
The Corporate Emergency Response Plan: A Smart Strategy

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In the classic book *The Art of War*, Sun Tzu outlines well-conceived strategies, tactics, and principles in order to minimize casualties while effectively gaining the advantage over the enemy. Similarly, corporate emergency response planning provides well-conceived strategies, tactics, and principles in order to minimize losses while effectively surmounting the challenges presented by a crisis. Therefore, it is wise for corporate executives to be ready to implement a comprehensive emergency plan when a crisis suddenly threatens their company, their people, their environment, and perhaps even their jobs.

Although an Emergency Response Plan (Plan) works in concert with government responders, the corporate Plan addresses issues that are beyond the concern and scope of the government. This includes such objectives as ensuring continuity of business operations, minimizing fiscal losses, protecting assets, being proactive with public relations, preparing for legal matters, anticipating stockholder concerns, and implementing measures to prevent a recurrence. While most corporate executives agree that having a current Plan is prudent, developing and maintaining it is often considered to be low priority and is deferred. Executives may rationalize that a catastrophe or other demand for emergency action will not occur on their watch as they turn to seemingly more pressing issues. Additionally, keeping a Plan current requires a commitment of time and perhaps money. But as we have seen with the *Costa Concordia* grounding, the *Deepwater Horizon* explosion and spill, and the Fukushima Daiichi Nuclear Power Station release, emergencies can happen quickly, with devastating results.

Consider the *Deepwater Horizon* explosion and Gulf oil spill in April 2010. In a matter of minutes, British Petroleum (BP) found itself facing a situation with eleven employee deaths, seventeen injuries, a fire, and an unprecedented oil spill. In the following days as the massive oil spill cleanup began, there were wildlife casualties, property damage, severe economic impacts, and negative publicity, followed by government investigations and inquiries, personal injury, and property damage lawsuits, and the ouster of BP's Chief Executive Officer Dr. Anthony B. Hayward. It does not take an emergency on the scale of such a major incident, however, to cause a severe impact on a business. Examples abound in every state of natural and man-made incidents that have endangered employees, destroyed property, damaged communities, and threatened a company's reputation.

Possessing a well-constructed Plan is not the end state; it must be implemented as the incident unfolds. As former

chairman of the Nuclear Regulatory Commission (NRC) Richard Meserve said in discussing the Fukushima reactor disaster, while emergency planning was not adequate, "The existing plans were not followed." Peter Behr, *Chaos Among Officials Bedeviled Japan During 2011 Tsunami Disaster*, SCIENTIFIC AMERICAN, Mar. 1, 2012. Executives cannot afford simply to "wing it" when a crisis erupts. An excellent example is the successful ditching of US Airways flight 1549 in the Hudson River in January 2009. Even skillful Captain Chesley B. Sullenberger and First Officer Jeffrey B. Skiles used the aircraft's Engine Dual Failure Checklist to ensure that they were performing every possible procedure during the few minutes between the bird strike and the aircraft's ditching. It is noteworthy that despite this unique ditching of the Airbus 320 with 155 people aboard, no fatalities, no pollution, and no litigation ensued. National Transportation Safety Board Report of Aircraft Accident, "Loss of Thrust in Both Engines After Encountering a Flock of Birds and Subsequently Ditching on the Hudson River," NTSB/AAR-10/03.

The lack of a well thought out Plan can lead to highly serious consequences. In September 2010, a Pacific Gas and Electric (PG&E) natural gas pipeline exploded in San Bruno, California, resulting in eight fatalities, injuries to fifty-eight people, and damage or destruction to 108 houses. The investigation by the National Transportation Safety Board revealed that PG&E lacked a detailed plan for responding to large-scale emergencies, including a defined command structure. Thus, it took PG&E more than ninety minutes to stop the gas flow, during which time firefighters were unable to battle the blaze. This time frame "was excessively long and contributed to the extent and severity of property damage and increased the life-threatening risks to the residents and emergency responders." "Pacific Gas and Electric Company Natural Gas Transmission Pipeline Rupture and Fire," NTSB/PAR-11/01. Because of the deaths and destruction to the community, PG&E has agreed to provide up to \$50 million to the city of San Bruno for infrastructure repairs and other costs of rebuilding the neighborhood plus another \$70 million as restitution. In addition, despite PG&E's acceptance of financial responsibility, residents have elected to pursue punitive damages by continuing with ninety civil lawsuits that are set for a July 2012 trial in San Mateo County court. Additionally, the California Public Utilities Commission is considering financial penalties for failure to comply with pipeline safety rules. If PG&E had promptly executed their Plan, some of the settlement costs and fines may have been mitigated and fewer lawsuits may have resulted.

