



Pipeline Emergency Response Handbook



Foreword

Fox Rothschild LLP is a national law firm with a strong litigation and regulatory compliance practice. This experience includes representation of utilities and pipeline operators in major NTSB investigations following pipeline accidents. Our attorneys have successfully guided utilities and pipeline operators through the NTSB investigative process and other sensitive issues that affect not only the probable cause findings, but also areas that may ultimately have bearing on civil liability, criminal liability and regulatory compliance.

We have also represented entities in toxic tort and mass tort claims throughout the United States. This background allows us to understand what our clients experience following a major pipeline or chemical accident, and develop plans, practices and procedures to assist our clients during the difficult aftermath. Our intimate knowledge, combined with our strong relationships throughout the industry, allow us to provide a quality of representation to our clients that is unparalleled.

This manual contains the basic advice and resource materials that we have found to be helpful in the aftermath of a pipeline accident or chemical leak. We believe these materials will help a company faced with a major accident to avoid the common missteps that can derail an otherwise valid accident response plan. While this manual cannot replace the advice and assistance of legal and technical experts on the scene, it does provide a solid basis from which an accident response plan can be developed. In fact, if you are reading this manual, you are taking the single most critical step toward ensuring the best possible outcome following an accident: you are planning ahead. The period after an accident is so hostile to learning that only by planning ahead can you hope to avoid becoming overwhelmed by the accident response process.

For immediate assistance with any incidents or concerns, please contact
Morgan W. Campbell – 202.794.1210– mcampbell@foxrothschild.com
David K. Tochen – 202.794.1217– dtochen@foxrothschild.com

Attorney Advertisement

© 2022 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice and should not be used or taken as legal advice for specific situations. This publication does not create, and receipt of it does not constitute, an attorney-client relationship between Fox Rothschild LLP and the recipient. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.

Contact



Morgan W. Campbell
Partner

Fox Rothschild LLP
2020 K Street N.W.
Suite 500
Washington, DC 20006

mcampbell@foxrothschild.com

TEL: 202.794.1210
CELL: 703.798.6888

Morgan W. Campbell counsels and defends major and regional airlines, FAA Part 145 repair stations, component manufacturers, airport authorities, fixed base operators and other entities before state and federal court. His representations also extend to regulated entities in FAA enforcement actions and internal corporate investigations as well as airlines, pipeline operators and others in matters pending before the National Transportation Safety Board.

Representative NTSB matters include:

- Centreville Pipeline Leak (2015)
- Sissonville Pipeline Rupture (2012)
- Flight 261 (2000)
- Flight 1248 (2005)
- Flight 3407 (2009)
- Flight 3153 (2016)

Introduction

Pursuant to its congressional mandate¹, the National Transportation Safety Board (“NTSB” or “Safety Board”) investigates transportation accidents in aviation, railroad, highway, marine, pipeline and hazardous materials safety to determine the probable causes of the accidents, issue safety recommendations, study transportation safety issues and evaluate the safety effectiveness of government agencies involved in transportation. Within the NTSB, the Office of Railroad, Pipeline and Hazardous Materials Investigations (“RPH”) has the responsibility for investigating pipeline accidents and accidents arising from the transportation of hazardous materials, provided they involve a fatality or substantial property damage, significant environmental impact, or problems of a recurring character². NTSB investigations focus not only on the effects of the materials released in public areas, the emergency response by local authorities, and the adequacy of federal standards for the transportation of hazardous materials, but also on the response from the utilities, carriers, pipeline operators, equipment and container manufacturers, and safety standard organizations. These investigations, reports, and recommendations are made in relation to the NTSB’s mission of saving lives through the prevention of transportation-related accidents.

Upon notification of an accident, the NTSB dispatches an investigator to the accident site. For major accidents, the NTSB dispatches a “Go Team,” consisting of NTSB investigators, to the accident scene as quickly as possible. In many of these investigations, an NTSB Board Member will also accompany the investigators on-scene and serve as the NTSB spokesperson. The Go Team brings a broad spectrum of technical expertise that is needed to investigate complex transportation accidents. The NTSB designates agencies and other organizations whose employees, functions, activities, or products were involved in the accident or incident as parties to the NTSB investigation to facilitate the rapid and complete acquisition of all relevant factual information. Parties to an NTSB investigation participate directly in the fact-finding phase of an NTSB investigation. Parties to the investigation are encouraged to submit their own proposed findings and analysis regarding an accident.

The Safety Board’s actions, decisions, accident reports, safety studies and recommendations are publicly available. Further, the factual reports of the NTSB are admissible in civil litigation in federal court and many state courts. Also, while the Safety Board’s analysis of factual information and its determination of probable cause cannot be entered as evidence in a court of law, such information impacts the utilities, pipeline operators and related stakeholders in the court of public opinion that could ultimately affect your company’s reputation and bottom line. Having legal guidance immediately following an accident, covering areas such as emergency response efforts, media relations, document productions, witness interviews, and public hearings, could mean the difference between the company being perceived as cooperative and responsible or as incompetent and obstructionist. Legal guidance also can reduce litigation exposure, manage regulatory consequences, and limit political fallout.

¹ Independent Safety Board Act of 1974.

² 49 U.S.C. § 1131.

Table of Contents

Initial Response	6
1. Accident Response Checklist	6
2. Practical Considerations for Emergency Response.....	15
3. Media Relations at a Major Aviation Accident.....	16
4. Communications – Compliance with NTSB Rules	21
5. NTSB Document Collection/Production	22
Families & Employees.....	24
6. Employee Work-Related Death Response	24
7. Response Team Wellness Management.....	28
8. Insurance/Benefit Coverage Levels/Actions	31
NTSB Investigation	33
9. Your Participation in the NTSB Accident Investigation	33
10. Overview of the NTSB Accident Investigation Process	38
11. PHMSA Reporting Requirements	40
12. NTSB Statutory Authority and Related Sections: 49 U.S.C. §1101-1155	42
13. 49 C.F.R. § 831: Accident/Incident Investigation Procedures	46
14. OSHA Regulations Relevant to Crash Site.....	53
Civil Litigation.....	55
15. Attorney Client & Work Product Privileges.....	55
16. Sample Internal Memo re: Work Product.....	57
17. Discovery of Electronically Stored Information (ESI)	61
18. Document Retention Tips	62
19. Retention and Preservation of ESI	63
Criminal Investigations	65
20. Potential Criminal Issues Relating to a Pipeline Accident	65
Appendix A: Search Warrant Checklist	70
21. 18 U.S.C. §1512: Tampering with a Witness, Victim, or Informant	75
22. 49 U.S.C. § 1111: Organization and Administration of NTSB.....	79
23. 49 U.S.C. § 1131: Authority of NTSB	81
24. 49 C.F.R. Part 199: Post Accident Drug and Alcohol Testing.....	83

Initial Response

1. Accident Response Checklist

In general, the goals of an accident response should be prioritized as follows:

- Protect People
- Protect Property
- Protect Evidence
- Notify National Response Center within One Hour
- Coordinate with NTSB and Comply with NTSB and PHMSA Rules

This will likely require the following actions:

