
EPCRA Emergency Plans: What to Consider Post-September 11

Beth A. Henning

The events of September 11, 2001 have forever changed the United States. Things once taken for granted are no longer. Assumptions we as a public have made regarding the safety of our existing systems, including environmental laws, have come under increasing scrutiny. Thoughts of NIMBY have shifted to “could it happen in my backyard?” Emergency responders now contemplate what once seemed inconceivable: Could a hazardous waste treatment, storage, and disposal facility be turned into a weapon of mass destruction? Will orphan sources of radiation be utilized in dirty bombs? Will further biological terrorism events be unleashed on the American landscape? And if any of these scenarios occur, how best does a community and its front line of defense respond?

This article examines the creation of state and local emergency agencies under the Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. §§ 11001–11050. The effectiveness of community emergency plans is examined in light of possible future terrorist events. This article also suggests modifications to existing plans and summarizes current initiatives for integrating federal response to terrorist acts with state and local capabilities.

EPCRA and the Creation of LEPCs

Since World War II, the United States has experienced incredible industrial growth. This growth resulted in the development and use of new chemicals to support the fledgling industries. While the communities surrounding industrial complexes had a general idea of what went on behind the facility gates, public awareness of the existence and use of the chemicals was sharpened by two chemical accidents that ushered in a new phase of chemical emergency preparedness, prevention, and response planning. In December 1984, an accidental release of methyl isocyanate from a Union Carbide chemical plant in Bhopal, India, killed several thousand people and severely injured thousands more. While the chemical industry in the United States was reexamining its safety practices in the wake of Bhopal, on August 11, 1985, an accidental release of aldicarb

oxime occurred from another Union Carbide facility in Institute, West Virginia. The release required the hospitalization of nearby residents and shook the American public's confidence in the chemical industry.

Congress responded to the catastrophic releases by enacting legislation that had two basic goals: (1) encouraging and supporting emergency planning for responding to chemical accidents and (2) providing local governments and the public with information about possible chemical hazards in their communities. To implement the goals of the EPCRA, the legislation called for establishing a network of entities at the local, state, and federal level and setting requirements for gathering needed information. 42 U.S.C. § 11011. This emergency planning structure formed a link between the local community and state and federal response agencies.

EPCRA required each state to set up a State Emergency Response Commission (SERC). 42 U.S.C. § 11001(a). In some states, SERCs were formed from existing organizations, such as state environmental, emergency management, transportation, or public health agencies. Other states created new organizations with representatives from public and private agencies and associations.

EPCRA § 301(b) required SERCs to designate emergency planning districts. 42 U.S.C. § 11001(b). The approach for devising each district varied widely—some states utilized city and township lines as boundaries for emergency planning districts, others followed county lines or designated the entire state as one district. The responsibility for oversight for each of the local emergency planning districts did not belong to the SERC, but rather was the responsibility of a Local Emergency Planning Committee (LEPC). Initially, LEPCs were tasked with the development of an emergency plan to prepare for and respond to chemical emergencies. 42 U.S.C. § 11003. The U. S. Environmental Protection Agency's (EPA) list of extremely hazardous substances (EHS) provided a focus for setting priorities in these local planning efforts. *See* 42 U.S.C. § 11002(a)(2).

LEPC members represent a broad-based community membership, and are generally familiar with factors that affect public safety, the environment, and the economy of the community. This expertise is essential as LEPCs continue to develop and update plans tailored to the needs of its planning district. LEPCs generally consist of representatives from state and local elected officials, law

Ms. Henning is a visiting assistant professor of law at the Chicago-Kent College of Law, Illinois Institute of Technology, in Chicago.

enforcement agencies, civil defense agencies, firefighting personnel, first aid personnel, health care personnel, local environmental groups, hospital staff, transportation personnel, broadcast and print media, community groups, and owners and operators of facilities subject to emergency planning requirements. *See* 42 U.S.C. § 11001(c).

A LEPC serves as a community focal point for information and discussions about hazardous substances, emergency planning, and health and environmental risks. Education of the public about chemical hazards and risk management actions and the extent and effect of "routine toxic chemical releases" assists the LEPC in carrying out its responsibilities as a community forum. *See generally* 42 U.S.C. § 11001(c). The emergency planning provisions of EPCRA are designed to promote the discovery and mitigation of risks associated with chemical use in the community. Prevention, preparedness, and quick response to chemical emergencies are the keys to risk reduction in a community. The LEPC has the responsibility for developing and maintaining a local emergency plan. 42 U.S.C. § 11003(a). These comprehensive emergency plans encompass a range of information including facilities' chemical use, storage location of chemicals and routes for first-responders and evacuation. Creating an emergency plan is an iterative process. The reporting requirements of EPCRA Title III require reporting from the facilities regarding emergency releases and hazardous chemical inventories, 42 U.S.C. § 11003(d)(2), thereby providing LEPCs with timely hazard information.

