

“We Have a Problem on Line 7” Pipeline Accidents and NTSB Investigations

The Aviation Symposium Webinar Series



Presenters



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National Transportation Safety Board

- Independent Safety Board Act - 49 USC §1101-- 1155
- 49 CFR § 831.2: NTSB is required to investigate accidents involving aviation, highways, railroads, pipelines, hazardous materials, and other accidents that are catastrophic, involve recurring issues, or otherwise fulfill NTSB's safety mandate.



NTSB Structure

- Board Members
- Modal Offices
- Victims/Family Assistance



NTSB Functions

- Findings of Fact
- Probable Cause
- Recommendations
- Assist Victims and Families
- Conduct Safety Studies
- Advocacy – Most Wanted List



NTSB Launch Decision

- Notification and Preliminary Information
- Chairman, Board Member On-Call, Director of Pipeline Office and staff, and other NTSB Executives decide launch/no-launch
- NTSB Chairman calls company CEO (varies by Chairman)



On Scene

- Board Member on scene
- Investigator-in-Charge
- Staff



NTSB Areas of Focus

- Speed and efficacy of Emergency Response
- Damage caused
- Integrity Management
- Aging infrastructure



Impact of NTSB Investigation

- Divert company resources
- Strains workforce
- Media coverage/brand impact
- Creates a record



Prioritize

- Protect People
- Protect Property/Environment
- Protect Evidence
- Notify and Investigate



Follow the Plan

- Initiate Emergency Plan
- Track Progress
- Use contact list for both company employees and outsiders such as PHMSA, NTSB, your state regulator, outside counsel, insurers, etc.



Notify Corporate Security

- Corporate security personnel should be advised of the accident.
- Secure accident site, company HQ, and any other sites of media interest (such as nearby compressor stations).
- It is not unusual for the press to seek access to corporate offices and key personnel immediately after an accident.



Make Required Notifications

- Notify National Response Center “at the earliest practicable moment following discovery” (See 49 CFR § 191.5)
- Include name of operator and person making report, emergency contact numbers, location/time of incident, and number of fatalities and personal injuries.



Meet Reporting Requirements

- File Report with PHMSA By 30 Days After Incident if death, hospitalization, \$50,000 in property damage, unintentional gas loss of 3 million cubic feet or more, emergency shutdown of an LNG facility, or is otherwise significant in the judgment of the operator.
- Do not speculate on cause.
- Do not speculate on spill volumes.



Avoid the Fine

- For failure to comply with the reporting requirements, a maximum civil penalty of \$200,000 per violation can be levied (each day violation continues is a separate violation), not to exceed a total of \$2,000,000 for a related series of violations.



Stay on Track

- NTSB
- PHMSA / State Regulator
- EPA
- Media
- Local government/politicians
- Customers/public



Notify Outside Counsel

- Outside counsel should be notified and advised to stand by as legal questions arise and employee interviews are requested.
- All persons interviewed by the NTSB are entitled to counsel. (See 49 CFR 831.7.)
- Given criminal/civil consequence, do not allow any employee to be interviewed without preparation and representation.



Test for Drugs

- Drug tests must be accomplished as soon as possible, but no later than 32 hours after the accident. (See 49 CFR §199.105)
- Drug tests must be accomplished on each covered employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. (See 49 CFR § 199.105)



Test for Alcohol

- ASAP. If not done within 2 hours, the reasons must be documented. If not done within 8 hours, attempts at testing must cease. (See 49 CFR §199.225)
- A covered employee must submit to a post-accident alcohol test required under § 199.225(a), a reasonable suspicion test required under §199.225(b), or a follow-up alcohol test required under §199.225(d).



Prevent Post-Accident Drinking

- Each operator shall prohibit a covered employee with actual knowledge of an accident in which his/her performance of covered functions cannot be ruled out by the operator as contributing to the accident from using alcohol for 8 hours following the accident, unless a post-accident test takes place under §199.225(a). (49 CFR § 199.221)



Remove from Duty

- No operator shall permit an employee who refuses to submit to such a test to perform or continue to perform covered functions. (See 49 CFR§ 199.223)
- Even employees who submit to testing should be briefly removed from duty to minimize potential liability.



Comply with Insurance Policy

- Notify your insurer of the leak, explosion or other mishap.
- Insurance policies typically require immediate notification in the event of an accident.



The Party System

- 49 CFR §831.11
- NTSB conducts investigations under its party system
- Invites entities to become parties
- Leverages technical expertise
- Parties are limited to those persons, gov't agencies, companies and associations whose employees, functions, activities, or products were involved in the accident and who can provide suitable qualified technical personnel to actively assist in the field investigation.