- **Call 911 and Coordinate with First Responders**
- **Initiate Emergency Plan**
 - The pipeline operator's emergency plan should be initiated. Personnel should be drilled on the plan and familiar with its contents. The plan should be readily available to monitoring center and gas control personnel, as well as key operational personnel.
- **Coordinate with Gas Control and Field Personnel**
 - Ensure gas control/monitoring personnel are coordinating with field operators and that field operators are in motion to the correct facilities and valve sites.
- **Quickly Identify Relevant Lines/Valves and Shut Off Gas and Isolate Leak/Rupture**
 - The NTSB and state and federal regulators increasingly expect that ruptures and leaks will be isolated within one hour.
- **Establish a Presence and Command Post at the Incident Site**
 - First responders/emergency personnel will require the input of pipeline operator representatives to assess when an area is safe to enter.
 - The command post will serve as a fixed place both for purposes of coordinating company actions and to interface with outside agencies.
- **Notify National Response Center (806-424-8802 or electronically at <http://www.nrc.uscg.mil>)**
 - "At the earliest possible moment following discovery," and no later than one hour after confirmed discovery, the operator must notify the National Response Center by telephone or electronically, and must include the names of the operator and the person making the report, along with their emergency contact numbers, the location of the incident, the time of the incident, the number of fatalities and personal injuries, if any, and all other significant facts that are known by the operator that are relevant to the cause of the incident or the extent of the damages. See 49 C.F.R. § 191.5.
 - Within 48 hours after the confirmed discovery of an incident, to the extent practicable, an operator must revise or confirm its initial telephonic notice with an estimate of the amount of product released, an estimate of the number of fatalities and injuries, and all other significant facts that are known by the operator that are relevant to the cause of the incident or the extent of the damages.
 - PHMSA advised operators in an Advisory Bulletin (ADB-02-04) published on September 6, 2002, that it interprets the phrase "at the earliest possible moment" to mean "usually one to two hours" after discovery. See 67 Fed. Reg. 57060. The Pipeline Safety Regulatory Certainty and Job Creation Act of 2011 directs PHMSA to amend the current notification requirements at 49 C.F.R. §

191.5 (natural gas) and 49 C.F.R. § 195.52 (hazardous liquid) within 18 months after January 3, 2012, by establishing specific time limits for notification; those limits may not exceed one hour following discovery. PHMSA published an Advisory Bulletin (ADB-2013-01) on January 30, 2013, stating its intention to issue a proposed rule to revise telephonic reporting regulations to establish specific time limits for telephonic or electronic notice of accidents and incidents involving pipeline facilities to the NRC. See 78 Fed. Reg. 6402. This advisory bulletin also encouraged operators “as a practice” to begin reporting accidents and incidents within one hour of confirmed discovery.

- Although timely reporting is important, do not delay actions needed to isolate the rupture.
- The operator should relay factual information only and should not speculate on the cause of the accident or the extent of the damages.
- Coordinate with Public Relations Department on initial communications.
- Coordinate with inside and outside counsel for initial team briefings.

- **Drug & Alcohol Tests**

- Drug tests must be accomplished as soon as possible, but no later than 32 hours after the accident. See 49 C.F.R. § 199.105.
- Drug tests must be accomplished on each employee whose performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. See 49 C.F.R. § 199.105.
- Each operator shall prohibit a covered employee who has actual knowledge of an accident in which his or her performance of covered functions has not been discounted by the operator as a contributing factor to the accident from using alcohol for eight hours following the accident, unless he or she has been given a post-accident test under § 199.225(a), or the operator has determined that the employee's performance could not have contributed to the accident. See 49 C.F.R. § 199.221.
- Alcohol tests must be accomplished as soon as possible. If not done within two hours, reasons for the failure to test must be documented. If not done within 8 hours, attempts at testing must cease. See 49 C.F.R. § 199.225.
- Each operator shall require a covered employee to submit to a post-accident alcohol test required under § 199.225(a), a reasonable suspicion alcohol test required under § 199.225(b), or a follow-up alcohol test required under § 199.225(d). No operator shall permit an employee who refuses to submit to such a test to perform or continue to perform covered functions. See 49 C.F.R. § 199.223.
- Each operator shall conduct the following types of alcohol tests for the presence of alcohol:

- (a) Post-accident.

- (1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the operator's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

- (2)(i) If a test required by this section is not administered within 2 hours following the accident, the operator shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by paragraph (a) is not administered within 8 hours following the accident, the operator shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

See 49 C.F.R. § 199.225.

- **Notify Insurers**
 - Insurance policies typically require immediate notification in the event of an accident.
- **Notify Corporate Security**
 - If the operator has a corporate security department, corporate security personnel should be advised of the accident so they can ensure security at the accident site, company headquarters, and any other sites (such as nearby compressor stations) the operator has reason to believe will generate media interest. It is not unusual for the press to seek access to corporate offices and key personnel immediately after an accident. If the operator does not have a corporate security department, it should review the circumstances of the accident and consider hiring a contractor to provide security. Locations that might require security (or additional security) include the accident site/Command Center, local compressor stations, and company headquarters.
- **Provide Environmental Notifications**
 - The pipeline operator's environmental protection personnel should be notified of the accident to address immediate environmental hazards.
 - Notification, if appropriate, should be provided to state and federal authorities (i.e., Environmental Protection Agency).
 - As part of the EPA's Emergency Management Program, any organization responsible for a release or spill above a federally-determined limit is required to notify the National Response Center at (800) 424-8802 or electronically at <http://www.nrc.uscg.mil>.
 - Other reporting requirements may exist for discharge of oil (Discharge of Oil Regulation/Clean Water Act or Spill Prevention, Control, and Countermeasure Rule) discharge of hazardous substances regulated under the Superfund Law, or release of designated extremely hazardous substances under the Emergency Planning and Community Right to Know Act of 1986.
- **Notify Outside Counsel**
 - Outside counsel should be notified and advised to stand by as legal questions arise and employee interviews are requested. The NTSB, PHMSA, state regulators, and others will make inquiries. If the NTSB travels to the accident site, interviews of key personnel might take place on that day or a following day. It is important that counsel have the opportunity to meet with key personnel prior to interviews.
- **Coordinate with Public Relations and Corporate Communications Departments**
 - All press releases and statements to the press should be reviewed and approved by the general counsel's office. This becomes especially important once the NTSB becomes involved, as statements regarding the accident might run afoul of the NTSB's rules and jeopardize the company's relationship with the Board, and potentially cause it to lose its party status. Loss of party status is particularly significant as it will lead to negative media coverage and will result in a loss of the advantages afforded to parties, such as the opportunity to help guide the course of the investigation and stay informed of important developments in the investigation.
- **Dispatch Legal Representative to Scene**
 - An attorney from the General Counsel's office should be dispatched to the accident site to provide advice on legal issues as they arise. It is helpful to have someone permanently assigned to the accident investigation and litigation. Note that NTSB rules prohibit any attorneys who represent claimants or insurers with respect to any accident-related claims from representing any party to the investigation. See 49 C.F.R. § 831.11(b)(1).

