



# Your First NTSB Pipeline Accident Investigation: “Okay, Now What?”

A Webinar

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# Why is the NTSB here?

- Independent Safety Board Act (49 USC § 1101– 1155)
- 49 CFR § 831.2: NTSB is required to investigate accidents involving ... pipelines
- The NTSB “shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of ... (D) a pipeline accident in which there is a fatality, substantial property damage, or significant injury to the environment.” (49 U.S.C. § 1131(a)(1))

# NTSB Go Team

- Regional office investigator might arrive before go team to begin the investigation and coordinate security (becomes IIC- Investigator in Charge- duty).
- Will secure evidence and ensure safety by identifying hazardous materials and fire hazards.
- Tour site and receive briefing from local officials.

# What will the NTSB do first?

- NTSB will not hinder efforts to protect people and property.
- NTSB will set up a command center.
- NTSB will be interacting with other agencies at the scene.
- NTSB will speak with pipeline employees.

# Will the NTSB question on site?

- Cooperate.
- Direct NTSB to appropriate authorities, such as Incident Commander.
- Do NOT ignore NTSB.
- Facilitate and assist.
- Interviews of pipeline personnel at scene are probably not appropriate.

# The Evening Of.

- Parties identified – PHMSA, pipeline company, local agencies.
- NTSB organizational meeting.
- Working groups established.
- Party Coordinator/group representatives.
- The Party Coordinator (PC) should help identify team members.

# What is a Party Coordinator?

- 49 CFR § 831.11.
- Report to NTSB.
- Respond to NTSB.
- Coordinate company resources.
- Ensure compliance with NTSB rules and procedures.
- Cannot be an attorney or claim rep.



# What is the Party Certification?

- Participants must sign statement agreeing:
  - Not to share info with co-workers, management or anyone outside the investigation (but note safety exception of 49 CFR § 831.13(c)(3),
  - 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](https://www.nts.gov/legal/Documents/NTSB_Investigation_Party_Form.pdf)*

# Why is the Party Coordinator Important?

- You are an investigator.
- You are a de facto attorney.
- You might be an interviewee.
- You might be a witness in civil or criminal litigation.

# Who Should be Party Coordinator?

- Must be employee of company.
- Must possess expertise required to assist the NTSB.
- Heft.
- Ability to speak for company.
- Ability to intervene when needed.
- Effective witness.
- Ability to serve for duration of investigation.

# Is Party Coordinator difficult?

- Yes!
- Long hours.
- Isolation.
- No net – free from chain of command.
- De facto lawyer.
- Must effectively lead your team.

# Okay. I'm Party Coordinator.

## What do I do?

- Lead other pipeline NTSB participants.
- Daily progress meetings with NTSB.
- Field work.
- Lab work.
- Site visits.
- Ask questions.
- Obtain and relay document requests and productions.

# What Do I Need?

- Laptop/charger/flash drives/extension cords.
- Phone/charger (camera).
- Gopher.
- Private conference room.
- Change of clothing.
- Toiletries.
- Help with day job.
- Water/caffeine/power bars.

# Who will I be working with?

- Investigator-in-Charge (IIC).
- Staff of Pipeline Modal Office.
- Other Party Coordinators.
- Other team members from your company.
- Company “outsiders” you need information and documents from.
- Legal counsel.

# Abide by NTSB Restrictions

- DO NOT publicly discuss cause of accident.
- DO NOT release information that has not been released by NTSB.
- Worst case scenario: DOJ may file obstruction charges (18 U.S.C. § 1505).
- DO communicate internally to extent needed to share safety information.
- DO let the IIC know if you are planning safety action.



# What do I need to know?

- Regulator Perspective.
- Media Interest.
- Civil litigation implications.
- Public perceptions.
- Discoverable communications.
- No discussion of liability/blame.
- No independent investigations.

# Can Counsel Assist Me?

- Yes!
- Can advise Party Coordinator.
- Can represent employees in interviews.  
(49 CFR § 831.7(a))
- Given criminal/civil consequence, interviewees must be ready/represented.
- Confidentiality issues.
- Information/document requests .

# What will NTSB focus on?

- Speed and efficacy of Emergency Response and notifications.
- Damage caused.
- Integrity Management.
- Aging infrastructure.
- Fatigue.
- Start identifying documents/sources of information early.

# Be Aware NTSB will look at Notifications

- Party Coordinator / counsel need review.
- 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.

# Review 30 Day Reports

- File Report (Form PHMSA F 7100.2) 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 or spill volumes.
- Copy NTSB on filings.

