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Role of Community Advisory Panels in the Aftermath of Critical Incidents in the Chemical Processing Industry

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ABSTRACT

Since the advent of "Responsible Care" initiatives, Community Advisory Panels ("CAP") have played an important role in ensuring community involvement in the safe operation of chemical facilities. Little consideration has been given, however, to how CAP's should function in circumstances where process safety efforts have failed and explosions, fires, off-site releases, or other critical incidents occur.

In such circumstances, chemical processing facilities face a host of immediate and longer term concerns. These include rescue and response efforts; environmental and other notifications; assistance to governmental response agencies; damage assessments; insurance notifications; computer and other records recovery; public communications activities; site security and remediation, business continuation and recovery; and incident investigation. The role which CAP's can and should play in these activities will be effected by the makeup of the CAP; the relationship of prior CAP activity to the critical incident; the nature and severity of the incident; the governmental response to the incident; and a number of other factors.

This presentation will consider critical incident response issues and evaluate the proper role of a CAP in emergency response and other post-incident activities.

**The Proper Role of Community Advisory Panels
In The Aftermath Of Critical Incidents
In The Chemical Processing Industry ***

Abstract

Community Advisory Panels (CAPs) have proven effective as a means of communicating to the public the chemical processing industry's concern with safety and dedication to the operation of safe, as well as profitable, facilities. Critical incidents such as explosions, fires, and toxic releases, however, often greatly increase public skepticism as to the chemical processing industry's interest in, and ability to, operate safely.

Following a critical incident there are a number of impediments to the continued effective use of CAPs. It is often possible, however, to overcome those impediments through preparation, advanced training of CAP members, and other techniques. If this is done, CAPs can provide an extremely useful resource in a chemical processing facility's critical incident response and recovery efforts.

*©2001 by Michael Dore, Esq. Mr. Dore is a Director in the Litigation/Environmental Department of Lowenstein Sandler PC, 65 Livingston Avenue, Roseland, New Jersey 07068, (973) 597-2344, mdore@lowenstein.com. He is an Adjunct Professor of Law at Rutgers Law School (Newark) and the author of Law of Toxic Torts: Litigation-Defense-Insurance (West Group 2000). While Mr. Dore and his law firm have represented a number of chemical facilities in the aftermath of critical incidents such as fires, explosions and toxic releases, the opinions and conclusions expressed in this article are exclusively his own and do not represent the views of Lowenstein Sandler PC or its clients.

Introduction

Since the advent of “Responsible Care” initiatives, Community Advisory Panels (“CAP”) have played an important role in ensuring community involvement in the safe operation of chemical facilities. Little consideration has been given, however, to how CAPs can and should function in circumstances where process safety efforts have failed and explosions, fires, off-site releases, or other critical incidents occur.

In such circumstances, chemical processing facilities face a host of immediate and longer term concerns. These include rescue and response efforts; environmental and other notifications; assistance to governmental response agencies; damage assessments; insurance notifications; computer and other records recovery; public communications activities; site security and remediation, business continuation and recovery; and incident investigation. All of these concerns may effect the role which CAPs play in critical incident response.

Independent of these concerns, however, the role which CAPs can and should play in critical incident response activities will also be effected by the makeup and historical viability of the CAP; the relationship of prior CAP activity to the critical incident; the nature and severity of the incident; and the governmental response to the incident. In addition, the training which CAP members receive in the essential skills required to understand the dynamic of, and effectively respond to, any critical incident in the chemical processing industry, will also determine the role which the CAP can play in those incidents. The purpose of this paper will be to consider how facilities can and should handle these various concerns and the role which CAPs can and should play in the aftermath of critical incidents.

The Development of CAPs In The Chemical Processing Industry

Formalized CAPs are a relatively recent phenomena in the chemical process industry. In their present form they are largely an outgrowth of the industry’s Responsible Care initiatives.

Responsible Care is a program designed to implement the chemical industry's commitment to continuous health, safety and environmental performance improvement. This initiative requires American Chemistry Council member and Partner companies to develop mechanisms for outreach with the communities in which they operate.