Although facility chemical inventory information is very important to LEPCs and first responders, transportation plans are equally important. In developing their emergency response plan, the LEPC also considers communication systems, evacuation routes, and resources. The LEPC should be aware of heavily traveled highways and routes that are used to transport chemicals and include them in the emergency plan. 52 Fed. Reg. 13,385 (Apr. 22, 1987).

In developing and updating emergency plans, the LEPC utilizes a "hazards analysis"—a three-step decisionmaking process which identifies the potential hazards facing a community with respect to accidental releases of EHSs and other hazardous chemicals. These steps are: (1) hazards identification, (2) vulnerability analysis, and (3) risk analysis. Together, they identify potential hazards, locate sensitive populations potentially affected by these hazards, and assess the likelihood that an accident might occur that would endanger members of the community or the environment.

While EPCRA promotes emergency planning activities, other federal laws also authorize programs to increase awareness of chemical hazards and to reduce the likelihood of chemical emergency situations. One such requirement related to the goals of EPCRA came with the amendment of the Clean Air Act (CAA) in 1990. Section 112(r) of the CAA outlined a comprehensive program to help prevent accidental releases, building on

the planning and preparedness foundation laid by EPCRA. 42 U.S.C. § 7412(r). The CAA approaches chemical safety from inside a stationary facility source, mandating that these facilities take steps to identify and control on-site hazards, and provide the public with information regarding actions facilities are taking to prevent and mitigate potential off-site effects of hazards.

To comply with Section 112(r) regulations, a facility must develop a risk management plan (RMP) containing information on facility identity, off-site consequence analysis, five-year accident history, a prevention program, and an emergency response program. In developing off-site consequence analysis, the facility must assess the potential off-site consequences of a "worst case" or catastrophic release. The dissemination of any worst-case scenario data to the public creates tension between public information and security issues in light of the events of September 11, 2001. A worst-case assessment generally contains schematic diagrams of facilities complete with piping and storage vessels. Moreover, the assessment also includes information on weather condition impact and maximum predicted casualties. *Right to Know Details of Chemical Supplies, Statement by Chief Gary E. Warren, Deputy Chief, Baltimore City Fire Department, available in Westlaw, ALLNEWS, 2001 WL 26187660.* While this worst-case information would certainly prove helpful to LEPCs in devising a community emergency plan, the responders will need to undertake measures to ensure that only those individuals with "legitimate need" can access such critical information. *See* 42 U.S.C. § 11022(e).

Updating the Comprehensive Emergency Plan in Light of September 11, 2001

Although recently EPA and the states were working together to ensure the availability of chemical hazard and risk management information at the local level, the countervailing interest of protecting sensitive facility security information may undermine this formerly open line of communication. While the LEPC's ability to improve the safety and health of its community is greatly enhanced by the support of an informed and active citizenry, LEPCs now have genuine counterterrorism concerns about readily accessible information. *See* 42 U.S.C. § 11044 (public availability of plans, data sheets, forms, and follow-up notices); 42 U.S.C. § 11022(e) (availability of Tier II information). On November 8, 2001, the Water Resources and Environment Subcommittee of the House Committee on Transportation and Infrastructure held hearings on community right to know. Some trade groups such as the American Water Works Association and the American Chemical Council suggested that policies of widely available industry chemical and schematic data be reexamined. The U.S. Public Interest Research Group maintained that the restriction of public right to know information will hurt

safety and that the government should take steps to protect the public from hazards, not merely hide those hazards from the public eye.

Through statutory and regulatory mechanisms, LEPCs prepare, maintain, and update comprehensive emergency plans addressing the *accidental* releases of extremely hazardous substances. LEPCs can utilize these same general planning principles to update plans for consideration of *deliberate* releases caused by terrorist activity. *See generally* U.S. EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *EPA's Role in Counter-Terrorism Activities*, EPA 550-F-98-014 (Feb. 1998) and U.S. EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, *LEPCs and Deliberate Releases*, EPA 550-F-01-005 (Aug. 2001).