Several other logical and compelling reasons stand out for developing a Plan. A well-constructed Plan will facilitate shutdown and evacuation, thus reducing injuries or fatalities. It will ensure that employees and visitors are accounted for and confirm that all the right people are notified. As a result, the possibility of workers' compensation claims or personal injury

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litigation from employees as well as third parties should be reduced or eliminated.

Given that executives and managers are infrequently faced with responding to a crisis, the Plan prompts the leader to act methodically and orchestrate a tailored response. The Plan enables the leader to focus on the most urgent priorities. Plans for Fortune 500 companies often take an umbrella approach that includes corporate-wide guidance as well as local instructions for each subsidiary. Not surprisingly, businesses that have a Plan have reported significantly shorter incident durations than companies without one. Conversely, those entities without a Plan experienced crises lasting approximately two-and-a-half times longer than those that invested in preparing one. Steven Fink, *Crisis Management: Planning for the Inevitable* 67 (2002).

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A comprehensive Plan will prepare senior management to deal with multiple simultaneous demands. Hazardous materials (HAZMAT) releases into the air, water, and ground often occur concurrently. Management may need to contain physical damage, notify the families of deceased employees, and inform news media, employees, shareholders, and investigators. While providing too many details to any of these interests could prove incriminating during any follow-on litigation, the company's reputation could be equally damaged if it is perceived to be manipulating or withholding information. Thus, following a well thought out Plan can be the key to the public's perception of the incident and the company's long-term reputation. As an example, the chief executive officer of Ashland Oil was well prepared and took a proactive approach when an oil storage tank collapsed into the Monongahela River near Pittsburgh in 1988, thus enhancing the company's reputation as a responsible corporation despite the substantial petroleum release.

Beyond the commonsense reasons, having a Plan may be legally required. Companies that store, transport, or manufacture certain quantities of hazardous materials or petroleum products or that operate certain facilities are required by U.S. federal law to have a Plan. The Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Hazardous Materials Transportation Act (HTMA), the Oil Pollution

Act of 1990, U.S. Coast Guard regulations, Nuclear Regulatory Commission regulations, and Occupational Safety and Health Administration (OSHA) regulations require preparation and adoption of a Plan for facilities that meet certain criteria. Many of these regulations contain very specific Plan requirements such as required training, notification of authorities, emergency medical treatment, employee counts, evacuation procedures, and emergency response equipment. Some facilities (e.g., those subject to section 112(r) of the Clean Air Act) are required periodically to review and update their Plans and even notify their employees of any changes (40 C.F.R. § 68.95). OSHA regulations also require Plans to be updated based on certain criteria and reviewed with each employee (29 C.F.R. § 1910.38). For companies storing certain levels of hazardous materials, having plans to interact with the community and to share information regarding specific materials on hand is a requirement of the Emergency Planning and Community Right to Know Act (42 U.S.C. § 11003). This information will assist public agencies in preparing to respond to the potential release of hazardous substances. For facilities that handle oil above specific thresholds, a Spill Prevention Control and Countermeasures Plan is required by the U.S. Environmental Protection Agency (EPA) (40 C.F.R. § 112). Depending on the type of facility, planning for worst-case scenarios is encouraged. A Plan may even be required by treaty. As a result of the Titanic disaster, the International Safety of Life at Sea (SOLAS) treaty requires several safety measures, including a fire-control plan for certain vessels. The International Convention for the Prevention of Pollution from Ships (MARPOL), adopted by 150 nations, requires a shipboard oil pollution Plan as well as immediate reporting of any discharge of oil, harmful substances, or noxious liquids.