- **Provide Representation to Interviewees**
 - All persons interviewed by the NTSB are entitled to legal representation. (See 49 C.F.R § 831.7). Given the potential for criminal prosecution, as well as civil liability, the pipeline operator should not allow any employee to be interviewed by the NTSB without adequate preparation and legal representation. Outside counsel may be best suited to this task.
 - If the NTSB travels to the accident site, interviews of key personnel might take place on that day or a following day. It is important that counsel have the opportunity to meet with key personnel prior to interviews.
- **Preserve Accident Site**
 - The pipeline operator must preserve evidence, including physical evidence at the site, to fulfill its duties to cooperate with the NTSB investigation and to avoid violating applicable spoliation laws.
- **Establish an Incident Command Structure**
 - On the day of the accident, the operator should form an Incident Command Structure to coordinate the company's post-emergency response, including information gathering, communications strategy, operational impacts, return to service considerations, and interactions with state and federal agencies. The structure should transition to a Unified Command, including state and federal agencies, as soon as practicable.
 - The team should include a Data Request Response Unit to coordinate the receipt and processing of information and document requests.
 - Once the NTSB begins its investigation, the company's party coordinator to the investigation and its representatives on the various NTSB working groups will, along with general counsel and outside counsel, form the company's NTSB team. All requests of the NTSB will be made to the party coordinator or working group members and will have to be processed through the company's NTSB team.
- **Assist in Selection of Personnel in NTSB Investigation**
 - The NTSB will request the pipeline operator to assign personnel to various NTSB working groups, such as human performance/survival factors, operations/integrity management, and metallurgical.
 - The pipeline operator should assign its best people to these groups. Many of them will be key witnesses in civil litigation and possibly criminal investigations. Although counsel experienced with NTSB investigations can assist and advise of effective tactics, the rules of the Board and the party system mean that the party representatives 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.
 - Brief the personnel assigned to the NTSB about their role and the meaning of party status.
- **Identify and Secure Key Documents**
 - The pipeline operator should identify and retain all records relating to the pipeline (material specifications, coating, wall thickness, welds, etc.), its integrity (records of construction, improvement, repair, cathodic protection, pressure testing, etc.), and all other records relating to the accident or incident or that might potentially be relevant in any way.
 - If the company has a document retention plan that provides for the periodic destruction of older documents, this process should be put on hold until all potentially relevant documents are identified and secured, or until the general counsel's office advises that the documents to be destroyed are not potentially relevant.

- The following documents, at a minimum, should be immediately identified and secured by the General Counsel's office:
 - Pipeline Construction, Inspection and Maintenance Records. All construction, inspection and maintenance records for the pipeline section at issue, including any seismic or soil studies in the area, including any that are not normally retained, should be immediately identified and kept secure.
 - Procedure Manual for Operations, Maintenance and Emergencies. 49 C.F.R. § 195.402(a) requires that each operator prepare and follow for each pipeline system a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. If the manual requires updating after an incident occurs, ensure that a copy of the manual is "frozen" in the state of revision that existed on the day of the accident.
 - These manuals include, but are not limited to, the Integrity Management Plan, the Emergency Response Plan, the Risk Management Plan, etc. Copies of the frozen manuals should be retained until the investigation and all litigation has ended.
 - Pipeline maps, schematics, etc. of the affected area.
 - Records of PHMSA audits.
 - Personnel Records. Personnel records for anyone whose performance cannot be discounted as a contributive factor should be identified and secured, including training records and all records showing such personnel are operator-qualified.
 - Company email messages that may be pertinent to the event.
 - Developing a timeline of incident recognition and response is key. Personnel should be cognizant of this and calls and texts should be reviewed and saved.
- Other documents that may be requested include public awareness materials provided to the public, appropriate government organizations, and excavators (bill stuffers, brochures, announcement flyers for classes/meetings, website materials, briefing materials, meeting notices, etc.) regarding the one-call notification system, hazards associated with gas leaks, indications a release has occurred, steps to take in the event of a release, or procedures for reporting gas releases. The NTSB might even request mailing list records for such items.
- Upon demand by the NTSB, the pipeline operator must "permit an NTSB investigator to inspect, photograph, or copy" any pertinent records for the purpose of investigating an accident." See 49 C.F.R. § 831.9(a)(4). Use of an FTP site is a good idea for use as a central repository that can be accessed remotely by the NTSB as well as by the company's NTSB team. The central repository should also help the company keep track of what has been produced to the Board and should also assist with the tracking and recognition of remaining document requests.
- The pipeline operator should always retain the original records. There is no requirement that original records be given to the NTSB.
- The pipeline operator should create and maintain a document transmittal log that includes, at a minimum, the following fields: document title or description, date of request, requested by, date delivered, person delivered to, and number of pages.
- Documents that are produced to the NTSB should generally be stamped "Trade Secret and/or Confidential Commercial Information" and/or "Sensitive Security Information" to ensure that proprietary information and SSI are protected. It is best to err on the side of marking documents confidential since the confidential designation can always be retracted at a later date. See 49 C.F.R. § 831.6(c).

- 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 additional government scrutiny. See 49 C.F.R. § 831.11(a)(4).
- Failure to preserve key documents also could constitute spoliation of evidence in any civil litigation or criminal investigation that may ensue. Depending on the jurisdiction, spoliation 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 as compensation for any loss of rights as the result of the spoliation; or d) other court sanctions.
- Access to the pipeline operator's records should be limited to NTSB personnel, persons authorized by the NTSB to participate in the investigation, and legal representatives of the company.
- **Brief All Personnel Involved in the Investigation on Legal Ground Rules**
 - Discussing the accident.
 - NTSB. No one should give an impromptu interview to the NTSB. All such interviews should be arranged through the pipeline operator's Party Coordinator to the NTSB. Counsel should be present for all employee interviews, which is a right provided by NTSB regulations. See 49 C.F.R. § 831.7(a). If anyone observes an unapproved NTSB interview, he or she should intervene to stop the interview and reschedule it for a later time.
 - Press. All press contacts and all requests for information should be directed to the corporate communications department or some other person or department designated to be the primary press contact. You should emphasize corporate policy on contacts with the press, which typically requires employees to refer reporters to a particular person or department.
 - Law Enforcement. Be mindful that it is illegal to instruct employees not to speak with law enforcement officials. Employees, however, should be urged to coordinate interviews with the pipeline operator's in-house or outside legal counsel, in the event the employees do choose to speak with law enforcement.
 - Employee Communications. All employee communications should be made through normal company channels. It should be assumed that all communications, even those to be distributed internally, will be made public. The rules for public disclosures should apply.
 - Cause of Accident and Admission of Liability. Under no circumstances should an employee speculate about the cause of an accident or admit liability or wrongdoing on the part of the company or any employee.
 - Release of Documents.
 - No documents should be given to anyone, including the NTSB and PHMSA, until they have been copied, cataloged and cleared through legal counsel.
 - All documents provided to the NTSB should be accompanied by a cover letter or email. Any such transmissions should be cleared with general counsel and outside counsel.
 - Company documents should be considered confidential and proprietary unless and until legal counsel determines otherwise. Documents provided to the NTSB should generally be stamped or watermarked "confidential" on every page to avoid public disclosure and protect proprietary data.
 - Signing Things.
 - Under no circumstances should a company employee sign anything without approval of counsel. This is particularly important for personnel participating in the NTSB investigation. For example, NTSB field notes that are incomplete, inaccurate and misleading are frequently

signed by employees who feel pressured by the NTSB to sign them. This can cause great difficulties in any ensuing civil litigation and criminal investigations.