LEPC Membership. LEPCs generally maintain a broad-based community membership roster. In addressing deliberate releases caused by terrorist activities, specific roles and responsibilities should be identified for the existing membership. To address a release involving suspected biological agents, the roster may be expanded to include new members with specific bioterrorism expertise, as this is more difficult to readily ascertain.

Emergency Plans. EPCRA requires LEPCs to review their emergency response plans on an annual basis. Prior to considering any counterterrorism elements, it is imperative that the plan be updated. Outdated facility contact information or the presence of new chemicals in the community that are not included in the existing emergency plan will hamper any efforts to address counterterrorism. Additionally, CAA §112(r) RMPs should be checked to see that specific hazards identified by each facility are addressed. Once the emergency plan has been updated, information and procedures related to potential terrorist incidents should be added. By way of example, one of the biggest differences in responding to a terrorist incident will be that law enforcement officials will be involved in response activities as investigators. Local, state, and federal agency officials will need to collect evidence and interview any survivors in the midst of the terrorist incident response. The priorities of the law enforcement agencies may create emergency response coordination issues that should be included in any update to the emergency plan. While addressing possible terrorist activities could cause a LEPC to modify the emergency plan to reflect myriad possibilities, the following modifications and updates should be included in the planning efforts.

Emergency Contact Information. For a prompt and coordinated emergency response, communications

must be secure and rapid. The plans should contain contact information (both primary and back-up contact numbers) for fire, emergency medical services (EMS), law enforcement, medical, and other local departments, and supporting organizations. Contact information for state officials including those at public health agencies, the SERC, state police, local FBI offices, and emergency management agencies should also be included.

Spill Reporting. The National Response Center (NRC) functions as the sole federal point of contact for reporting oil and chemical spills into the navigable waters or environment of the United States and its territories. NRC mans the Chemical and Biological Hotline which was established by a Memorandum of Agreement between NRC and the Soldier and Biological Chemical Command (SBCCOM). NRC duty officers take reports of actual or potential domestic terrorism and link emergency calls with the Department of Defense for technical advice on dealing with weapons of mass destruction (WMD) and with the FBI to initiate any federal response

actions. A weapon of mass destruction is: (1) any destructive device such as an explosive, incendiary, or poison gas, bomb, grenade, rocket, missile, or mine; (2) poison gas; (3) any weapon involving a disease organism; and (4) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life. *See* 18 U.S.C. § 2332a. NRC also provides reports and notifications to other federal agencies as necessary.

Response Functions. In the event of a terrorist attack, the emergency plan should address the direction and control of responders. Generally a local response authority should establish control of the incident scene, eventually transitioning

the incident command structure into a "unified command." The overall lead federal agency for a domestic terrorist incident is the FBI. The FBI leads the "crisis management" activities during the response (which includes measures to identify, acquire, and plan the use of resources needed to anticipate, prevent and/or resolve a threat or act of terrorism). The lead agency for coordination of federal support to state and local responders during the "consequence management" phases of the response is the Federal Emergency Management Agency (FEMA). "Consequence management" includes measures to protect public health and safety after an explosion or release; restoration of essential government services; and the provision of emergency relief to governments, business, and individuals. FEMA support is provided upon presidential declaration, typically following a request from the state and local agencies for assistance. Upon

*LEPCs generally
maintain a
broad-based
community
membership roster.*

completion of crisis management activities, the overall lead federal agency role may be transferred to FEMA by the U.S. Attorney General. Other departments and agencies, such as the Departments of Defense and Health and Human Services, and EPA, also have specific counterterrorism-related functions. These functions are spelled out in the Terrorism Incident Annex of the Federal Response Plan (a plan that established the process and structure to address consequences of major disasters or emergencies). 42 U.S.C. §§ 5121 *et seq.*; *see also generally* Federal Response Plan (April 1999); Presidential Decision Directive 39 (PDD-39); U.S. Policy on Counter Terrorism. FEMA has developed guidance for state and local emergency management agencies to assist them in developing terrorist response plans as annexes to state and local emergency operations plans.

Communications. Effective communication is critical during a terrorist attack. The emergency plan should include public notification and warning systems. Additionally, the plan should include measures for communication among first responders, law enforcement officials, and medical care providers. In the event of a terrorist attack, the FBI will establish a "Joint Information Center" for information collection and dissemination.