It is prudent to incorporate other legal requirements into a Plan to serve as a safeguard against unwillingly violating the law in the midst of a hectic response. For example, under the Department of Transportation regulations, pipeline operators are required to conduct drug and alcohol testing of employees within 32 hours of an incident. Also, a spill of certain HAZMAT substances over specified thresholds must be reported to the National Response Center within 12 hours of the spill, and a written report of the incident must be prepared. Additionally, all coal mining accidents are required to be investigated by the owner with a determination of the cause and the means of preventing a recurrence (30 U.S.C. § 813(d)). States also have unique requirements that should be incorporated into the Plan. For example, in Pennsylvania, regulations for the Clean Streams Law require that either the person spilling a pollutant into surface or groundwater or the person owning the premises must immediately notify the state Department of Environmental Protection. Because there is no reportable quantity, all spills into ditches, drains, or sewers are within the scope of this law. For international companies, the laws of the nation in which the company's facility is located should be incorporated into the Plan. Canada's emphasis tends toward fire safety, whereas China's safety focus is the nuclear arena. Germany concentrates on being environmentally responsible. The variety of these national laws contributed to the complexity of a Plan developed by the authors for a Fortune 250 company with international facilities. Thus, extreme care must be taken to craft each Plan to comply with these national laws. Whether the applicable law is federal, state,

another nation's, or a treaty, the midst of the crisis is clearly not the time to be conducting legal research.

Principles for Developing a Plan

Several important principles provide the foundation for constructing a solid Plan. First, there must be a designation of an on-site decision maker. This incident director must be someone who is capable of making quick, rational decisions with the best information available at the moment. The person must understand that decisiveness trumps the perfect decision, while also recognizing that some decisions may be irreversible. While this person could be the president, chief executive officer, or chief operating officer, it also could be anyone else who has the skills to manage multiple issues in a demanding environment. The designated person must possess strong leadership attributes, have an intimate knowledge of the business, possess the ability to evaluate risks versus benefits, be familiar with employees' capabilities, and have the acumen to deal with the press. An understanding of the community and the environment is also beneficial.

Second, disaster preparedness at the individual or personal level must be emphasized as well and preferably from the executive tiers down. This emphasis on "at home" preparedness (in addition to "at work" preparedness) is founded on both a moral concern for the well-being of all employees and the desire to ensure that employees who are assigned to the company's emergency response crews are well prepared for action. As illustrated by the absence of dozens of New Orleans Police Department officers following Hurricane Katrina, employees who are not personally prepared will be consumed in personal and family issues that will likely restrict their ability to report to work.

The third principle is that there must be a "Plan B." Redundancy with respect to people, equipment, and systems is critical. For example, due to the unavailability of the Tokyo Electric Power Company's chairman and president until 10 a.m. on the day after the tsunami struck in March 2011, which was the most critical period, the electric company "was consequently unable to make prompt organizational decisions and wound up losing the government's trust with regard to information sharing and decision making." Yoichi Funabashi & Kay Kitazawa, *Fukushima in Review: A Complex Disaster, a Disastrous Response*, BULL. OF ATOMIC SCIENTISTS 4 (Mar. 1, 2012). Because communications is the backbone of emergency response, the Plan should also provide for a backup system in the event of a communications outage or computer failure. A communications failure may cause emergent incidents to deteriorate, as illustrated on several levels with Hurricane Katrina. Redundancy also applies to such assets as databases, power, vehicles, and the emergency operations center itself. While decisions regarding whether to have a redundant system or equipment will be subject to an evaluation of cost versus benefit, having a "Plan B" can turn a potentially major problem into a minor event.