- Nature of the NTSB Process.
 - Employees who participate in the investigation should be warned that other parties to the investigation have interests that differ from and often conflict with the pipeline operator's interests.
 - Although individual pipeline operators are infrequent participants in accident investigations, PHMSA, and some state regulators, have substantial experience in accident investigations and therefore know the NTSB investigators and the NTSB process. As such, these parties can manipulate the investigation by suggesting certain areas of inquiry, downplaying certain areas, and otherwise providing information and analysis that is slanted to serve their interests. For example, PHMSA might defend its regulations by alleging that adherence to regulations would have prevented the accident or that the operator committed a mistake that regulation could not have addressed. The pipeline operator's representatives on the investigation team should be made aware of this fact and be ready to intervene if something is being improperly driven in a direction that could have a negative impact on the company.
 - 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.
- Potential for Criminal Investigation.
 - Everything that is developed in an NTSB investigation has potential to be used in a criminal prosecution of both the company and its employees. This makes it critically important that those involved in the investigation follow these guidelines and remain in close communication with counsel.
 - The standard for criminal negligence is similar to the civil standard of gross negligence and risk of prosecution can arise from circumstances little worse than simple negligence.
 - 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. 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.
- **File Report with PHMSA**
 - An incident report must be completed and filed with PHMSA within 30 days after an incident if the event caused death, personal injury requiring hospitalization, \$50,000 or more in property damage, or involved unintentional gas loss of 3 million cubic feet or more, resulted in an emergency shutdown of an LNG facility, or was otherwise significant in the judgment of the operator. See 49 C.F.R. §§ 191.9 and 191.15.
 - Compliance with this requirement is discussed further in Chapter 11 of this Handbook.
- **Contact Government Affairs Personnel**
 - In the aftermath of an accident, state or federal legislators might announce hearings or take other action affecting the company. Reaching out to government affairs contacts can help the company stay informed of these actions.
- **Ongoing Investigation After Field Phase Completed**

After the Board's field interviews and site investigation is completed and the accident site is released to the company, the NTSB investigation will continue. Significant milestones are as follows:

- Release of Preliminary Accident Report within 30 Days
 - Although this report is usually brief and does not establish probable cause, it nonetheless may be important from a public relations standpoint. The decision as to whether to respond publicly to the report's release and, if so, how to respond consistent with the Board's rules, should be made carefully and with advice of counsel.
- Draft Group Reports will be Circulated
 - Draft reports from the groups involved in the field phase of the NTSB's investigation are often circulated to the parties in the first month or two following an accident. These draft reports are not released publicly, so if new facts pertaining to the accident are set forth in the draft report, the parties are not permitted to re-disclose these facts without the NTSB's prior consent.
- Materials Testing
 - Following a pipeline accident, relevant segments of pipe and pipeline components will be shipped to the NTSB's Materials Lab for testing. Due to the lab's workload, the testing and preparation of draft reports might be significantly delayed.
- Ongoing Documents Requests
- Potential Requests for Further Interviews
- NTSB Public Investigative Hearing (49 C.F.R. Part 845, Subpart A)
 - If the NTSB decides to hold an investigative hearing, employees of the company will be witnesses at the hearing. Preparation of these witnesses will be critical.
 - Although counsel should be present at the party table, the party coordinator (who cannot be an attorney) must be prepared to ask questions of witnesses to help elicit facts countering any inaccurate/unfair portrayal of the company. Counsel can help prepare the party coordinator in advance for this role and can assist him/her as needed during the hearing.
 - Coordination of public relations before, during and after the hearing will also be important.
- Party Submissions
 - The parties will be asked to provide the Board with submissions setting forth the party's view of the relevant facts and the probable and contributing causes of the accident. 49 C.F.R. § 845.13.
- Sunshine Hearing
 - The Board will meet publicly to discuss and decide upon their findings, conclusions and recommendations.
- **Identify Victims**
- **Identify contacts for support functions**
 - HR
 - Payroll
 - Benefits
 - Communications
 - Employee Assistance Program (EAP) – Get name for direct contact by victims' families

2. Practical Considerations for Emergency Response

The most successful emergency response is thoroughly planned and regularly practiced. Review your emergency response manual and procedures to ensure you have considered the following:

- What types of events trigger a response, how will personnel be alerted that a defined event has occurred, who will coordinate the response, and who will respond?
 - Create a list of key persons and their cell phone numbers. Include both company employees and outside contacts such as PHMSA, NTSB, the National Response Center, TSA, FBI, your state regulator for the state in which the accident occurred, outside counsel, insurers, etc.
 - A senior manager, probably from gas control, should be tasked with ensuring that all relevant personnel are promptly notified and for coordinating the emergency response. The manual should specify who will assume the role in the event the senior manager is unable to perform it. Further alternates should be identified, to ensure this role can always be performed regardless of the personnel working at any given time.
 - Knowing where your personnel are located and reaching them promptly is critical for achieving a successful response. Use of GPS tracking devices on vehicles can help you locate personnel promptly.
- What are the notification and response procedures?
- Who is on the Incident Response Team? (Consideration should probably be given for one or more representatives from each of the following: Integrity Management, Communications, Executive, Human Resources, Legal, Health and Safety, Environment, and Security). Who are the alternates?
- What are the duties of the members of the Team?
- Do all areas of operations have adequate cell coverage? If not, what is the backup system of communication that will be used? Satellite phones? Walkie-talkies?
- Is the event a terrorist act? If so, are the communications secure?
- What safety and other information will be provided to outside callers?
- What procedures are in place for each type of substance that might be released?
- What procedures will be followed in the event of injuries or deaths?
- Who are the relevant local first responders, and how will they be contacted and who will contact them?
- What instructions are provided regarding speaking with the media?
- Does the designated emergency response center / conference room have conference call capability and the proper numbers and instructions for operation? Is it routinely checked to ensure there are no technical issues in the event of an emergency?
- Is the manual reviewed on a regular basis to ensure all contact information is accurate and up to date?

3. Media Relations at a Major Pipeline Accident

Pipeline Operators and the NTSB

The NTSB has media relations guidelines for major aviation accidents which sets forth the policy of the NTSB. This document is a slightly modified version of the aviation accident guidelines published by the NTSB. As such, this document reflects the perspective of the Board and, where practical, the original language of the Board's guidelines is reprinted verbatim. We have prepared this document to show how the Board's policies apply to pipeline accidents.

If a pipeline operator experiences an accident involving fatalities, it will be confronted with many public relations challenges. This document sets forth the Board's philosophy and procedures in the hours and days immediately following a major accident for the purpose of providing guidance about parameters established by Safety Board procedures that an affected operator, as a party to the investigation, has agreed to follow.

The Safety Board understands and appreciates the multiple public affairs responsibilities that the operator faces when a major accident occurs. It is the policy of the Safety Board to work cooperatively with public relations representatives. However, it should be understood that the NTSB public affairs staff are few and until such time as a routine working relationship is established on scene it would benefit the operator's representatives to seek out Safety Board public affairs staff for information, guidance and coordination.

Congress created the National Transportation Safety Board in 1967, as an independent entity within the U.S. Department of Transportation, charging it with, among other things, investigating pipeline accidents in the United States. In addition to determining probable cause, the Board issues safety recommendations in an effort to prevent future accidents. With the enactment of the Independent Safety Board Act of 1974, the NTSB was established as an entirely independent agency, not part of the Department of Transportation, and with no organizational connection to the Pipeline and Hazardous Materials Safety Administration (PHMSA).

For more than 30 years the Board has conducted investigations under a party system, using experts from other agencies and organizations to provide expertise it does not or may not possess. All parties are selected by the NTSB based on the Board's needs for that particular investigation. Generally, some or all of the following groups will be parties to an investigation: the pipeline operator, PHMSA, the state regulator, and the local and/or state agencies that provided emergency response. Additional parties may be added as needed.