# Security Concerns

- Protect data and files.
- Ensure working locations are secure.
- Do not put info on company shared drives.
- Do not speak or share information with press.
- You need a secure location – need a war room.

# Opportunities for Input

- Field Notes.
- Interviews.
- Lab testing protocols.
- Responses to NTSB subpoenas/requests.
- Public Hearings.
- Draft factual reports / technical review.
- Party submission.
- Meetings to discuss probable cause.

# Field Notes

- Group chairs issue Field Notes at conclusion of on-site work. Additional Fact-Gathering Continues.
- Draft field notes are provided for review and input.
- Do not sign unless correct. Annotate dissents.
- Receive copy of field notes before team leaves site.



# Be Careful with NTSB Interviews

- No impromptu interviews.
- No “informal” interviews.
- Arrange through party coordinator.
- Have counsel prepare witness.
- Have counsel defend witness.
- Be prepared!
- Help prepare your working group rep.

# Interviews

- Is witness psychologically ready?
- Is witness physically ready?
- Is there adequate time to arrange for regular job to get done so safety is protected?
- Has witness conferred with counsel.
- Is there adequate private meeting space?
- Ask questions.

# NTSB Document Requests

- “... an NTSB investigator may—  
[i]nspect, photograph, or copy any records or information ... and correspondence regardless of the date of their creation or modification, for the purpose of investigating an accident.” (49 CFR § 831.9(a)(5))
- The pipeline operator should always retain the original records.

# 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.

# Responses to Requests/Subpoenas

- Designate a single point person.
- Work at direction of PC.
- Long hours.
- If must have more than one, needs to be seamless.
- Counsel can often assist with this, because the PC will be busy.
- Limit access to documents.

# 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.

# 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))

# 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.
- They transport, not you.
- Sign the shipping document evidencing they are taking custody.

# After On-Scene Work is Completed

- Once fact-finding is completed, Modal Safety Office shares final drafts of Group Chairmen's factual reports and parties should propose revisions/comments.
- All factual material is sent to the party coordinators and placed on the public docket.
- At that point, a technical review meeting is convened to allow the parties one final opportunity to correct errors and propose additional investigation.

# 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.

# 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.
- Must be job of PC.
- You are the one with all the access.
- Counsel must be involved.
- Factual reports are admissible evidence in federal court.

# Post Evidence Gathering Phase

- Analysis phase commences – NTSB only; no participation by parties.
- Typically includes work by Materials Lab.
- Modal Safety Office prepares draft Board Accident Report for internal “Directors’ Review” prior to Board Member review.
- Board may delegate authority to issue more streamlined final accident reports “known as “Accident Brief”) for particular accidents.



# 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 Railroad, Pipeline, and Hazardous Materials Investigations opens public docket.
- Communications restrictions lifted.

# Assist with 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.
- Ramifications for litigation, public relations
- Counsel must be involved

# 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.

# 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.

# It is Never Over

- NTSB investigations are technically never closed.
- 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).



# Evade Common NTSB Pitfalls

- Lack of coordination with your team.
- 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.

# Be Prepared

- Identification of personnel to fulfill roles.
- Identification of backups.
- Be ready to go.
- Advanced consideration of who to use for in-house and/or outside counsel legal advice.

# Contact Information

If you have any questions, please contact us:

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<https://plane-lyspoken.com>

# Further Reference

- See LeClairRyan brochures:
- *NTSB and Accident Investigations*, available at:  
<https://www.leclairryan.com/files/Uploads/Documents/NTSB%20pages.pdf> and
- *Pipeline Emergency Response*, available at:  
<https://www.leclairryan.com/files/Uploads/Documents/Pipeline%20Trifold%202019.pdf>.

# Further reference (cont'd)

- Handbook: [Pipeline Emergency Response](#)
- Brochure: [Emergency Preparedness and Response](#)
- Brochure: [Pipeline General Information](#)
- Past Webinar: [Pipelines and the SAFETY Act](#)
- Past Webinar: [NTSB Investigations of Pipeline Accidents](#)

# Upcoming Events

## **Using the SAFETY Act As a Tool to Manage Risk *Aviation Symposium Webinar Series***

Wed. April 3, 2019

1:00-2:30 pm ET

Register [here](#)

## **14<sup>th</sup> Annual Aviation Symposium**

**Save the Date**

February 4-6, 2020

Any event questions? Email us [aviation.practice@leclairryan.com](mailto:aviation.practice@leclairryan.com)



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