

20 April 2017

PREPARING FOR ACCIDENTS, SPILLS AND DISASTER IN THE UK: PART II

Incidents which cause environmental harm or injury and illness to workers or neighbours can have significant consequences for the companies responsible. Preventing those incidents must, therefore, be a priority, but if they happen they must be managed so as to minimise physical and environmental damage, liabilities and the risk of an adverse regulatory and media response. This new series of articles summarises key issues for companies operating in the UK, with Part II covering dealing with the regulators and investigating officers' powers to take statements from witnesses.

Dealing with the Regulators:

Regulators have wide statutory powers which are most likely to be exercised after an incident. Employees should understand regulators' powers and know how to react to regulatory officers, since obstructing a regulatory officer or failing to co-operate without reasonable excuse is usually a criminal offence. Employees should request evidence of the officer's identity and authority to investigate, and clarification about which statutory powers are being exercised.

The regulatory officer usually has the power to:

- (i) enter premises at reasonable times except in an emergency (with a police constable if serious obstruction is anticipated);
- (ii) examine and investigate the premises or anything on the premises;
- (iii) direct that all or part of the premises be left undisturbed for the purposes of the examination or investigation;
- (iv) dismantle or test any article or substance which has caused the incident or is likely to cause harm (but not so as to damage or destroy it unless necessary); and
- (v) take away any such article or substance for the purposes of examination and presentation as evidence. If working with the police, the regulator also can ask them to obtain a search warrant. A Justice of the Peace can issue a search warrant if he or she is satisfied that an indictable offence (i.e. an offence triable in the Crown Court) has been committed and there is material on the premises which is likely to be of substantial value in investigating the offence.

Statements

Investigating officers usually have statutory powers to obtain statements from witnesses. These powers include requiring any person to give any information relevant to the examination or investigation and to sign a declaration of truth of the answers given. Usually, the employee can nominate another person to be present, which should generally be the

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company's lawyer or the "incident manager". Generally, no answer given pursuant to such a requirement can be used as evidence against the person giving it in any proceedings, although it can be used as evidence against the employer or another employee.

The investigating officer can also require the production of records which are required to be kept or which the officer needs to see for the purpose of the investigation. It is important to know what "records" the regulator can request be produced. Under the Environment Act 1995, for example, this may extend to test results but not to commentary in a report by consultants. Records protected by legal professional privilege generally do not have to be produced.

Regulators also have powers to obtain some information from individuals without protection against self-incrimination. Examples include notices to obtain information served under section 71 of the Environmental Protection Act 1990 (possible waste offences) and regulation 60 of the Environmental Permitting (England and Wales) Regulations 2010 (investigations of regulated facilities). Recipients of such a notice are obliged to provide the information requested even though it may be used in evidence against them in the event of prosecution. Failure to do so without a reasonable excuse is a criminal offence.

Regulators investigating a possible criminal offence generally request an interview under caution with a senior representative of the company under the Police and Criminal Evidence Act 1984 (PACE) procedures. Interviews conducted under PACE are taped and can be used in evidence against the interviewee, the company or other employees, directors and managers. Attendance at a PACE interview is not compulsory. However, failure to attend risks an adverse inference being drawn from failure to mention something known to the potential interviewee which is later relied on at a trial, or a heavier sentence if the failure to attend is brought to the court's attention during sentencing.

On the other hand, the company representative who agrees to attend a PACE interview may not have all the relevant information to answer questions, or may inadvertently say something in the interview which provides ammunition to the prosecution. The alternative is to offer to provide written responses under caution. This procedure avoids the disadvantages mentioned above and enables the company to set out its version of events in the best light possible. Some regulators agree to the written response procedure. Others decline it on the grounds that it does not allow for the same flexibility that a verbal interview would and it allows for the creation of credible but false evidence. Therefore, it is probably better for the company's representative to attend the interview, answer any factual questions she or he can answer, and offer to provide other requested information in writing after the interview. If the regulator objects, the interviewee can rely on the right to silence. Under those circumstances, it is unlikely that any adverse inference could be drawn.

Prior to attending a PACE interview, it is advisable to ask the regulator for a list of questions or, if that is not forthcoming, a list of the areas to be covered in the interview and the proposed line of questioning. Regulators are not obligated to provide this information in

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advance, but sufficient information must be provided to enable the company to understand the nature and circumstances of the offence so that questions can be answered honestly.

Regulators sometimes seek voluntary statements from employees which are subsequently typed up and presented to the employee as a witness statement to be read and signed. Such a statement is admissible in evidence against the employee who signs it as well as against the company and other employees.

It is obviously beneficial for management and the workforce to know what to do when a regulatory officer calls. Whenever possible, the officer should be asked to wait for the company's appropriate "incident manager" and, if the delay will not be too long, the company's lawyer. A substitute should be available if the usual incident manager is not available. Other employees should avoid contact with the regulatory officer if possible and, if approached, direct the officer to the incident manager. If the officer formally (under a statutory power) requires an employee to give information, the employee should require a suitable person to be present (preferably a lawyer or, in default, the incident manager) and should not answer any questions until then.

As soon as possible the in-house legal team or external lawyers should be asked to attend to monitor the investigation and take a note of everything the officer does and all items removed. The lawyer should also be present at any interview, whether mandatory or voluntary, to provide advice and to record all questions and answers. If the employee's position may prejudice that of the company or vice versa, the employee should have separate legal representation.

In any event, it must be remembered that the regulatory officer (whether statutory powers are used or not) is attending in a formal capacity and is seeking evidence. Any comment made may be used as evidence against the company. It is therefore important to be both co-operative with any regulatory investigation and ensure that anything said is factually correct.

Incident Management Plan

An incident needs to be managed properly to minimise impacts on health and safety and on the environment; comply with all applicable legal requirements; satisfy the requirements of the regulatory authorities and demonstrate that the company is maintaining a co-operative approach; minimise liabilities (for example, to employees and neighbours); and manage any adverse public relations and media attention. For that reason a management plan should be established to:

- (i) identify members of the incident team;
- (ii) (set out the key emergency actions which are to be taken;
- (iii) establish the company's response procedures both internally and for dealing with the regulators, neighbours, the press and other third parties; and

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- (iv) undertake an internal investigation as soon as possible after the incident. Steps should be taken to gain legal professional privilege for the investigation report if so desired.

While "prevention is better than cure", many companies will at some point face an EHS incident and should therefore plan ahead to ensure the best possible outcome.

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This article was first published in Natural Resources & Environment (the American Bar Association's Environment Magazine) Spring Issue 2017.

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