Upon being notified of a major accident, the Board dispatches a "Go Team" from Washington with the goal of arriving on site that day. The team conducts an on-site investigation typically lasting anywhere from 4 to 10 days. Sometimes a public hearing is held, which will usually be at the NTSB's hearing facility in Washington, D.C. (usually about 6 months later), and the Board's final report is typically issued about one year after the accident. Parties will be afforded the opportunity to provide the Safety Board with their findings, conclusions, and analysis of the events of the accident, although they will not participate in developing the NTSB's analysis or probable cause determination. Throughout this period, press and public interest can be intense. It is important to know what areas of inquiry are appropriately answered by the pipeline operator, and which are to be answered by the Safety Board. A more detailed account follows.

The First Few Hours

Representatives of the Board's Office of Safety Recommendations and Communications always accompany the Go Team. This office has an answering machine that during non-duty (evening and weekend) hours gives the home telephone number of the public affairs officer (PAO) on call. Therefore, someone can often be reached in an emergency.

Safety Board family support personnel might also travel to the accident scene. They facilitate and integrate the resources of the federal government and other organizations to support the activities and efforts of the local and state government and the operator to meet the needs of victims and their families.

Operator's Public Affairs Response

When an operator has been involved in an accident, we encourage one of its public relations representatives to call the NTSB's Media Relations Office at (202) 314-6100. If the office is closed, the answering machine during the evening and on weekends will have the name and home number of the PAO on call; this individual will likely be the

Board's primary press officer at the scene. A Safety Board PAO will attempt to contact a public relations representative from the company in those initial hours after an accident.

The Go-Team

The Go-Team could consist of as many as a dozen or more NTSB investigators. The Investigator-in-Charge (IIC), a career employee of the Safety Board, manages the investigation. The investigative team is made up of NTSB investigators who are experts in various disciplines. Each of these investigators serves as a group chairman with representatives from the appropriate parties, including the operator, assigned to his or her group. Typically, groups are formed on scene in all or some of the following disciplines: Operations, Survival Factors, Human Performance, Metallurgy, and Integrity Management.

In addition to the investigative teams, the NTSB group is also made up of support teams covering media relations and family affairs. Press officers are dispatched to accompany Go-Teams, sometimes with a Board Member who serves as principal spokesperson. The IIC can also fulfill that responsibility. Safety Board legal officers may also provide support.

There are five Members of the National Transportation Safety Board, nominated by the President and confirmed by the Senate to serve five-year non-concurrent terms. The President also nominates a Board Member to serve a two-year term as Chairman, subject to Senate confirmation, and designates another Board Member to serve as Vice Chairman for a two-year term. The Members serve on Go-Teams on a rotating basis and accompany the teams to serve as principal spokespersons for the investigation while on scene. It is the five Board Members who, under law, will eventually analyze the factual information collected by the investigators to determine probable cause and issue safety recommendations.

At the Accident Scene

The Safety Board immediately establishes a command post as close to the accident scene as possible, most often in a hotel. Press telephones are installed and those numbers are publicized as soon as they are known.

Once the Go-Team arrives on scene, the Board holds an organizational meeting during which parties are designated and the investigative groups are defined. Every evening, a progress meeting will be held. Media relations representatives from the parties, attorneys and news media are not permitted in these meetings. The operator's party representative (known as the coordinator) should brief public relations staff on the progress of the investigation, but PR representatives should not hesitate to arrange to meet with NTSB PAOs on-scene on a regular basis. The initial meeting should be held as soon after the Go Team's arrival as possible.

It is during the organizational meeting that the parties agree to follow the Board's procedures, part of which affects operator PR staff. The IIC's standard prepared opening statement contains the following paragraph:

"The Safety Board will disseminate to the public all information regarding the accident [investigation], either through our Board Member, public affairs officer, or me. We will hold regular briefings to the press. Please refrain from discussing the accident [investigation] in public, or giving information about it to the press. Any violation of this request will be considered a serious infraction of Board rules."

This rule protects everyone. Typically, the NTSB conducts press briefings during the day and at night following the progress meeting. Only factual information – that all the parties have heard – is released. The NTSB does not speculate or give out unverified information. With all parties deferring to the Board to release information on the investigation, the team speaks in a coordinated, consistent and orderly manner. Through this procedure, competition for "spin" is thus minimized, and the maximum opportunity for coordination and cooperation among the parties is maintained.

The Board has no objection if the operator sends a media relations representative to the accident site. In fact, because there are many questions the press asks that we cannot or will not comment upon (see below), the Board encourages operators to send public relations staff to the scene, keeping in mind the rules of participation. If the operator does send press representatives to the scene, we encourage that person to make contact as soon as possible with the NTSB PAO so that formal communication lines are established. It is the goal of the NTSB not to "blind side" anyone and to work cooperatively with the operator within the established guidelines. This is facilitated by regular discussions during the on-scene phase.

Access to the accident site is controlled by the NTSB. At a time deemed appropriate by the IIC, the press is usually escorted to a site close to the wreckage, either in total or represented by a pool.

What an operator can do

The Safety Board is cognizant of the increasing pressures all of us are subjected to because of the changed nature of our news media. We do not wish to prevent a company from assuring its customers, employees and the general public of their concern for the victims and their commitment to pipeline safety.

The Board intends to give company spokespersons latitude to meet the press and disseminate information, provided that such information does not interfere with the goals of our investigation and does not damage the integrity of the party process. Therefore, a pipeline operator should stay away from any judgments about the significance of issues, and nothing that is released should suggest that another party (or other entity) may have played a role in causing the accident. Remember, one benefit of our procedures is to prevent a party from offending – inadvertently or otherwise – another party and provoking a reaction in kind. When in doubt as to what can be shared publicly, the company should seek advice from the IIC.

Admittedly, this is not a matter that lends itself to plain black and white assessments or rules. There is some factual information that is obviously related to the investigation that nevertheless can be released without compromising the integrity of the investigation or damaging the party system. For example, the date the pipe was constructed is a fact the NTSB will need for its investigation, yet its revelation by the operator in the hours after the accident will not harm the investigation in any way and is therefore not prohibited under our regulations. Similarly, the release of the last date of inspection of a pipeline or a description of the pipeline's integrity management program would be permitted, but a statement like "This pipeline has no maintenance issues relevant to this accident" would clearly be prohibited because it calls for a judgment that is not the operator's to make; that matter will be a subject of the investigation.

What can be said

In considering what would be appropriate to say, an operator can start off with the concept that anything that could have been said the day before the accident can be said the day of the accident and thereafter.

The accident:

- Only general circumstances of the accident should be discussed; for example, what pipeline was affected, where the rupture occurred, what the operator did to identify and stop the leak, etc.

The company:

- In general terms, factual information about your corporate philosophy and structure, and practices on training, maintenance and operations;
- Company size, number of employees;
- History (including previous accidents); and
- Business alliances.

Family assistance:

- Virtually anything connected with an operator's efforts to support injured persons and affected family is well within the operator's purview for post-accident press conferences at any time.

What the operator shouldn't say

The company's employees:

- Actions of employees leading up to the accident;
- Any relationship between training and the accident;
- Any speculation about what the employees might have done or not done during the accident sequence or to prevent the accident; or
- Statements that suggest the unlikelihood of the employees doing something wrong, or that implicitly or explicitly point fingers at others.

