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CRISIS MANAGEMENT AND EMERGENCY RESPONSE: WHAT WOULD YOU DO IF DISASTER STRIKES?

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The telephone rings at 3:20 a.m. and an exasperated voice on the other end says, "There's been a mine explosion at Mine No. 5 and we have not heard from three units of men!" Twenty-three minutes later, the phone rings again and another panicked voice says, "There's something wrong at the slurry impoundment, the pool level has just dropped five feet and we're trying to figure out what's wrong!" Thirty minutes later, the mobile phone rings and an excited security guard says, "We have reports of thick black water running down both the right fork and left fork of Straight Creek and both seem to be rising in the banks!" As if this isn't enough excitement, the mobile phone rings again and a stressed company official says, "I just heard a report that black slurry is running out of the portals of XYZ Company No. 2 Mine, which is adjacent to our No. 5 Mine!"

Is this all some kind of dream or nightmare? More importantly, however, if this could happen, what on earth do you do? Although we all like to think that "It can't happen to me," we all must admit that mine explosions do happen, slurry impoundments can rupture and creeks can flood with black water causing damage to others, including competitors. Your response must be quick, cool-headed, calculated and effective. This paper will examine the issues, concerns and ramifications of this hypothetical "disaster" and then present a systematic crisis management response. While each situation is different, there are general guidelines for forming an effective plan of action.

The first concern in any disaster is the protection of human life. The next is any assistance needed because of the magnitude of the situation. A constant consideration is "damage control." That is, keeping the situation from getting worse, more complicated or both.

1. Salvation and Protection of Human Life.

The paramount consideration in any disaster is the preservation of life. In our hypothetical scenario, it is possible that (1) miners in your mines or in the XYZ mines could be trapped or imperiled as a result of the mine explosion or as a consequence of well-meaning "rescuers" who might make some rash judgments; (2) the residents along both forks of Straight Creek could be in harm's way.

The first response should be quick and effective communication to all persons who could possibly be affected in order to (1) assess their first-hand knowledge of the extent of injuries, peril or damage; and/or (2) notify them of the impending danger. In our disaster, communication with the underground miners at both mines should be made immediately. It is imperative that mine communication equipment be kept in top working order and maintained in accordance with federal regulations governing such communications (30 CFR 75.1600-2) and applicable state regulations.

As for the public, there must be a plan in place to notify persons living near a facility. Every mining facility should have an easy, readily accessible emergency contact list which should have contact persons prioritized with all available emergency telephone numbers listed. While the topic of "notification" will be addressed in more detail below, this contact list, at a minimum, should list telephone numbers for the nearest ambulance service, the nearest medical facility, the nearest mine rescue team, the local civil defense disaster officer, the local and state police, applicable local and state regulatory emergency contacts and company officials.

The Emergency plan, should include a plan for the mobilization of

all available emergency medical technicians at the mine along and the mobilization of a pre-designated crisis management "team." The crisis management team should include: (1) the plant site communications person whose sole job is to handle communications between the surface and the underground or the surface and other mine site areas; (2) an "offsite" communications person whose sole job is to handle all incoming and outgoing communications from the plant site along with relaying messages to and from the plant site communications person; (3) a representative from the engineering department whose sole job is to coordinate all needs for mapping and engineering services that might be involved, including interface with environmental (governmental) regulators; (4) a representative from the safety department whose sole job is to coordinate communications and cooperation with all safety regulatory agencies; (5) a supply person in charge of procuring and distributing needed supplies; (6) a public relations person whose sole task is to communicate with the media and the general public; and (7) a management person designated to be in charge of all company efforts to deal with the emergency.

2. Notification to the Regulatory Authorities and the Public.

In our disaster, there has most likely been a mine explosion which has triggered a rupture and breakthrough of a coal slurry impoundment which, in turn, has inundated the mine to some extent, exited the mine causing flooding downstream and may have also broken through into an adjacent mine of a competitor. Presuming that the first step in the emergency plan is well underway, namely, the immediate rescue effort and preservation of life, prompt notifications must be given to all regulatory agencies which have jurisdiction over the various aspects of the disaster. With regard to the mine explosion, all health and safety enforcement agencies, such as the Mine Safety and Health Administration and the State Mine Safety and Health Regulatory Agency must be immediately notified. Prompt notification should be given to the local MSHA district manager.¹ Local civil defense and disaster agencies should also be promptly notified in the event that it is necessary to evacuate homes or take other measures to protect life and property.²

Since our disaster entails the release of black slurry water into the streams, federal and state environmental agencies must be contacted. Regarding the mining aspect, the nearest Federal Office of Surface Mining, Reclamation and Enforcement should be contacted³ and any state environmental regulatory agency. Additionally, the nearest office of the Federal Environmental Protection Agency must be notified. If any "navigable waters" of your particular state (and the United States) may be affected, the local office of the Coast Guard must be notified.