The Community Awareness & Emergency Response Code of the Responsible Care program calls for the coordination of the chemical industry and local communities through communication and cooperative emergency planning. The Code requires companies to establish facility outreach programs and emphasizes dialogue with the community including requiring facilities to develop and annually test a community based emergency plan. Community Advisory Panels are, in large part, an outgrowth of this aspect of the Responsible Care initiative.

A Community Advisory Panel consists of individuals who represent their community and who have made a commitment to meet with the management of their local chemical plant on a regular basis. Chemical companies set up CAPs to learn about their communities' concerns, and allow citizens to learn about their local chemical companies' facilities and the safety procedures and controls they follow. Because CAPs are viewed as a benefit to everyone, chemical companies will often invest significant amount of time and money to keep CAPs running effectively. Currently, there are more than 300 CAPs in operation throughout the United States.

These CAPs are responsive in part to the extreme suspicion with which chemical facilities are viewed by the American public. Indeed, commentators have noted that: "The chemical industry cannot regain public trust, and regulatory flexibility will not be a credible option, unless all stakeholders are directly involved in the process. Methods must be found whereby all the relevant communities, including workers/trade unions, local community groups, and national environmental groups, can participate in, oversee, and scrutinize regulatory

flexibility.”¹ It has also been noted that local community advisory panels “provide the basis for a ... forum that ... foster ... greater accountability to local publics, and a consequently enhanced legitimacy for the industry’s activities.”²

Industry credibility with the public is often at its lowest in the aftermath of a critical incident which may result in deaths, serious bodily injury, substantial property damage, dangerous toxic exposure of workers and neighbors, disruption in normal community life and a host of other problems. ³ Thus, the effective use of CAPs at these crucial times can be a significant factor in retaining or restoring public confidence in the operation of the subject facility.

CAP Membership

The role which CAPs can and should play in critical incident response is significantly impacted by the makeup of those panels.

The American Chemistry Counsel’s Guide To Community Advisory Panels⁴ notes that the following categories of people may be considered for representation on Community Advisory Panels:

- Educators;
- High School or College Students;
- Health Care Providers;
- Environmental Group Members;

¹ Neil Gunningham, “Environmental Management Systems and Community Participation: Rethinking Chemical industry Regulation” 16 UCLA J Env’tl. L. & Pol’y 319, 384-85 (1998).

² See, Peter Simmons & Brian Wynne, Responsible Care: Trust, Credibility and Environmental Management, in Environmental Strategies for Industry 221 (Kurt Fischer & Johan Schot eds., 1993).

³ See, The Long Road To Recovery; Community Responses to Industrial Disasters (James K. Mitchell, Ed.) (United Nations University Press 1996)

⁴ Guide to Community Advisory Panels, American Chemistry Council (2001 Ed.)

- Emergency Responders;
- Homemakers;
- Hourly Workers;
- Agriculture Representatives;
- Small Business Representatives;
- Senior Citizens;
- Clergies;
- Local Mayor or City Council Members;
- Retirees; and
- Media Representatives.

In addition, some CAPs have included facility customers, union representatives, material or equipment suppliers and other parties directly involved with the operation of the facility itself.

Individuals from each of these different backgrounds have been found to bring valuable perspectives in aiding the public acceptance of chemical facilities. In addition, they have been effective in communicating key information to the broader publics impacted by those facilities. Similarly, individuals with each of those backgrounds offer a significant opportunity for effectively addressing the concerns of local community in the aftermath of a critical incident (which concerns may well have been greatly intensified as a consequence of the critical incident itself).

Prior Role of the CAP

The ability of any CAP to function effectively in response to a critical incident will be dramatically impacted by the historic use and viability of that panel.

CAPs provide a variety of benefits to chemical processing facilities. It has been noted that different CAPs have different constituencies included in their membership. In addition, however, the specifics of how CAPs interact with any particular chemical facility, the frequency of CAP meetings, the communications tools used by the CAP (e.g. newsletters, web sites, etc.), the nature and amount of information disclosed to CAP members, and the influence which CAP activity has on facility operations all differ from facility to facility.

The role of the CAP in the day-to-day operations of any particular chemical facility will set an absolute outer boundary on the ability of that CAP to function effectively in response to critical incidents at that facility. Following a critical incident, a facility may choose to use its CAP for a wide variety of purposes - ranging from serving as an initial sounding board for information intended to be conveyed to the general public, to acting as a direct public spokesman for the facility. With respect to any potential use, however, if the CAP has not already established its credibility in these areas in less stressful times, it is unrealistic to believe that it will be able to function effectively at such a critical juncture in the history of the facility.

