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# FIRST RESPONDERS' ENVIRONMENTAL LIABILITY DUE TO MASS DECONTAMINATION RUNOFF

The Environmental Protection Agency (EPA) is issuing this alert as part of its ongoing effort to provide information on environmental issues related to biological, chemical, and nuclear terrorist incidents. EPA publishes *Alerts* to increase awareness of possible hazards and environmental concerns. It is important that SERCs, LEPCs, emergency responders and others review this information and take appropriate steps to minimize risk.

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## PROBLEM

On April 19, 1999, the Team Leader of the Chemical Weapons Improved Response Team (CWIRT), U.S. Army Soldier and Biological Chemical Command sent a letter to EPA raising issues concerning first responders' liability during a weapons of mass destruction (WMD) terrorist incident. Specifically, the CWIRT asked about the first responders' liability for spreading contamination while attempting to save lives.

Environmental liability resulting from critical lifesaving actions may seem unlikely, but could be a serious concern for many first responders. The question is: Can emergency responders undertake necessary emergency actions in order to save lives in dire situations without fear of environmental liability even when such emergency actions have unavoidable adverse environmental impacts? This concern is not limited to WMD terrorist incidents, it has

and frequently is discussed in the hazardous materials response community.

## THE NERVE AGENT DRILL

The federal government recently sponsored a multi-agency drill based on a simulated nerve-agent attack. The release of the nerve agent resulted in hundreds of simulated casualties who survived the initial terrorist attack. The hazmat team had to rescue and decontaminate these "survivors" before they could receive medical attention. The hazmat team identified the need to collect the water used to decontaminate the victims (deconwater) to avoid a release to the environment. During the drill, these very capable, well-equipped, well-intentioned, professional hazmat teams delayed their initial entry for more than one hour, awaiting the arrival and set-up of pools to collect the deconwater. While the actor-survivors were dying a slow, painful, convulsive death, state and federal officials were debating and insisting that deconwater had to be collected for proper disposal. By the time the rescuers set up the holding pools and entered the site, nearly 90 minutes later, the "survivors"

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had expired. The contaminated water was collected but the “victims” died.

## **GOOD SAMARITAN PROVISIONS**

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Section § 107 (d) Rendering Care or Advice, addresses this issue. Section 107 (d) (1), often known as the “good Samaritan” provision states: “No person shall be liable under this sub chapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan (NCP) or at the direction of an on-scene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof.” This provision does not preclude liability for costs or damages as a result of negligence. Releases of chemical and biological warfare agents due to a terrorist incident are considered hazardous materials incidents and therefore CERCLA §107 (d) (1) could apply, to the extent that there is a release or threatened release of a hazardous substance.

In addition, §107(d)(2) provides that state and local governments are not liable under CERCLA “as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person.” Section 107(d)(2) would insulate state and local governments from potential CERCLA liability arising from first responder actions. **However, the provision does not apply to costs or damages caused by “gross negligence or intentional misconduct by the state or local government.”**

During a hazardous materials incident (including a chemical/biological agent terrorist event), first responders should undertake any necessary emergency actions to save lives and protect the public and themselves. **Once any imminent threats to human health and life are addressed, first responders should immediately take all reasonable efforts to contain the contamination and avoid or mitigate environmental consequences.** EPA will not pursue enforcement actions against state and local responders for the environmental consequences of necessary and appropriate emergency response actions. First responders would not be protected under CERCLA from intentional contamination such as washing hazardous materials down the storm-sewer during a response action as an alternative to costly and problematic disposal or in order to avoid extra-effort.

## **OTHER LIABILITY ISSUES AND STATE TORT LAWS**

EPA cannot prevent a private person from filing suit under CERCLA. However, first responders can use CERCLA’s Good Samaritan provision as defenses to such an action. First responders could also be subject to actions under other laws, including state tort laws. A state’s tort law allows individuals and businesses to seek compensation for losses or harm caused by another. The extent of tort liability of a state or local governmental jurisdiction, as well as individual employees or representatives of that jurisdiction, is established by the tort law of each state. The liability of governmental jurisdictions and their employees may be shaped by factors such as negligence, statutory and discretionary immunity, etc. **First responders should consult legal counsel in their state to discuss authority, status as an agent of the state, immunities, and indemnification.**

## **FEDERAL SUPPORT DURING A WMD INCIDENT**

Contaminated runoff should be avoided whenever possible, but should not impede necessary and appropriate actions to protect human life and health. **Once the victims are removed and safe from further harm and the site is secured and stable, the first responders should be doing everything reasonable to prevent further migration of contamination into the environment.**

First responders should involve state and federal officials as soon as possible to reduce potential liability concerns. Under CERCLA, the Federal On-Scene Coordinator (FOSC) can determine which environmental regulations are applicable (or relevant and appropriate) to any removal response and may further determine that any such environmental regulation is impracticable to achieve depending on the exigencies of the situation. If the FOSC determines that it is impracticable to comply with any particular environmental regulation, then the responders (local, state, Federal or responsible party) do not have to comply with that particular environmental regulation. **By involving FOSC, first responders can substantially reduce their potential liability.**

In addition, FOSCs have an expanse of resources under the NRS to support state and local responders in determining a solution which best addresses protectiveness of human health and the environment. Under the NRC, the FOSC can provide invaluable assistance in determining clean-up and decontamination needs, health criteria and appropriate clean-up protocols as needed. FOSC support is even more critical in the aftermath of a WMD terrorist attack when critical post-emergency actions such as agent identification, crime scene sampling, crime scene preservation, and long-term risk evaluation are also being

conducted.

## **PRE-PLANNING IS KEY!**

It may not be technically feasible to contain all the runoff resulting from a WMD incident, but emergency responders may be able to reduce its impact to the environment by pre-planning. Responders can maximize local resources by using existing response mechanisms as much as possible. Local Emergency Planning Committees (LEPCs) are a good starting point. LEPCs are established under the Emergency Planning and Community Right-to-Know Act to develop local governments' emergency response and preparedness capabilities through better coordination and planning, especially within the local community. LEPCs include elected officials, police, fire, civil defense, public health professionals, environmental, hospital and transportation officials, who can work together creatively using available resources to minimize the environmental impact of WMD incidents.

**For More Information.....**

**Contact the Emergency Planning and  
Community Right-to-Know Hotline**

**(800) 424-9346 or (703) 412-9810  
TDD (800)553-7672**

**Monday -Friday, 9 AM to 6 PM, EASTERN  
TIME**

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