¹While no federal regulation, nor probably any state regulation, will specify any specific time that such notification be given, common sense and the nature of the emergency, alone, mandates that such notification be given immediately. Both state and federal agencies will most likely mobilize their own mine rescue teams to assist in the emergency efforts and they also bring specialized training, experience and knowledge in dealing with emergency situations.

²Given that many local governments may not be experienced or equipped to handle disaster response, there should be a list of a few chosen local officials who can be contacted on an emergency basis and relied upon to take any necessary action for the protection of the public.

³Notification should also be given to OSM.

3. Damage Control.

Although this situation could be the largest disaster you have ever had to deal with, you must also, unfortunately, remember — things can always get worse. In the midst of rescue efforts and emergency procedures, there always exists the possibility that such efforts themselves could cause additional problems. Regarding the mine explosion, no one wants a repeat of the 1976 Scotia disaster.⁴ In the wake of a mine explosion, the underground mine atmosphere can be drastically and dangerously changed. For example, a fireball from an explosion will usually eliminate nearly all of the oxygen in a mine atmosphere causing certain asphyxiation for any person entering without self-contained breathing apparatus. Burning debris left in the mine could indicate enough oxygen in the atmosphere to serve as an ignition source for a buildup of explosive methane gas. A violent explosion could also disrupt roof conditions giving rise to the possibility of roof falls and/or coal pillar failures. In our case, the explosion was enough to apparently fracture the strata barrier between the surface coal slurry impoundment and the underground mine causing the slurry to discharge and inundate the active mine workings.

In addition to our mine explosion, there is also the possibility of a build-up of water in certain locations of the mine which may have trapped some of the miners underground or created a dangerous situation for any rescue team approaching the area. While the miracle of the Quecreek Mine rescue was a technological success story, there always loomed the potential that the rescue efforts could have cost the lives of all the trapped miners.⁵

The rupture of the impoundment also poses the threat of emptying an untold volume of slurry into two different mines, several surface streams and countless private properties. Some method for immediate plugging of that rupture should be quickly put in motion.⁶ The remedial actions necessary to repair the ruptured impoundment are only part of the problem. The potential for downstream flooding and extensive property damage is another reason for immediate action. Plans should be implemented to (1) evacuate any persons in

⁴In 1976, an explosion occurred at Blue Diamond Coal Company's Scotia Mine in Ovenfork, Kentucky. During the rescue operations, a second explosion occurred which claimed additional lives, including those of the federal investigation team of the Mine Enforcement and Safety Administration (MESA, predecessor to MSHA).

⁵In August of 2002, a mining crew in the Quecreek Mine cut into some old abandoned mine workings causing a rapid inundation of the mine, temporarily trapping nine miners. The miners managed to locate themselves in an "air pocket" created in a high point of the mine that was surrounded by the rising water. The rescue plan eventually succeeded in drilling an escape bore hole into the air pocket area where the miners were located but there was a technical concern that a penetration into this air pocket could result in a siphon effect which would have immediately siphoned off the remaining air and drowned the miners. The collective experience and expertise of the mining regulators and professionals anticipated this problem, developed a scheme of pumping down the mine water to a point where the penetration could be performed safely and successfully.

⁶In October of 2000, the Big Branch Slurry Impoundment of Martin County Coal Corporation ruptured causing over 250,000,000 gallons of slurry to inundate an old mine and exit through two creeks along the surface. Rapid detection and astute work allowed for a combination of four bulldozers to quickly dig enough fill material to quickly plug the breakthrough area thus preventing even more inundation.

danger of flooding; (2) sandbag or build up the creek banks to prevent overtopping of streams; (4) advance dredge stream banks to contain the additional flow; and (5) establish a containment barrier to slow or stop slurry flow into larger waterways. Additionally, municipal water systems often have water intakes in larger streams and measures must be taken to insulate those water intakes from the contamination.

Our disaster has a domino effect and all consequences must be anticipated and dealt with to prevent the disaster from getting worse. This is another reason why all pertinent regulatory authorities should be contacted so as to bring their collective expertise to bear in an overall plan for "damage control."⁷

4. Liability Considerations.

Once miners have been rescued, the public protected and the immediate danger has been placed in check, it is inevitable that attentions will turn to civil and criminal liability. It is absolutely essential that you have experienced legal counsel on site, early on, to advise you in dealing with various regulatory agencies.

More often than not, serious charges arise, as a result of what happened after the immediate response rather than during the emergency. During the chaos surrounding a disaster, it is very easy for overworked, exhausted employees and management to make poorly reasoned actions, to innocently (or deliberately) taint or destroy evidence or to make inadvertent remarks that could prove costly. Keep in mind that every regulatory agency that participated in any manner most likely has the power to issue violations and impose penalties. Possible criminal charges could be brought by the U.S. Attorney under Federal law, or the state Attorney General, for state law infractions.