The Training Issue

Regardless of the individual backgrounds and experiences of CAP members, and the prior role of the CAP at any particular facility, to function effectively in response to critical incidents CAP members must be trained for that purpose.

Initially, that training must encompass instruction on the nature of the critical incidents in which CAP members will potentially be involved. That training can take the form of tabletop or mock drills or a variety of other forms. Regardless of the particulars of the training, however, CAP members must gain an understanding of the critical incident context in which they will be asked to function.

Thus, it is crucial that, long before any critical incident arises, CAP members understand the emergency preparedness obligations and efforts of the facility; the emergency plan documents that are available; the response priorities that will be followed by the facility;

and governmental and other response activities that can be anticipated. In addition, the legitimate roles that the different publics will play in responding to critical incidents must be understood by panel members. Without this understanding of the context in which facility personnel, governmental authorities and others will respond to critical incidents, it is unrealistic to expect CAP members to function effectively with respect to any tasks that they will be asked to perform.

If CAP members are to function effectively following a critical incident, however, they must be trained in far more than the emergency response and investigation context in which they will be expected to function. They must also understand the physical dangers which are often present in the aftermath of a critical incident,⁵ the potential legal liabilities which are faced by responders to critical incidents,⁶ the role of the media in critical incident response,⁷ the emotional needs of different constituencies impacted by the critical incident⁸ and the role which they are expected to play as CAP members in connection with critical incident response.

Logistical Issues

Even if a CAP has worked effectively prior to the critical incident and is made up of individuals who are well trained for the roles they are expected to perform following such an incident, the incident itself can present logistical issues which may prevent the effective use of this resource. Thus, administrative issues, such as where CAPs are to meet, whether and if so,

⁵ See e.g., Chemical Safety Alert, Chemical Accidents: Information Sources For Safer Response (E.P.A./CEPPO May 1999); Guidance Concerning Health Aspects of Chemical Accidents (Organization For Economic Co-Operation and Development) (Paris 1996)

⁶ See Chemical Safety Alert, Direct Responders' Environmental Liability Due to Mass Decontamination Runoff (E.P.A./CEPPO 2000)

⁷ Product Stewardship Bulletin 22, The News Media's Vital Role In Chemical Emergency Planning and Response, Chemical Education Foundation (2000)

⁸ Marlene A. Young, The Community Crisis Response Team Training Manual 2d Ed. (National Organization for Victim Assistance 1998); Helping Children Cope with Disaster, Federal Emergency Management Agency, American Red Cross; Training Manual for Mental Health and Human Services, Workers for Major Disasters 2d Ed., Dept. of Health and Human Services, Center For Mental Health Services (2000)

how they release information, how emergency meetings are to be called, etc. must be all be considered in advance - - with a view toward ensuring that these procedures are appropriate for post-incident response.

In addition, to the extent that CAP members may be expected to perform particular roles following critical incidents, facilities may wish to add these individuals as additional insureds to their liability insurance policies.

Finally, participation in critical incident response often raises the danger of adverse emotional impact on the responding parties. As such, facilities must ensure that CAP members have access to the same counseling services as other parties involved in emergency response activities.

Impact of Post Incident Investigations

Among the factors that can influence the role which Cap members play in a post-incident response, are the governmental investigations being conducted as a follow-up to those incidents. Those investigations can be conducted by local, State or Federal criminal authorities, OSHA, the Chemical Safety and Hazard Investigation Board, the Food & Drug Administration, the National Transportation Safety Board, the Federal Aviation Administration, the Environmental Protection Agency, as well as specialized agencies such as the Department of Army, Navy or Air Force and even administrative agencies such as the Securities and Exchange Commission.

The purposes of those investigations and the constituencies to which those investigative agencies are responsive can vary widely. In addition, the jurisdictional basis for such investigations and the agency's statutory duties and resources can be vastly different.

Significantly, those agencies may also have very different investigative authorities. They may or may not be able to execute search warrants; compel witness testimony; compel the production of documents; compel documents or testimony from parties not subject to their regulatory authority; conduct investigations with or without headquarters approval, and conduct investigations that are either unlimited or severely circumscribed in time.