The accident:

- What the investigation will focus on or how it will be structured;
- Descriptions about how the pipe failed;
- Speculation on the role elements like earth movement or third party excavations might have played in the accident; or
- Judgments about what the issues in the investigation are going to be and nothing that implicitly or explicitly points the finger at another potential party to the investigation.

Family Assistance:

Avoid commenting on areas that the medical examiner or coroner should officially address. Such areas include:

- Identification procedures and length of time it may take to complete all positive identifications;
- The search and recovery process; and
- Condition of recovered remains.

It is also important to let the medical examiner or coroner officially release the names of the fatalities that have been positively identified. Once this information is released by the medical examiner/coroner, the operator is free to discuss this with the media.

While the Safety Board does not officially prohibit parties from providing spokespersons on morning or evening news and interview programs, as the investigation progresses it generally will be less and less appropriate for an operator to do so.

Family Assistance: The operator and the NTSB³

At all times following an accident – both on-scene and in the months that follow – public discussion by the operator about what it is doing in the area of family affairs is appropriate. It is the operator's prerogative to determine how often and in what manner it wishes to brief the public on its efforts to support the survivors and the families of those involved.

While the operator will always be the primary source of public information on these matters, the Safety Board's family assistance officer will probably be asked to disseminate information on the Board's interaction with the operator and other supporting organizations, the medical examiner and the families.

After the On-Scene Investigation

When the Board shuts down its on-scene press activity the press officers return to Washington and issue any information from there. Several days after that, the investigators themselves come home.

There are a few significant milestones during the course of the investigation. In an effort to collect additional information from sworn witnesses, the Board sometimes holds a public hearing (or, less often, staff-conducted depositions). The hearing is typically held around six to eight months after the accident. The factual reports from the various investigative groups are released on the first day of the hearing. If no hearing is held, those documents are released in a public docket from the Board's Washington headquarters, again about six months after the accident.

Toward the end of the process, parties have an opportunity to submit to the Board (and provide to all other parties) their proposed conclusions, findings of probable cause and safety recommendations. There are no restrictions on public release of these documents, although traditionally parties have tended not to discuss them until the time of the Board meeting. One or two weeks prior to the Board meeting, the pipeline operator should make every effort to meet with each individual Board Member to raise key issues and discuss matters addressed in the party submission.

The Board Members discuss and vote upon a final report on the investigation – the draft of which is prepared by NTSB staff – in a public "Sunshine" meeting (so named after the Government in the Sunshine Act). The final report is the vehicle through which the Board determines the probable cause of the accident and announces its safety

³ Although pipeline operators, unlike airlines, do not have statutory family assistance obligations, it is certainly appropriate for pipeline operators to reach out to survivors, family members of decedents, and the affected community.

recommendations (although recommendations can be issued at any time during the investigation). An abstract of the conclusions, probable cause and safety recommendations is issued within an hour of the end of the meeting and placed on the Board's website. The full report will appear on the website some weeks after the meeting, with printed copies available a few weeks after that.

During all of these post-accident-scene events, an operator will be asked by the media to comment on the information released. As a party to the investigation, the operator cannot speculate as to the cause of the accident or offer analysis of the factual information. Keep in mind at all times the guidance in the NTSB's regulations, 49 C.F.R. § 831.13(c), "Provision and dissemination of investigative information:"

(c) Release of information. Parties are prohibited from releasing information obtained during an investigation at any time prior to the NTSB's public release of information unless the release is consistent with the following criteria:

(1) Information released at the scene of an accident -

(i) Is limited to factual information concerning the accident and the investigation released in coordination with the IIC; and

(ii) Will be made by the Board Member present at the scene as the official spokesperson for the NTSB. Additionally, the IIC or representatives from the NTSB's Office of Safety Recommendations and Communications may release information to media representatives, family members, and elected officials as deemed appropriate.

(2) The release of information described in paragraph (a)(1) of this section by the NTSB at the scene of an accident does not authorize any party to the investigation to comment publicly on the information during the course of the investigation. Any dissemination of factual information by a party may be made only as provided in this section.

(3) A party may disseminate information related to an investigation to those individuals within its organization who have a need to know for the purpose of addressing a safety issue including preventive or remedial actions. If such internal release of information results in a planned safety improvement, the party must inform the IIC of such planned improvement in a timely manner before it is implemented.

(4) Any other release of factual information related to the investigation must be approved by the IIC prior to release, including:

(i) Dissemination within a party organization, for a purpose not described in paragraph (b)(3) of this section;

(ii) Documents that provide information concerning the investigation, such as written directives or informational updates for release to employees or customers of a party;

(iii) Information related to the investigation released to an organization or person that is not a party to the investigation



4. Tips for Compliance with NTSB Communications Rules

Communications that should be reviewed by counsel:

- Company presentations regarding the incident, including presentations to Boards of Directors, field presentations, and “lessons learned” presentations.
- Communications to PHMSA or state regulators.
- Communications with contractors or employees regarding a pipeline’s return to service.

Avoid:

- The “third rail” of NTSB communications – statements about the cause of an accident.
- Any release of findings or facts regarding the accident unless they have already been released publicly by the Board. Remember:
- Circulation of findings and other material by the NTSB to the parties in the investigation does not constitute a public release of information. Information released only to the parties cannot be re-disclosed without the advance permission of the Board.
- If the company wishes to obtain the Board’s permission, it should do so in writing.

Steps to Take:

- Have communications reviewed by legal counsel.
- Make appropriate notifications to the NTSB and requests for pre-clearance.
- Structure appropriate non-disclosure agreements with contractors and employees who are not “briefed in” to the NTSB investigation.
- Watch for over-reaching by NTSB and use counsel whenever the NTSB’s position on a matter impedes ongoing safety and/or regulatory efforts and/or normal business operations.



5. NTSB Document Collection/Production

Collecting and producing documents for the NTSB can be one of the most difficult efforts a party will undertake immediately following an accident. It is also an area where mistakes are frequently made. The NTSB will apply heavy pressure for prompt production of key documents, sometimes with multiple requests to multiple party employees. Notwithstanding this urgency, it is critical that you control and protect the flow of documents. The key is to have a single point of contact for documents and establish a system by which documents can quickly be found, logged, digitized, marked Confidential and produced to the NTSB. All requests for documents should flow through a single person and all group participants should be instructed that they are not to produce anything to the NTSB directly.

The person in charge of documents should direct the collection of key documents, assemble the documents, log them into a production log, stamp or watermark them as confidential and arrange for their production to the NTSB. If possible, all documents should be digitized. Once that is done, a PDF watermark can be applied identifying documents that should not be released by the NTSB to the public. Regulations require that each page of a confidential document be so designated. If a confidential document is produced in hard copy, each page of the document must be stamped confidential. While a generic "Confidential" stamp will suffice, we recommend a stamp or watermark that says:

**Trade Secret and/or
Confidential Commercial Information
[Company Name]**

The standard for whether a document should be designated as confidential is whether it is "of a kind that would customarily not be released to the public." *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871 (D.C. Cir. 1992 (en banc)). This is the most liberal of the court rulings on this topic. While the NTSB may later argue that another standard applies, the use of this standard in the beginning will prevent you from producing documents that may be protected from public disclosure under federal law. Once designated as confidential, the NTSB must advise you that it wishes to disclose the document publicly. When in doubt, it is better to designate a document as confidential. You can always waive that designation later. If a document is not readily available to the public, we recommend that you designate it as confidential.