Public Health. The emergency plan should also address public health and medical issues as they relate to terrorist events. The plan should include procedures to identify and treat victims, store and distribute antidotes, and handle fatalities. Mass care issues that should be contemplated in the event of a terrorist incident include decontamination, multihazard and multiagent triage, mortuary services, and the notification of families of any fatality. Evacuation may be required outside the perimeter of the incident scene to guard against further casualties from contamination by a release. In-place sheltering (putting a physical barrier between a release and survivors) may be required if the area must be quarantined or if citizens may be safer in a different location. Testimony of Dr. Amy E. Smithson before the House Committee on Transportation and Infrastructure, Subcommittee on Water Resources and the Environment (Nov. 8, 2001). Therefore the plan must be flexible in order to accommodate the situation as it unfolds. The personal safety of the first responders in the event of a terrorist attack should be considered in the emergency plan. It may not be apparent immediately that a release is terrorist-related. Moreover, a combination of chemical, biological, or radiological releases may be present at the incident scene. The first responders may

not have a sufficient quantity of personal protective equipment for the event. Additionally, incidents could escalate quickly from one scene to multiple locations, creating further risks to first responders.

Hazards Analysis. In the emergency plan, the LEPC should identify potential hazards, determine the vulnerability of an area as a result of hazards, and assess the risk of a hazardous materials release or spill. Explosive, chemical, biological, and nuclear WMDs should be considered as potential hazards. Under the hazards analysis, the LEPC should identify potential targets and assess their vulnerability to attack, considering population, accessibility, impact on daily life, economic impact, and the symbolic value of areas at risk. The LEPC should take into account that terrorists may target the first responders to hamper effective response efforts. Additionally, facilities that handle explosive, toxic, or volatile chemicals may be turned into an "agent" by the terrorists. Public buildings and public areas are highly vulnerable to attack. While most industrial facilities or water treatment facilities generally will have site security in place, the LEPCs should consider

whether the facility or critical equipment and chemicals are protected by buildings or fences. Additionally the LEPCs should ascertain the availability of alarm or other systems to detect trespassers. Finally, access to critical areas should be controlled. LEPCs should also consider emergency procedures in the event of multiple and simultaneous terrorist attacks.

Biological Terrorism. In the case of a biological attack, an epidemiological investigation may be performed to assess the distribution of cases and sources of outbreak. Planning bioterrorism response is made more complex because the response will require early detection, identification of the agent, epidemiological investigation and disease outbreak intervention across multiple jurisdictions within or outside of

a state of origin. The emergency plan should include a checklist of basic questions to ask when conducting interviews with hospitalized victims and other individuals in the affected population.

In April 2000, the Centers for Disease Control and Prevention (CDC) published findings for strengthening public health and health care capacity to protect the United States against biological and chemical terrorism. CDC, Morbidity and Mortality Weekly Report, Vol. 49, No. RR-4, *Biological and Chemical Terrorism: Strategic Plan for Preparedness and Response, Recommendations of the CDC Strategic Planning Workgroup* (Apr. 21, 2000). The report marked the first time that the CDC joined

*The plan should
include measures
for communication
among first responders,
law enforcement
officials, and
medical care providers.*

with law enforcement officials, as well as intelligence and defense agencies, to address a national security threat. The report recognized that the agents were likely to be covert, requiring a linkage between emergency planning and the public health infrastructure.

Dissemination of a biological agent will generally not have an immediate impact because of a delay between exposure and illness onset. Between the identification of first cases and possible second round outbreaks, public health officials must determine that an attack occurred, identify the organism, and prevent additional casualties through prevention strategies. The skills needed to detect and investigate unknown or exotic diseases are similar to those utilized in response to a hazardous chemical release. However, the public health agencies must be prepared for the use of rare biological agents or the combination of agents, simultaneous attacks, and resulting mass casualties. Because of these difficulties in dealing with biological attacks, state and local health agencies need to be capable of detecting unusual disease or injury patterns. The state and local health agencies must also have the expertise and resources for responding to clusters of unusual disease. As the detection, diagnosis, and mitigation of a bioterrorism event is quite complex, the LEPC can assist public health agencies by incorporating provisions into the emergency plan to deal with the detection and surveillance of unknown illnesses. The CDC will coordinate and provide resources to a community in the event of a confirmed terrorist attack. Also, upon request by a state health agency, the CDC will assist local agencies to investigate unexplained or suspicious illnesses.

The CDC is currently working toward communication systems that will support disease surveillance, provide rapid notification and information exchange regarding suspicious outbreaks of disease, disseminate diagnostic results and emergency health information, and coordinate emergency response activities.

