

No Entry Means No Entry: A HAZWOPER Primer

A. Introduction.

This article is a response to an article in the July 2009 issue of *Fire & Arson Investigator* regarding the applicability of HAZWOPER training requirements to fire investigators' activities. In his article, William LeMire argues that the HAZWOPER training required under 29 CFR 1910.120 does not apply to fire investigators' activities at a fire scene, and that any attempt to bar scene entry based on lack of HAZWOPER credentials "has no basis in fact or law." Although Mr. LeMire is correct in asserting that 1910.120 does not on its face apply to fire investigations, his view arises from an artificial task-based view of fire investigators' activities and does not reflect a complete understanding of investigators' roles at sites involving hazardous substances. Moreover, Mr. LeMire seems to overlook the fact that HAZWOPER requirements were implemented to promote site safety, not to limit access to evidence. His article represents a step backwards in the IAAI's decades-long effort to promote safety at fire scenes and protect the health of its members.

B. Site owners/operators have an absolute right to control access to their facilities.

As a preliminary matter, consider Mr. LeMire's assertion that barring access to a hazmat scene "has no basis in fact or law." Mr. LeMire assumes that it is fire investigators that have attempted to exclude their fellow investigators from hazmat scenes. As any experienced fire investigator knows, this is not the case.

Site owners, not fire investigators, control site access. Site owners have the absolute right to control who enters upon their property, and the absolute right to determine the qualifications for entry. This only makes sense because site owners may also be responsible for any injuries sustained by investigators while on the scene.

This potential liability looms large for most site owners, and for good reason. In order to evaluate and mitigate this risk, site owners typically retain industrial hygienists, remediation specialists, toxicologists, structural engineers, and other consultants to evaluate the potential risk to entrants and to establish appropriate training levels. Hazmat fire scenes present a myriad of hazards: chemical, biological, physical, structural, to name a few. Different hazards require different types of training. In most cases, the most efficient way for site owners to ensure ad-

equat training is to require HAZWOPER certification; no other program provides as comprehensive training in mitigating the risks fire investigators are likely to encounter at hazmat sites.

Faced with a site owners' HAZWOPER requirements, unprepared investigators often counter, "I've been doing this for years; I understand the risks." Or, better still, "I'll sign your waiver." Although the latter warms the cockles of many an attorney's heart, warnings and waivers are subject to the vagaries of the local jurisdiction's case law and do little to keep investigators safe. Given the choice, most site owners prefer a safe investigation to a viable defense in an investigator's wrongful death action.

To be sure, owners/operator's right to control site access is tempered by their duty to provide access to evidence and avoid spoliation of evidence. Under no circumstances can owners exclude qualified investigators. As HAZWOPER becomes the standard in the industry, however, it is increasingly unlikely that a successful spoliation claim will be based on good-faith exclusion for lack of HAZWOPER certification.

C. Task-based analyses of HAZWOPER's applicability make little sense.

In his article, Mr. LeMire correctly points out that HAZWOPER applies only to workers engaged in remediation or emergency response operations. He goes on to note that "remediation" and "emergency response," as defined by 1910.120, do not typically describe the work activities of a fire investigator. Citing an OSHA letter of interpretation, Mr. LeMire concludes that HAZWOPER does not apply to fire investigators because they typically arrive long after the emergency response is over.

This analysis overlooks three important facts. First, origin and cause investigations and remediation activities typically proceed side-by-side; investigators and remediation workers operate in close proximity and are exposed to identical risks. Second, there is rarely a clean break between emergency response and investigation. Fire scenes do not become safe the moment the fire trucks pull away and the police barricades come down. Finally, and most importantly, complex fire scenes are dynamic and inherently unstable. Buildings can collapse, vessels can rupture, and fugitive chemicals can react with one another long after the "emergency response" has been declared over.

Fire investigators rarely arrive at fire scenes and find them pristine, perfectly-preserved and free of hazards. Many hazards simply cannot be removed without substantially altering the scene. As a result, fire investigators and remediation workers typically work in close cooperation with one another. Their activities must be planned in intricate detail to preserve evidence while stabilizing the scene and mitigating risks.

Indeed, many investigations must proceed sequentially, with remediation workers stabilizing one area while investigators work in an adjacent area that has already been remediated. The processes are inextricably linked in time and space, and remediation workers and investigators are exposed to similar risks as a result. It makes little sense to require less training for investigators simply because they hold cameras instead of shovels. Safety training requirements must be based on potential risk exposure, not on artificial designations of work activities.

Mr. LeMire's analysis also assumes that "emergency response," "investigation," and "remediation" are clearly-defined phases in the recovery process, with smooth linear progress from stage to stage. Fire investigators familiar with complex scenes know this is rarely the case. "Emergency response," "investigation," and "remediation" are merely labels applied to points on a continuum connecting the incident with a fully-remediated site. There are no discrete stages with crisp boundaries; emergency response may overlap with the investigation, which often overlaps with remediation.