Fourth, certain standard policies must be waived or streamlined during an emergency. Those policies should be articulated along with the conditions under which they will be waived and the designated individual who may grant the waiver. Streamlined emergency policies need to be "on the shelf" before the incident. After the incident, the policies should be evaluated to determine how well they worked and then modified as necessary. The parameters of a bona fide emergency policy should be clearly and succinctly stated, with

internal controls articulated in writing to prevent abuse.

A fifth principle is to establish an emergency response organization that parallels the company's current organization. People who normally work with each other and know their colleagues will work together more efficiently. One exception is that the company should leverage the hidden talents of its people. Many employees have previous careers or specialized training that may be totally different from those used in their current jobs. These specialized skills may make them more valuable in selected emergency response positions.

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The final principle is to understand the capabilities of external organizations that might assist during an incident. These include the fire department, ambulance service, hospital, Red Cross, law enforcement, state department of natural resources, state emergency management agency, Federal Emergency Management Agency, EPA, Nuclear Regulatory Commission, U.S. Coast Guard, and private firms such as HAZMAT cleanup contractors, construction contractors, and security firms. Maintaining a list of local counselors or instituting an employee assistance program may prove beneficial for posttrauma counseling.

The Enemies of a Plan

Executives need to understand the enemies of the Plan (i.e., those forces that will undermine its effectiveness). The first enemy on our list is the hollow plan. This document is a result of a cut-and-paste from another plan and is often used when there is a requirement from government regulators or a partnering company for a Plan. This approach results in a "form over substance" document with no top management support. One example of this is BP's *Deepwater Horizon* Plan that depended on "proven equipment and technology" that reportedly did not exist. Furthermore, BP's Plan allegedly referred to Arctic wildlife and provided incorrect contact information for oil spill engineers. *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 2:10-md-02179-CJB-SS (E.D. La.), First Am. Master Compl. "B1 Bundle" paras. 482-483, ECF No. 1128 (Feb. 9, 2011).

The second enemy is basing a Plan on invalid assumptions. Valid assumptions are foundational to a Plan and need to be thoroughly vetted. The Japanese Nuclear Safety Commission did not include provisions for an extended loss of power in its accident-management policy. To the contrary, its premise was that electric transmission lines or emergency power capability would be restored quickly. The reality was that the Fukushima power plant

was without power for six days, requiring workers to develop inefficient workarounds. Funabashi & Kitazawa, *supra* at 4–5.

The third enemy is normalcy bias—the rationalization that the scenario is not as bad as it actually is. Normalcy bias was demonstrated by the statements of BP's ousted CEO, when he stated that "the Gulf of Mexico is a very big ocean. The amount of volume of oil and dispersant we are putting into it is tiny in relation to the total water volume." <http://money.cnn.com/2010/06/10/news> (last visited Mar. 6, 2012). Normalcy bias is further exemplified by the response of the *Costa Concordia* crew. After the ship struck the rock near Giglio Island, passengers were reportedly told to return to their staterooms. About an hour passed before the order to abandon the ship was issued, possibly contributing to the loss of thirty-two lives as well as the \$570 million vessel. Thus, normalcy bias will delay critical actions and place the response team behind the power curve, a position from which it is unlikely to recover.

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The fourth enemy is misinformation. During a shocking event, people see and perceive different things. During the San Bruno natural gas pipeline explosion, there were reports of an aircraft crash. The fact that the explosion was about three miles from San Francisco International Airport may have lent plausibility to the reports. But such misinformation can cause delays in responding, or response with the wrong resources.

The fifth enemy is failing to customize an emergency response plan template. Although templates are useful and may promote efficiency in developing a Plan, there can be an overreliance on the template. Because of the unique features of any particular facility, the Plan must be customized for the corporation and each facility. The omission of specific details such as the organization chart, management phone numbers, local or international requirements, and reporting criteria will promote errors, omissions, and confusion.

The last enemy is failing to keep a Plan up to date. People move, technology changes, and corporate structures morph. The Plan must be updated with even minute details such as a telephone number change. Contractors may close their business or change their specialty, and certain personnel certifications such as cardiopulmonary resuscitation (CPR) will expire. For these reasons a Plan will become obsolete if not updated.