Quick Summary:

- Make one person responsible for producing all documents to NTSB
- If a document is not readily available to the public, mark each page confidential
- If possible, digitize all documents before producing them
- Log all documents before producing to NTSB and keep a copy

IDENTIFYING AND ISOLATING KEY DOCUMENTS

The NTSB investigators will typically request the documents listed below. Not all of these documents will be relevant to every accident, but you should immediately isolate all of these documents to the extent you believe they may be relevant to your accident.

OPERATIONS

1. Emergency plan
2. Excavation reports
3. Procedure Manual for Operations, Maintenance and Emergencies
4. Org charts
5. Drug and alcohol testing results
6. Odorization records
7. Personnel records for anyone whose performance cannot be discounted as a contributive factor
8. Training records and certifications
9. Public awareness materials

INTEGRITY MANAGEMENT

1. Construction records
2. Corrosion records
3. HCA analysis
4. Work orders
5. Leak and failure history
6. In-line inspection reports
7. Schematics
8. Integrity Management Plan
9. Risk Management Plan
10. Seismic or soil studies
11. PHMSA audits
12. Integrity assessment plans
13. PHMSA monthly reports

CONTROL ROOM RECORDS

1. SCADA screenshots
2. Monitoring Center logs and notes
3. Gas Control logs and notes
4. SCADA data
5. SCADA screen layouts
6. SCADA parameters/set points
7. SCADA – system history
8. Control Room Management Plan

MAPS & DRAWINGS

1. Alignment sheets
2. Valve maps
3. Line diagrams
4. UTM maps
5. Line markers

SITE INVESTIGATION

1. Photos of incident site
2. Notes of observations
3. Diagrams of incident site
4. Field measurements at incident site

TIMELINES

1. Timeline of pipeline operator's response to incident

COMMUNICATIONS

1. Phone records – calls
2. Phone records – text messages
3. Emails
4. Correspondence/mailings

Families & Employees

6. Employee Work-Related Death Response

Immediate Company Actions

Note: The steps on this first page should be completed within minutes. Families should be contacted before the news breaks, if at all possible.

- Identify Victims
- Identify contacts for support functions
 - HR
 - Payroll
 - Benefits
 - Communications
 - Employee Assistance Program (EAP) – Get name for direct contact by victims' families
- Identify immediate family members of employees from personnel files or database
 - With dependents:
 - Names
 - Address(es)
 - Phone number(s)
 - Social security number(s)
 - Life Insurance Beneficiary(ies) – if other than spouse
 - Emergency Contact Information – if other than spouse
 - Without dependents:
 - Emergency Contact Information
 - Beneficiary(ies)
 - Name(s)
 - Address(es)
 - Phone number(s)
 - Social Security number(s)
 - Find out if individual had pets and/or rented an apartment
 - If individual rented, find out if he/she had a roommate
- Company representative should notify families in person, if possible. If not, by phone
 - Explain the situation
 - Arrange for visits to employees' homes
 - Determine and communicate the Company's immediate response for pay and key benefits, such as:
 - Pay continuation for X days
 - Continued medical plan costs
- Contact Benefits Department to identify all benefits applicable to each victim
- Company representative should notify roommate and/or landlord by phone
- Confirm that victims with no one residing with them had no pets needing care

- If they had pets, ask surviving family members or friends about adoption or contact the local humane society to assist with adoption
- HR Representative and/or other Company Representative to meet at the family's home as soon as possible. The following should be communicated and provided to the family in writing or obtained as applicable. (Note: Family will not be able to, and should not be expected to, absorb any of the information provided during this visit.)
 - Provide name and number of direct contact at EAP
 - Provide name and number of company contact and/or vendor contact for
 - Benefits questions
 - Workers' Compensation
 - Social Security Administration
 - Medical carrier
 - Dental carrier
 - Rx carrier
 - Disability carrier (if applicable)
 - Life insurance carrier
 - Inform who will contact them to review benefits available and that they will be assisted in pursuing all benefits available. (Note: Do not try to review benefits at this time unless they have been double-checked and confirmed.)
 - After determining what the Company will provide, inform of company's decision to pay for other assistance. Examples include:
 - Funeral Expenses
 - Transport of remains, if necessary
 - Transportation of immediate family members, if necessary (e.g. bring parents to be with surviving spouse and children)
 - If necessary, family member(s) to site of accident
 - After determining what the Company will provide for surviving families with children, inform the families. Examples may include:
 - Dependent Care will be provided, as necessary, up to X days
 - Housekeeping and yard care – will be provided up to X days
 - Need for relocation – if Employee had been relocated to current location, will provide relocation back to original location for:
 - ◆ Household Goods
 - ◆ Lease Break
 - ◆ Sale of house
 - ◆ Purchase of New House
 - Determine if Direct Deposit should be stopped for employee (This would apply if the family did not have a joint checking account or if there are no surviving family members)
 - If Direct Deposit is to be stopped, determine to whom paychecks should be made payable
- Contact payroll administrator to stop deductions and/or make appropriate changes to pay and benefits
- Arrange overnight delivery of paycheck(s), if applicable
- If family members do not have spare keys for victims' cars, contact car dealership to obtain key blank
- If victim has no surviving family members, determine where car should be deposited and contact car dealership for key blank

- Contact EAP to arrange work-site briefings as needed and get direct contact names at the EAP for victims' families
- At work place:
 - Secure employees' work area
 - Allow nothing to be moved until wishes of survivors are determined
 - Notify co-workers of situation
 - Assess need for on-site debriefings
 - Schedule debriefings, as needed
 - Debrief supervisors and/or other workers on monitoring co-workers
 - Observe co-workers for difficulty coping
 - Arrange for memory books for co-workers to sign and/or post pictures, poems, thoughts, etc. (give these to the survivors after 90 days)
- At accident site, if family members wish to visit:
 - Flowers for family members (be cognizant of individuals' religious traditions)
 - Car service
 - Hotel, if necessary
 - Meals charged to hotel bill
 - \$X spending money/family for meals and miscellaneous expenses
 - Request no receipts or refund of unspent cash
- Contact local Social Security Office to assist families in initiating claims
- Review insurance policies, benefits and Company policies that may be applicable:
 - Crisis Response
 - General Liability
 - Workers' Compensation
 - Social Security
 - Basic Life
 - Supplemental Life
 - Accidental Death and Dismemberment
 - Disability (if applicable)
 - Medical
 - Dental
 - 401(k)
 - Pension Plan
 - Employee Stock Purchase Plan
 - Stock Incentives
 - Employee Discount Programs and other Privileges
 - Company Car
 - Car Allowance
 - Financial Planning Assistance
- Provide a summary sheet for each family within a week after the accident. Review in detail after 2 weeks
- Find out how remains will be returned and to where
- Determine what support will be needed when remains are returned (i.e. counselors, family members, etc.)
- Determine need for and offer to provide independent financial planning for survivors, either through EAP or other service
- Determine appropriateness of prepaid college fund for surviving children and Company's willingness to provide

- Continue weekly contact with families for a period of time, post incident
- Set up contact schedule for families for set periods (e.g. 3, 6 & 12 months out as well as birthdays, anniversaries, Christmas and important to each specific family)
- As soon as personal effects are released, engage an independent 3rd party to clean up the items and determine what belongs to whom, if possible. Items that cannot be tied to an individual should be catalogued for families to identify.
- Additional suggested services/activities for consideration:
 - Set up worksheets of all benefits available for each family. Track progress of benefit payments to ensure timeliness and accuracy.
 - Establish memorial funds
 - Consider establishing distribution formula for contributions to victim memorials that are not specific to an individual
 - Physical memorials
 - Flowers provided for funerals/memorial services
 - Hold memorial service at work place
 - Consider sending small gifts to those who helped, along with thank you notes
 - Thank you notes to those who assisted – all should be sent to specific individuals within the organization, if possible
 - EAP
 - Car dealership
 - Employees who assisted
 - Rescue Squad
 - Fire Department
 - Red Cross
 - Airlines
 - Hotel
 - Police
 - NTSB contact
 - Landowner
 - BMG – personal effects contractor
 - Contributors to memorial funds
- Additional Company Follow-Up Action to Consider:
 - Memorial service on anniversary of event to provide closure to period of mourning
 - Company participation in events with proceeds going to memorial funds (e.g. 10k runs, having friends get sponsors)



7. Response Team Wellness Management – Quick Reference

What is Well-being and Why is it Important?