In some cases the stages not only overlap, but become iterative as described above, with remediation stages alternating with investigation stages. The process may even return to the emergency response stage if investigation or remediation activities destabilize the site and create an unanticipated chemical reaction, structural instability, or release of hazardous materials. It makes no sense to base training requirements on an arbitrarily-imposed label for the particular stage of the incident response. The stages are fuzzy around the edges and can change in an instant. The better approach is to base training requirements on the anticipated risks posed by conditions in the field.

D. Site owners/operators who fail to control access to hazardous fire scenes risk OSHA sanctions.

Mr. LeMire concludes his article with the dire warning that a HAZWOPER-based exclusion of an opposing fire investigator may expose the excluding party to harsh, though unspecified, sanctions. The authors are unaware of a single incident where that has been the case. In fact, it is much more likely that site owners who fail to exclude unqualified experts will face sanctions.

Under 1910.120(e) and (f), site owners must implement site control plans to control workers' exposure to hazardous substances, and exclude untrained individuals from zones where hazardous substances are present. These requirements are not task-specific, nor are they a function of the phase of the recovery process. Once an exclusion zone has been established for emergency response or remediation, anyone seeking access must be properly trained. Even though a fire investigator's activities may not fall within the scope of HAZWOPER, he or she must be HAZWOPER-trained in order to enter an existing exclusion zone.

These requirements warrant a closer look. Site control is addressed in 1910.120(d)(3):

Elements of the site control program. The site control program shall, as a minimum, include: A site map; site work zones; the use of a "buddy system"; site communications including alerting means for emergencies; the standard operating procedures or safe work practices; and, identification of the nearest medical assistance. . . .

"Site work zones" are restricted zones whose boundaries are defined by the hazards present. OSHA CPL 02-02-071 "Technical Enforcement and Assistance Guidelines for Hazardous Waste Site and RCRA Corrective Action Clean-up Operations HAZWOPER 1910.120 (b)-(o) Directive" specifically advises OSHA compliance officers to ask "is restricted site access enforced?" when conducting compliance evaluations. Under CPL 02-02-071, OSHA compliance officers evaluate site control based on the following factors:

What to look for. The employer must set up physical-security barriers (e.g., fence, caution tape, guarded entry, etc.) to exclude unnecessary personnel from the general area. Verify that site procedures minimize the number of personnel and equipment on-site, consistent with effective operations.

Section 1910.120(e)(1)(i) outlines the train-

ing required for individuals seeking access to a site work zone:

All employees working on site (such as but not limited to equipment operators, general laborers and others) exposed to hazardous substances, health hazards, or safety hazards . . . shall receive training meeting the requirements of this paragraph before they are permitted to engage in hazardous waste operations that could expose them to hazardous substances, safety, or health hazards. . . . (Emphasis added).

Section 1910.120(e)(3)(i) outlines the specific training mandated by 1910.120(e)(1)(i):

General site workers (such as equipment operators, general laborers and supervisory personnel) engaged in hazardous substance removal or other activities which expose or potentially expose workers to hazardous substances and health hazards shall receive a minimum of 40 hours of instruction off the site. . . . (Emphasis added).

These provisions make it clear that OSHA does not differentiate between emergency response personnel, remediation workers, and fire investigators once an exclusion zone has been established. Moreover, OSHA inspectors do not forget about the fire scene once the public-sector response has concluded. OSHA inspectors typically monitor the private-sector remediation and investigation, and routinely open investigations of those activities. Site owners who allow inadequately-trained fire investigators into exclusion zones risk the safety of those individuals and may face OSHA sanctions as a result. The fire investigators (and their employers) making improper entry may face similar sanctions based on OSHA's ability to cite multiple employers on a given worksite.

E. Conclusion

This article is not intended as a personal attack on Mr. LeMire. Rather, it is an attack on the notion that site safety should take a back seat to site access, and that those who exclude unqualified investigators do so with ulterior motives. As Mr. LeMire correctly notes, this is an important issue; all investigators must be given the opportunity to conduct a thorough and independent investigation. But equal access cannot come at the expense of safety.

The IAAI, in conjunction with other industry groups, has made great strides in raising

safety awareness among fire investigators in recent years. It is unfortunate that the views of IAAI's General Counsel run counter to this trend. Fortunately, Mr. LeMire's position represents a minority view in the fire investigation community. More and more fire investigators are becoming aware of the benefits of HAZWOPER certification and are receiving the training in ever-increasing numbers. Although HAZWOPER may not always explicitly apply to fire investigators' activities, it offers the most comprehensive training for mitigating risks investigators are likely to encounter at hazardous fire scenes. Fire investigators who ignore HAZWOPER do so at their peril.

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