On-scene ~ 1 week

- Fact gathering and evidence collection
- Witness interviews
- IIC issues subpoenas and designates parties
- Organizational meeting
- Establish investigative groups (Ops/HP, Metallurgical, Emergency Response, Hazardous Materials, Control Room and SCADA, Integrity Management)



Role of NTSB Office of General Counsel in Support of Accident Investigations

- Assists with on-scene legal issues
- Explains NTSB party system and information sharing issues to party counsel
- Communicates with local prosecutors, state attorneys general, US Attorney Offices
- Signs subpoenas (several hundred issued per year)
- Advises on evidence and wreckage handling issues and family assistance issues



Select the Right People

- The pipeline operator should assign its very best people to the NTSB working groups.
- Many will be key witnesses in civil litigation and possibly criminal investigations.
- All must be capable of recognizing and intervening when the pipeline operator's interests are being compromised by actions taken, or neglected, by the NTSB or other parties.



Know Your Duties

- Personnel assigned to the investigation will be expected by the NTSB to participate for the entire investigation and generally may not be replaced by alternates or relieved of duty until the NTSB approves.
- The Party Coordinator will be the primary focal point for all contact with the NTSB on the accident investigation.



Know Your Duties (Cont'd)

- Personnel approved to participate in NTSB investigation must sign statement agreeing:
 - Not to share info with co-workers, management or anyone outside the investigation
 - Not to prejudice the investigation or violate NTSB policies or instructions
 - Not to withhold pertinent information
 - He/she does not occupy a legal position
 - He/she does not represent claimants/insurers

https://www.nts.gov/legal/Documents/NTSB_Investigation_Party_Form.pdf



Be Careful with NTSB Interviews

- No impromptu interviews
- No “informal” interviews
- Arrange through party coordinator
- Have counsel prepare witness
- Have counsel defend witness
- Prepare party coordinator and working group member for interview
- Do not speculate



Prepare for Document Requests

- Consult with IT department; consider outside vendor
- Check state laws and employment agreements re: employee electronic information/privacy
- Understand document retention policies and suspend automatic deletion of emails/documents pending counsel opinion documents are not potentially relevant
- Document hold notices
- Identify which persons need to be involved with obtaining documents
- Identify document privileges



Identify Key Documents

- Pipeline construction and installation
- Pipeline testing
- Pipeline inspection
- Pipeline protection
- Pipeline maintenance
- All other records relating to the accident or incident or that might potentially be relevant in any way.



Identify Key Documents (Cont'd)

- Seismic or soil studies in the area
- Pipeline maps, schematics, etc.
- Records of PHMSA audits
- Personnel records for anyone whose performance cannot be discounted as a factor
- Emails/texts
- Procedure Manual for Operations, Maintenance and Emergencies (49 CFR §195.402(a))



Other Documents to Retain

- Integrity Management Plan
- Emergency Response Plan
- Risk Management Plan
- Freeze the version in place at time.
- Retain correct versions until investigation and litigation has ended.



Other Documents to Retain (Cont'd)

- Public awareness materials
 - one-call notification system
 - hazards associated with gas leaks
 - indications a release has occurred
 - steps to take in the event of a release
 - procedures for reporting gas releases
 - mailing lists



Failure to Preserve

- Failure to preserve key documents could be construed as conduct prejudicial to the investigation, which could lead to loss of party status, negative attention by media, and government scrutiny. See 49 CFR§ 831.11(a)(4).



Spoliation of Evidence

- Failure to preserve key documents also could be construed as spoliation of evidence, which can lead to:
 - a) a court order that certain allegations of the adverse party be taken as true;
 - b) imposition of monetary sanctions;
 - c) an independent lawsuit seeking monetary damages.



Abide by NTSB Restrictions

- Do not discuss cause of accident.
- Do not release information about the investigation that has not been released by NTSB.



Know What You Can Say

- Anything you could say pre-accident:
 - Your safety record
 - Basic company facts
 - Pipe age, specifications, material, type of welds, type of coating, etc.
 - Company policies and procedures
- Information that has already been publicly released by NTSB.
- Anything the NTSB lets you say. Ask them.



Preserve Pipeline Wreckage

- Evidence, including physical evidence at the site, must be preserved to cooperate with the NTSB's investigation and to avoid violating applicable spoliation laws.
- Pipeline sectioning, storage and transport must be coordinated with NTSB.