In light of those investigative authorities and purposes, different agencies will use dramatically different investigative procedures. They may conduct informal individual or group interviews, they may obtain written statements, they may conduct recorded or unrecorded sworn interviews, permit subjects of the investigation to have counsel or non-legal advisors present at the time of the interview, etc. Moreover, those organizations have different procedures in response to discovery of possible criminal activity - - ranging from termination of the investigation to advising potential witnesses of their constitutional and procedural rights.

Significantly, such organizations also have vastly different investigative expertise. They may or may not have access to academic and/or industry experts; they may have experience in conducting on site investigations; and they may even use outside investigators to assist them.

The potential consequences of an adverse result of an investigation can also be dramatically different. Administrative penalties of different magnitudes may be imposed; criminal charges may be pursued; investigative information may be used in ongoing administrative oversight; and organizations may make different demands on parties to waive their attorney/client privilege.

Finally, different investigative authorities may have different public reporting procedures and media disclosure policies. They may or may not agree to maintain the confidentiality of the investigation throughout the investigative process; they may issue public reports of the investigation at the conclusion, or throughout the course, of the investigative. In addition, they may either permit or prohibit participation of investigators in subsequent civil proceedings. Furthermore, different organizations will coordinate with other governmental agencies in different ways and may have vastly different peer review requirements before any comprehensive report on critical incidents can be released.

These different investigative authorities and procedures will dramatically impact the post incident response activities at every facility. Unless CAP members understand the dynamic and potential impact of the post incident investigations being conducted, they will have

little chance of functioning effectively in the environment in which those investigations will be a principal focus of many key facility personnel.

Use of the CAP in Responding to a Critical Incident

The ability of the CAP to effectively respond to a critical incident will be impacted by all of the issues identified above.

In addition, however, care must be taken to ensure that the CAP can, in fact, be used in a manner consistent with its essential character as a vehicle for public communication and dialogue. The culture of any effective CAP must be one of full disclosure and open communication. While post-incident dealings with the public should be consistent with this ethic, circumstances exist in which this openness is extremely difficult to achieve. If particular investigative steps are being taken and/or particular individuals are potentially subject to personal criminal liability, it may not be possible to conduct CAP activities in the same spirit of openness and candor as was true prior to the critical incident.⁹ CAP members must understand that anything said at CAP meetings can be used in subsequent judicial proceedings. As such, a determination must initially be made as to whether the essential character of the incident itself or the governmental response to that incident is such that particular aspects of that incident (or the corporate or facility response to that incident) cannot be conducted in a public forum such as CAP meetings.

Assuming that such a basic “disqualification” is not present, however, there are a wide variety of activities that CAPs can and should perform on a post-incident basis. They can provide a sounding board to determine how the public generally will respond to information on the critical incident; they can provide a source of information on the type of data that the public demand with respect to that critical incident; they can be used collectively or individually as

⁹ See, Michael Dore and Rosemary E. Ramsay, Limiting the Designated Felon Rule; The Proper Role of the Responsible Corporate Officer Doctrine In the Criminal Enforcement of New Jersey’s Environmental Laws, 53 Rutgers L. Rev. 181 (2000)

public spokesmen for the facility; they can be used as a short term or long term influencers of the public's perception of the facility's response and recovery efforts; or they can be used as a conduit to facilitate discussions with particular constituencies impacted by the critical incident (such as neighbors, labor unions, customers, governmental authorities).

Conclusion

CAPs clearly have a role to play in critical incident response. What that role can and should be, however, will be dependent on the facts of each particular case. In addition, (1) the makeup of the CAP; (2) the nature and effectiveness of the role which the CAP has played at the facility in the past; (3) the training CAP members have received in the skills necessary to effectively participate in critical incident response; (4) the logistical preparations that have been made to permit the CAP to function in the post-incident environment; (5) the critical incident role which the CAP is expected to play and (6) the existence of external forces such as pending criminal or other government investigations that may compromise the openness of communication that is essential for effective CAP performance, will all have a dramatic impact on the ability of a facility to use its CAP as a key tool in its critical incident response and recovery activities.