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5 Tips To Limit An Environmental Disaster's Legal Fallout

By **Keith Goldberg**

Law360, New York (April 03, 2013, 7:13 PM ET) -- It's an energy company's worst nightmare — an explosion, leak or other mishap that spews hazardous substances into public areas.

Just ask BP PLC, which has already paid billions of dollars in connection with the 2010 Deepwater Horizon disaster and could be on the hook for billions more, or ExxonMobil Corp., currently dealing with a pipeline rupture that leaked thousands of gallons of crude oil into a residential neighborhood in Arkansas.

Incidents like these are public, and can be very costly if a company's response isn't adequate, attorneys say.

"You're already preaching to a future jury ... your response in the first few hours or days may dictate what a future judge or jury believes and what their attitudes are going into a case stemming from the disaster," Lee Kaplan of litigation firm Smyser Kaplan & Veselka LLP told Law360.

While companies can't eliminate all their liability stemming from an environmental disaster, attorneys offered Law360 five ways companies can keep their legal costs from spiraling out of control:

Have an Updated Response Plan in Place

The company best equipped to deal with liability stemming from an environmental accident is the company that has emergency procedures in place before the accident occurs, attorneys say.

"Even before the accident, how prepared you are is what's going to determine how much liability you face," Steptoe & Johnson LLP partner Biz Scott, former general counsel for the Pipeline and Hazardous Materials Safety Administration, told Law360. "If [companies] are not prepared beforehand, it's difficult to say how they are going to limit the environmental impact of an accident."

That means having a detailed response plan that deals with all potential mishaps — pollution, spills, etc. It also means ensuring that those plans are periodically reviewed and updated, and holding incident drills so employees are able to implement the response plan when a real accident occurs.

"You've got to have a truly comprehensive, updated disaster response plan and the training for people to implement it," Kaplan said. "The big operators all have those; the

question is whether the small operators keep it updated."

Respond Quickly and Limit the Damage

The call comes in. A pipeline has ruptured and is leaking oil. What should be done first?

Attorneys say it's vital for companies to immediately deploy their response teams to the site of an accident and do whatever is necessary to mitigate its impact on the environment. The logic is simple: the less damage that's done, the less liability a company potentially faces.

"You can't undo the event, but in most instances there are steps that can be taken to mitigate the impacts, particularly those that have the potential of any risk to human health or the environment," Day Pitney LLP environmental partner Beth Barton told Law360. "Stopping the impacts or containing the impacts is paramount."

Time is a constant factor — the more a company's response drags out, the more it exposes itself to potential litigation, attorneys say.

"If you're a company that moves around large amounts of hazardous substances, you have to have response teams ready to go," Tony Hopp, who co-chairs Edwards Wildman Palmer LLP's product liability and mass torts practice group, told Law360. "One thing plaintiffs' attorneys look for is delays — that the company knew something was leaking or oozing and waiting a day, or more than a few hours, to start the response."

Notify Authorities Promptly

In many cases, immediately notifying all relevant federal, state and local authorities of an accident is a condition of a company's operating permit or license. But even if it isn't, companies should make that a priority in order to demonstrate that they're responding to a mishap appropriately, attorneys say.

"First of all, it meets an obligation that the companies presumably have determined that they have," Barton said. "More importantly, it links back in a way to that primary role or purpose of mitigating the impacts [of the disaster.]"

It's especially important to keep local authorities in the loop throughout a disaster and the resulting response, even regarding developments that don't necessarily concern them, according to Kaplan. Unhappy local officials get the attention of higher authorities and potential litigants, he said.

"You better find out how to get the local authorities working with you and not against you," Kaplan said. "They are major influence-makers. It's useful to have done that before the disaster occurs, but better late than never."

Be Transparent with the Affected Community

Few things can cost companies more in court than the revelation that they hid information about the seriousness of an accident from the public, according to Hopp.

"Transparency is critical is to minimize the value of claims," Hopp said. "It's tricky, because it's all happening in real time, but you would almost rather make the mistake in a public way than in a way which you attempt to hide the mistake."

Tom Campbell, who leads the crisis management team at Pillsbury Winthrop Shaw & Pittman LLP, calls the aftermath of an environmental mishap a "race to the truth."

"As soon as you understand what the truth is, you need to tell the truth you can tell as quickly as possible," Campbell told Law360. "You want to get out front, but you want to be absolutely certain what you communicate is true. If you have superior information, you can successfully manage environmental liability."

Which is why it's vital for companies to maintain a constant, open link with the community affected by an accident, attorneys say, whether it's setting up an information hotline or sending employees out to homes to provide warnings.

"All those kinds of PR things aren't directly related to the response, but it's persuading people that you're sorry it happened and that you're going to do something about it," Kaplan said. "You're going to cut back on the number of claims and increase the likelihood for people to accept a nominal amount of money for their liability claims."

Identify and Evaluate Potential Claims

Litigation is inevitable after an environmental accident. That's why it's important for companies to have a team on the ground that can fairly evaluate any potential claims, according to Andy Levine, who chairs Stradley Ronon Stevens & Young LLP's environmental practice.

"Have you genuinely caused economic damage, such as significant business interruption, or is it more residential in nature? Is there damage to environmentally sensitive areas?" Levine told Law360. "You need to do a very quick assessment of the claims that are going to be flowing your way."

If companies have a good handle on what potential claims they face, they can take steps to address it, such as setting up a claim fund or helping prop up a local economy that's been damaged by the accident, he said.

"If you've taken responsibility for economic issues, you can blunt the amount of damages," Levine said.

But while it's important to identify potential claims as quickly as possible, attorneys caution against trying to resolve them just as quickly.

"When you're entering into a community and people get the impression that all you're trying to do is limit your legal liability, you won't limit your legal liability," Scott said. "I wouldn't recommend going out there in the first 48 hours and collecting waivers; that could be received very poorly."

--Editing by John Quinn and Richard McVay.