Radiological Emergency. The Federal Radiological Emergency Response Plan (FRERP) governs peacetime radiological emergencies, delineating the determination and responsibilities of the lead federal agency. The FRERP states that a response to contain or mitigate a threatened or actual release of radiological material would be essentially the same whether it resulted from an accidental or deliberate act. Federal Radiological Emergency Response Plan, II-3 (May 1, 1996). The Atomic Energy Act (AEA) directs the FBI to investigate alleged or suspected criminal violations of the AEA, however. 42 U.S.C. §§ 2011-2296b-7. Moreover, the FBI has the responsibility to locate nuclear

weapons, devices, or materials. Generally speaking, a terrorism event will require coordinated response with the lead federal agency providing technical support and assistance to the FBI. Further, the FBI will manage law enforcement activities, coordinating response activities with the appropriate federal, state, and local agencies within the framework of the FRERP.

Training. In 1996, the Nunn-Lugar-Domenici legislation authorized funding to form a domestic preparedness training initiative. The training, under the control of the Department of Justice, offers a range of specialized courses for local responders from a variety of disciplines. The domestic preparedness program also includes tabletop and full-scale exercises. The exercises allow the participants to increase their overall preparedness for any WMD event. Additionally, the CDC will also provide terrorism-related training to first responders and health care providers. During 1996, Congress passed the Defense Against Weapons

of Mass Destruction Act, Pub. L. No. 104-201, and the Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132. These acts enhanced domestic terrorism response and funded emergency response terrorism training for first responders. A number of other funding initiatives and other resources addressing domestic terrorism response efforts have been fragmented. To provide coordinated support to first responders, the Attorney General created the National Domestic Preparedness Office (NDPO). The NDPO is to serve as the information clearinghouse for federal programs supporting state and local responder communities regarding domestic WMD preparedness, training, exercises, equipment, research, and development. The stated goal of the

NDPO is to form a partnership between the federal government and first responders.

Future Steps

Since September 11, productive discussions between Congress, agencies, first responders, and other affected parties have commenced regarding response to WMD events. Numerous issues face emergency responders in the event of a domestic terrorism event. Congressional debates have noted the fragmentation of response coordination. Senator Tim Johnson (D-SD) has stated that responsibility for responding to a bioterrorism attack is fragmented between forty federal departments and agencies. 147 CONG. REC. S10634-04 (Oct. 11, 2001). Representative John Larson (D-CT) suggested that planning for domestic terrorism events should come from the local level up and that funding is necessary to allow local

*The CDC will
coordinate and
provide resources
to a community in
the event of a confirmed
terrorist attack.*

communities to become more involved with strategic planning to be able to coordinate with state and federal agencies. 147 CONG. REC. H6494-01 (Oct. 10, 2001).

Bioterrorism also poses a significant threat to our public health systems. U.S. hospital emergency rooms generally are not prepared to treat bioterrorism victims in an orderly fashion. TESTIMONY, STATEMENT OF DAVID M. WALKER, COMPTROLLER GENERAL OF THE UNITED STATES, HOMELAND SECURITY—A FRAMEWORK FOR ADDRESSING THE NATIONS EFFORTS, GAO-01-1158T, 9 (Sept. 21, 2001). Additionally, bioterrorism events pose threats to our legal system in that public health law is in need of update and reform: federal and state laws responding to bioterrorism may not complement each other, raising federalism issues. Individual rights and freedoms may be abridged in the event of a terrorism act. *See* David P. Fidler, *The Malevolent Use of Microbes and the Rule of Law: Legal Challenges Presented by Bioterrorism*, 33 CLINICAL INFECTIOUS DISEASES 686-689 (2001).

The September 11 events have forever changed the

face of emergency management. The inconceivable worst-case event will now trigger a different thought response in the first responder's mind. And while that altered cognitive awareness will not diminish the responder's response commitment, the need for accurate split-second decisionmaking in light of multiple unknowns remains. Prevention, preparedness, and quick response to emergencies—goals of EPCRA—can be facilitated through the thorough examination, updating, and exercising of a community's comprehensive emergency plan. LEPCs must monitor advisories and updates from agencies and offices such as FEMA, CDC, and NDPO. Through consistent communication and cooperation among emergency responders on all levels, the network of local, state, and federal response agencies will seamlessly function in the event of a terrorism act. And after September 11, community members will not turn a blind eye to the factory down the street but rather consult with the LEPC members on HCIHIMBY (How can I help in my backyard?). 