Developing the Plan

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the Plan should address. While this is often an unconscious step, this deliberate evaluation is the foundation of the Plan. In addition to the obvious risks such as fire, hurricane, blizzard, or oil spill, the Plan should evaluate other risks that may not normally be associated with an emergency. These are events that can cripple a company and will vary depending on the industry and the location. Examples are supplier or shipper interruption, violent criminal action, Internet service outage, explosion, and alarm failure. The Plan must also include any legal requirements, such as notification of authorities. Based on these drivers, policies and procedures can then be developed. In constructing the Plan, one also must ensure that the planned procedures are practical and executable. As demonstrated after the West Virginia Upper Big Branch Mine explosion, management lacked the basic knowledge of how many miners were missing in the mine. A weakness in the accounting of individuals working in the mine resulted in confusion in the command center, criticism of the company over an inaccurate press release, and awkward meetings with families. It took more than nine hours after the explosion to determine the number of miners who were actually missing. J. Davitt McAteer, et al., *Upper Big Branch, Report to the Governor* 37–39 (May 2011).

It is also vital to craft a streamlined organizational structure for the emergency that identifies key individuals, their functional responsibilities, and their authority to act. An organization that provides for the addition of personnel as an incident grows will be able to meet the expanding informational needs. This is an area that is often overlooked and is yet critical for a well-executed response. Staff must understand how to keep the top decision maker informed without overwhelming him or her with unnecessary details. Information must flow smoothly, be documented, and cannot "fall through the cracks." Although this point may appear basic, examples abound of sophisticated organizations that became centers of turmoil when presented with a crisis.

Designating a location as an emergency operations center and promulgating a hard copy of the Plan with comprehensive checklists, facility layouts, phone numbers, and email addresses are essential tasks. It is also recommended that managers store the phone numbers and email addresses for key people in their mobile devices, since emergencies do not restrict themselves to working hours. For facilities that store hazardous materials, material safety data sheets should be included in the Plan. Another area that is often overlooked is the training and preparation of employees. Personal preparation by employees, especially for incidents such as a hurricane that affect the community, are important from the perspective that employees will not be available for work if they have not personally prepared. In addition, a determination of the level of first-aid response should be made, ranging from maintaining a first-aid kit to qualifying staff as emergency medical technicians. Because of the short response time required to treat cardiac arrest, some organizations have invested in Automated External Defibrillators (AEDs) and trained their staffs in AED and CPR. For example, at Kaufman & Canoles, P.C., we have equipped our seven offices with AEDs supported by fifty volunteer lawyers and staff who have been certified in AED/CPR response.

The selection and staging of emergency equipment is especially relevant for industrial facilities. Such assets as firefighting equipment, HAZMAT cleanup equipment, and personal protective clothing must be readily available and well maintained. In certain circumstances, contractual agreements with

certain vendors or contractors should be negotiated during the development of the Plan, since the organization will have little leverage to negotiate when faced with the emergency. It is also recommended that insurance policies be reviewed for appropriate levels of property and casualty coverage, including business-interruption coverage. A primary key to a successful Plan is to organize the plethora of commonsense steps and the myriad federal, state, local, or foreign legal requirements into a concise set of policies and actions.

The Three Phases of an Emergency

Experience has proven that the Plan should be organized in three chronological phases that set the stage for a comprehensive and efficient response. These three phases apply regardless of the size or type of incident.

The Initial Response Phase commences when an individual reports an incident. The Plan will provide a complete checklist to guide the incident director through the myriad of important, time-critical actions. If properly followed, a well-designed Plan will facilitate the flow of accurate and timely information, which guards against the aforementioned normalcy bias. Such information is a key component to the successful launch of an effort that dispatches the right people with the right equipment.

