-level presence.

6) Don't penny-pinch.

Budgeting is a necessary step in remediation efforts. However, documenting cost comparisons — particularly where remediations are experimental or unsuccessful — can be very damaging before a jury. More troublesome is penny-pinching. Evidencing a concern over a few hundred dollars can really pale when a jury is asked, "Would you let your daughter drink this stuff?"

7) Don't let people go home at 5 o'clock.

Your neighbors are worried, and while they may be at home, they probably aren't going to bed. We had a remediation project in which an emergency recovery well had to be drilled a foot or so from a bedroom. We moved the family to a motel and posted a company representative outside the house, with a cell phone to provide periodic reports to the family, to assure nothing went wrong. In another case, a child was taken to the hospital for testing. We staged an employee at the house to be sure all the family needs were met in the interim. Do not change employees. The family members are there all the time, so your employee or response contact should be there as well. As the project matures, these demands will lessen.

8) Don't provide factual information without sufficient basis.

It is important to provide information as quickly as possible to affected citizens and the agencies. Both should receive information at or about the same time. Because these investigations will develop over time, information will sometimes be incorrect. Do your best to minimize incorrect information while expediting information flow. Remember, you can always qualify your information with something like, "While still under investigation, we believe ..."

9) Don't discount the importance of persons, critters or location.

It is a given in today's society that all people deserve equal environmental treatment. However, it is easy to disregard critters in evaluating risk or remediation techniques. Many people are offended by that approach. It is better to provide the factual assessment to the agency for its response rather than minimizing the concern for animals. Even more dangerous are comments or actions evidencing a lack of respect for the affected land. People identify with their property and feel slighted when you conclude their property does not warrant as much attention as other property. These actions can lead to environmental justice claims.

10) Don't assume the matter ends with remediation and liability litigation.

If the matter is of national or regional concern, it is possible that there would be criminal enforcement. If there are documents necessary for your ongoing business operations involved in the causal conditions, you may wish to copy them so that you have them as a reference in the event the originals are taken by the authorities. When the FBI arrives, it will take files and leave you nothing.

In summary, advance preparation for emergencies and efforts toward being a good neighbor and a solid corporate citizen are important investments in your company. Compliance with legal requirements at all points in the spectrum is critical to a successful outcome in the event that an emergency occurs. Practical considerations can equally affect the outcome of your efforts.

--By Paul M. Bohannon and Johanna S. Coulter, Andrews Kurth LLP

Paul Bohannon is a partner with Andrews Kurth in the firm's Woodlands, Texas, office. Johanna Coulter is a senior attorney with the firm in its Washington office.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

ANDREWS
ATTORNEYS **KURTH** LLP

STRAIGHT TALK IS GOOD BUSINESS.®