NTSB Document Requests

- Upon demand by NTSB, the pipeline operator must “forthwith permit inspection, photographing, or copying” of pertinent records. 49 CFR§ 831.9(a).
- The pipeline operator should always retain the original records. There is no requirement that original records be given to the NTSB.



Document Transmittal Log

- Create and maintain a document transmittal log that includes at a minimum:
 - document title or description
 - date of request
 - who requested it
 - date delivered
 - person delivered to
 - number of pages.



Mark Confidential

- Documents produced to NTSB should be stamped “Trade Secret and/or Confidential Commercial Information” to ensure that proprietary information is protected. The confidential designation can always be retracted at a later date. See 49 CFR§ 831.6(c).



Beware your John Hancock

- Under no circumstances should a company employee sign anything without approval of counsel. This is particularly important for personnel participating in the NTSB investigation. NTSB field notes that are incomplete, inaccurate and misleading are frequently signed by employees who feel pressured.



After On-Scene Work is Completed

- Additional Fact-Gathering Continues
- Modal Safety Office issues a public preliminary report within several weeks after the accident
- Modal Safety Office recommends to the Board whether or not an investigative hearing is needed to obtain additional facts
- Once fact-finding is completed, Modal Safety Office shares final drafts of Group Chairmen's factual reports with opportunity for parties to submit comments (Technical Review)



Review Draft Factual Reports

- Carefully review and comment on NTSB Draft Factual Reports
- Push back on erroneous information
- Push to remove any analysis from the factual report



Post Evidence Gathering Phase

- Analysis phase commences – NTSB only; no participation by parties
- Analysis work typically includes work by the NTSB's Materials Lab Division
- Modal Safety Office prepares draft Board Accident Report for internal "Directors' Review" prior to Board Member review



Post Evidence Gathering Phase

- Draft Report consists of factual information, analysis, findings, probable cause statement, and recommendations
- Approximately eight weeks prior to submission of draft report for Board Member review, Office of Rail, Pipeline, and Hazardous Materials Investigations opens public docket



Prepare Party Submission

- Draft a party submission that includes:
 - Summary of key facts
 - Your analysis of the investigative record
 - Proposed findings of fact
 - Proposed probable cause
 - Proposed recommendations



Pre-Board Meeting Phase

- Each Board Member may separately meet with staff to discuss the draft Board Accident Report. Also, Board Members submit written comments to staff
- Agency publishes Sunshine Act meeting notice in the Federal Register announcing time and date on Board Meeting to deliberate and vote on the draft Board Accident Report.



Meet with NTSB Board Members

- Schedule meetings with each NTSB Board Member before the NTSB's "Sunshine Meeting."
- Opportunity to raise key issues directly with NTSB Board Members.
- Modal Safety Office staff, Board Member assistants, and General Counsel staff will likely attend these meetings.



Board Meeting Phase

- Board meets in public session to deliberate and vote on the proposed findings, statement of probable cause, recommendations, and the Accident Report
- Board Members may reserve the right to file concurring and/or dissenting statements
- The full report typically appears on the web site several weeks later



Post-Board Meeting Phase

- Petitions for Reconsideration (PfR): A party or other person having a direct interest in the investigation may submit a PfR based on the discovery of new evidence or on a showing that the Board's findings are erroneous. (See 49 CFR §845.32).



NTSB Investigation of Major Accident

- 49 USC §1154(b): “No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.”

BUT: NTSB Factual Reports are admissible as evidence in court.



Stay Alert for Possible Prosecution

- NTSB investigation can be used for criminal prosecution of both the company and its employees.
- Legal counsel may consider criminal defense counsel for the company as well as certain employees if there is any suggestion of criminal negligence or a criminal investigation.



Be Aware of Low Criminal Standard

- Under federal law, if an employee commits a crime in the course of his or her employment, the employer is also guilty of a crime.
- The standard for criminal negligence is akin to gross negligence and can be little worse than carelessness, particularly if there was an operational or profit motive for the subject actions.



Evade Common NTSB Pitfalls

- Not selecting right personnel.
- Not protecting confidential documents.
- Not adequately preparing for interviews.
- Not reviewing documents before producing and keeping document log.
- Not getting witnesses legal representation.
- Not reviewing/pushing back on field notes and draft factual reports.



Evade NTSB Pitfalls (Cont'd)

- Not building good relationships.
- Not using a single point person for document productions.
- Conducting parallel internal investigation.
- Violating NTSB disclosure restrictions.