Safety must be a top priority for responders as the damage and injury assessment is developed. The incident director and on-scene supervisors must be vigilant about any developing or previously unreported hazards. Additionally, these leaders must keep in mind both their ethical responsibility to conduct safe operations as well as the corporation's culpability should employees be negligently directed to take unsafe actions. If serious injury or death occurs, the next of kin must be promptly and personally notified. On-scene security must also be established to eliminate the potential for theft and to preserve any evidence for later investigation. Photos taken immediately after the event are an excellent way to provide information and investigative evidence.

Depending on the type and magnitude of the incident, governmental authorities may need to be notified and their assistance summoned. Reporting an incident is not something that should be taken lightly. As an example, the *Costa Concordia's* captain has been charged with failing to inform Italian maritime authorities of the ship's sinking. <http://news.nationalpost.com/2012/02/23> (last visited Feb. 29, 2012). Subject to the size and organizational structure of the company, internal corporate notifications may also be required. It may prove necessary to prepare a news release or to arrange a news conference.

While not initially at the forefront of concern, an accounting process may need to be established to track the costs of any urgent procurements. As the incident progresses, failing to track costs could be problematic if not controlled. Given the pace of operations, it is easy to overlook the status of employees who are not engaged in the incident. All decisions and directions for each employee and contractor should be documented.

For several reasons, an internal investigation should commence early in the incident. The incident may expose the entity to criminal or civil penalties. For example, the Clean Water Act calls for a civil penalty of \$1,100 per barrel of oil spilled. If the entity is later determined to have acted in a grossly negligent manner, then the exposure increases

to \$4,300 per barrel. Another reason to organize an investigation is to prevent or minimize the effects of a future recurrence. Depending on the type of incident, a policy change may be needed, additional employee training may be required, or updated equipment may need to be purchased. Regardless, all evidence needs to be gathered and every potential witness needs to be identified. It is also appropriate for the investigation team to notify and work with the company's insurance agent.

The Cleanup and Recovery Phase keeps the response effort moving forward, initiates cleanup, and commences recovery. In this phase, personnel issues may arise and logistics may continue to be tracked to prevent uncontrolled spending. Temporary or permanent repairs to damaged equipment and buildings may be required. Families of any missing employees must be kept updated while press releases are issued and news conferences are conducted. Sustainable security levels must be maintained and a strategy to resume business must be developed.

The After-Action Phase involves restoring the facility to complete operation and concludes the incident, although any litigation, reconstruction, or insurance claims could continue into the future. The investigation is then completed by management in concert with legal counsel and should include an executive summary supported by detailed facts surrounding the incident. Any observations that are in dispute or contradictions in witnesses' statements should be expressly stated. The causal factors of the incident should be identified. These factors fall into four primary categories: an act of God (e.g., hurricane, earthquake), material failure (e.g., equipment failure, alarm malfunction), personnel error (e.g., transportation accident, operator error), or intentional personnel actions (e.g., sabotage, employee negligence, civil unrest). The incident's cause can also be a combination of any of the aforementioned factors, which may require in-depth scrutiny to uncover. For example, the Fukushima Daiichi Nuclear Power Station release was caused by both an act of God and a series of personnel errors. Funabashi & Kitazawa, *supra* at 4.

In anticipation of litigation, observations, opinions, and recommendations should be presented in a separate privileged document. Of interest will be supervisory oversight leading up to the incident along with any other impact that the supervisor could have had. The investigation should address possible preventive measures and any interim actions taken. Active or potential litigation from both internal and external sources should be identified in the privileged document.

Lessons learned should be developed and shared with management. If the organization or incident is large, a critique of the Plan should be conducted to identify opportunities for improvement. Post-trauma counseling may be required for personnel with severe injuries or employees who suffered traumatic events, such as experiencing the death of a colleague.

The tangible benefits of a comprehensive Plan are clear. Although it may be difficult to allocate the time required, it takes only one serious incident to eradicate a business reputation, destroy assets, and endanger lives. In the unfortunate event of an incident, the up-front investment in developing the Plan will provide immediate payback, thus more than justifying the effort. Like Captain Sullenberger, when a crisis strikes, a smart executive will take command, implement the Plan, and possibly save the company and even lives. 