In our disaster, MSHA could issue citations to the company for an infraction of the underground mine safety laws as well as for infractions for failure of the slurry impoundment. The agency would also likely conduct interviews of all employees and witnesses in an effort to finalize its investigation into the cause of both the explosion and the inundation and it could also conduct a special investigation as to whether there was any deliberate or intentional conduct on the part of the company and/or its management force. While these interviews are usually voluntary, individuals should definitely be advised that they could become targets of the investigation and are entitled to have a representative attend the interview with them.⁸ Should MSHA determine there are possible criminal infractions, the case against the company and/or any number of individuals could be turned over to the U.S. Attorney's office for prosecution.

A Federal investigation will not preclude a separate state investigation and, in our mine explosion, the state agency responsible for mine safety and enforcement could also impose violations for infractions and take action against the individuals, as well. In some

states, it is the state agency which issues mine licenses to companies, certifies individuals to be mine foremen and may certify individuals as miners. The possible consequences could range from suspension of a mine license, foreman certificate or miner's certificate to the imposition of penalties and/or criminal prosecution under the respective law.

Regarding compliance with the Surface Mine and Reclamation Act of 1977 (SMCRA), there could be a state agency investigation if that state has "primacy" under the Act.⁹ The state environmental agency can also issue violations, impose penalties on companies and could turnover the case for criminal prosecution under state law, as well. Where a state does not have primacy, OSM acts in the enforcement capacity. OSM could refer the case to the U.S. Attorney for prosecution of infractions of SMCRA.

Let us not forget that the EPA has jurisdiction, as well, and could impose penalties of its own. The Agency can also refer cases to the U.S. Justice Department for environmental crimes prosecution.

When more than one person is involved in a disaster, there is always the specter of conspiracy charges under state or federal law. RICO charges could be imposed, as well, under certain circumstances.¹⁰ In sum, there is an entire array of various state and federal criminal or quasi criminal charges which could be levied for acts deemed causative of the disaster, or for acts taken in the wake of a disaster.

In addition to these types of sanctions, one must always be mindful of the real threat of civil lawsuits arising from the consequences of such a disaster. In our case, there is the potential for damages arising from the mine explosion and from the inundation. The explosion, could trigger wrongful death civil suits should any fatalities result; or civil actions for personal injuries. While most state worker's compensation statutes may provide some protection for the company regarding such civil actions, plaintiff's attorneys have increasingly attempted to go after parent companies, subsidiaries or any other corporate entities which may have been connected in some manner to the mining operation. To avoid any worker's compensation roadblocks. Damage claims from downstream residents of the slurry impoundment would be a certainty. A company could also face damage claims from any business which may have experienced business interruptions during flooding. Municipalities may claim damages to their water intake systems or damages resulting from the interruption of water supply. Depending upon whether the slurry or mine drainage contains harmful or hazardous substances, there may even be some claims for personal injuries based upon exposure to such substances.

In our disaster, we must also account for the possibility of natural resource damages. Fish kills, hazards to wildlife and/or destruction to wildlife habitats and wetlands could carry significant monetary ramifications.

Just as you need all the help you can get on the technical front to deal with and work through a disaster, it is absolutely imperative that you retain experienced legal counsel to guide you through the quagmire that is sure to develop in the aftermath of a disaster.

⁷In the case of the Martin County Coal Corporation incident, EPA put in place a tri-partite command scheme to deal with the cleanup downstream of the slurry. The team was comprised of company representatives, EPA representatives and state agency representatives, all coordinating ideas, efforts and work in the cleanup.

⁸Under the Mine Act, the representative could be anyone, but it is most effective if the person is an attorney. In most cases, a company will elect to provide separate counsel for any individual who feels there might be some conflict between the company's interest and the individuals interest in the investigation and it is proper for the company to pay attorney's fees and expenses for such representation so long as the retained attorney is given the freedom to represent the individual to the fullest extent.

⁹In accordance with SMCRA, a state may institute its own program for regulatory enforcement wherein OSM relinquishes primary jurisdiction for enforcement but retains oversight powers.

¹⁰The Racketeering Influenced Corrupt Organizations Act (RICO) was initially enacted to deal with the influence of organized crime such as the Mafia. It has since been used to impose sanctions on any group of individuals which acts together as an organized unit to propitiate crimes. Consequences of RICO charges could be imprisonment and enhanced fines or penalties.

Unfortunately, many companies have failed to survive following a disaster. Those that have survived have done so by taking swift, intelligent action early on in an effort to deal with a serious situation in the best possible manner while mitigating the damages.

5. Conclusion

Survival through a disaster actually begins with a good emergency response plan. Once calamity strikes, it is absolutely imperative to put this response plan in motion with good, cool-headed individuals at the helm. The first and foremost objective is to save lives and to not enhance the danger to others. Next, secure the assistance necessary to further respond to the emergency. The appropriate regulatory authorities must be notified and their resources tapped to help you through this situation. An essential element of a crisis response team is experienced, effective legal counsel that can guide you through the early decisions in dealing with a disaster, the minimization of personal exposure to liability and guidance through the quagmire of pitfalls that will inevitably arise. While very few people have ever had such a phone call at 3:20 a.m., a well, thought-out emergency response plan is a necessity "when the bell tolls for thee."