Well-being is a combination of mind, body and spirit which, when healthy and in balance, allow us to live our lives as we choose. It is how we manage our feelings and behaviors; how we make decisions; and how we interact with others.

Well-being is important because it is impacted during times of great stress, such as responding to a disaster. The hours you will work and what you do will be different from your normal routine. It will be easy to get “out of balance,” which could negatively impact you, your relationships, and your health.

Awareness of the causes and signs of stress, knowing coping strategies, and where to get help during a disaster, can keep you “in-balance.” It won’t make the response easy or stress-free, but it will allow you to cope in a positive and healthy manner. This is important as studies show that employees who do not get help to deal with stress following a disaster often leave their employment within one or two years.

“What should I do?” Use the Coping Strategies Self-Assessment (page 3), understand stress and how it can affect you, manage your well-being during an investigation, and continue to monitor your well-being after the investigation is complete.

Common Signs of Stress

- Emotional/behavioral signs include:
 - Depression, fear
 - Changes in life routines such as sleeping, eating, exercise
 - Increased use of alcohol, cigarettes, or drugs
- Physical signs include:
 - Grinding your teeth
 - Headaches, neck aches
 - Stomach disorders
 - Muscle tension
 - Twitching

What You Can Do About It

- Develop positive coping strategies now
 - Fill out a Coping Strategies Self-Assessment and set a goal to raise your score
 - Maintain a supportive group of friends to socialize with regularly
 - Pursue a hobby or a sport you enjoy
 - Laugh frequently
 - Limit alcohol, sugar, caffeine, tobacco
- During and following a catastrophic response
 - Call home
 - Continue your regular exercise program
 - Try to keep your regular sleep schedule
 - Use Employee Assistance Program, or critical incident response volunteers
 - Do not make big life changes or major decisions during the investigation or for some time after a major event
 - Designate a friend or family member to assist your family when needed
 - If troubling thoughts about the event continue unabated after 30-45 days, seek help

COPING STRATEGIES SELF-ASSESSMENT

Directions: There are many ways to cope with the stress in your life. Some techniques are more effective than others are. The purpose of this checklist is to help you assess how effectively you are currently coping. Upon completing this checklist, you will have identified many of the ways you choose to cope, and, by adding up the numbers, you will see if your method is helping you or hurting you.

Scores are all or nothing (ex. 0 or 10 points). When you have completed & scored all 16 items, tally your final score.

- ___ Give yourself 10 points if you feel you have a supportive family.
- ___ Give yourself 10 points if you actively pursue a hobby.
- ___ Give yourself 10 points if you belong to a group, outside of work, that meets at least once a month (other than your family).
- ___ Give yourself 15 points if you are within five pounds of your "ideal" bodyweight, considering your height and bone structure.
- ___ Give yourself 15 points if you practice some form of "deep relaxation" at least three times a week. Deep relaxation includes meditation, imagery, yoga, etc.
- ___ Give yourself 5 points for each time you exercise 30 minutes or longer during the course of an average week.
- ___ Give yourself 5 points for each nutritionally balanced and wholesome meal you consume during the course of an average day.
- ___ Give yourself 10 points if you, on average, have no more than one caffeinated drink a day.
- ___ Give yourself 10 points if you have some place in your home that you can go to in order to relax and be by yourself.
- ___ Give yourself 10 points if you practice time management techniques in your daily life.
- ___ Subtract 10 points for each pack of cigarettes you smoke during the course of an average day.
- ___ Subtract 10 points for each day during the course of an average week you watch 3 hours or more of television or spend 3 or more hours surfing the Internet.
- ___ Subtract 10 points for each day during the course of an average week you consume any form of medication or chemical substance (including alcohol) to reduce your anxiety or calm yourself down.
- ___ Subtract 10 points for each day during the course of an average week you take any form of medication or chemical substance (including alcohol) to help you sleep.
- ___ Subtract 10 points for each evening during the course of an average week you bring work home; work that was meant to be done at your place of employment.
- ___ **TOTAL SCORE**

Scores:

- 100+** **Excellent skills for whatever life throws at you**
- 75-100** **Strong enough to handle severe stress (personal loss, financial issues, etc.)**
- 50-74** **Adequate to handle common stress (rush hour, deadlines, etc.)**
- Below 50** **Danger Zone**

THIS PAGE INTENTIONALLY LEFT BLANK

8. Insurance & Benefit Coverage Levels & Actions

- **Liability** – Review policy for
 - Eligible benefit recipients
 - Personal effects - \$ amount of coverage for:
 - Computer
 - Family heirlooms
 - Jewelry
 - Watches
 - Clothes
 - Etc.
 - Medical expenses and/or funeral, as appropriate
 - Transportation of remains

- **Crisis Response** – Review to see if this coverage is secondary to any other applicable coverage for the event
 - Dollar amount aggregate/accident
 - Executive transportation to the scene
 - Funeral expenses
 - Psychological Counseling
 - Any pre-approved expense

- **Workers' Compensation** – Need to review for applicable state(s)
 - Review for offsets
 - Dollar amount of benefit
 - Disposition of Spouse benefit upon remarriage
 - Length of dependent child benefit
 - Transportation of remains - dollar amount maximum
 - Burial Expense - dollar amount maximum

- **Social Security**
 - Lump sum death benefit
 - Monthly income benefit for spouse, if applicable, until remarriage
 - Monthly income benefit for dependents, if applicable

- **Business Travel Accident**
 - Lump sum or periodic payment of death benefit to beneficiary
 - Dollar amount of coverage
 - Minimum
 - Maximum
 - Determine any other benefit provisions

- **Basic Life Insurance**
 - Dollar amount
 - Maximum dollar amount
 - Determine how proceeds are paid (i.e. to draft account, check, etc.)

- **Supplemental Life Insurance**
 - Dollar amount
 - Maximum dollar amount

- Premium waiver may apply, if disabled
- Determine how proceeds are paid
- Determine if Spouse and Dependent coverage end as a result of the employee's death
- **Accidental Death and Dismemberment Insurance**
 - Dollar amount
 - Maximum dollar amount
 - Additional situational benefits may apply (i.e. seat belt usage)
 - Determine if benefit includes a pro-rated schedule
 - Some plans offer education and child care benefit for surviving spouse and children
- **Disability (in the event of disability)**
 - Short Term Disability
 - Long Term Disability
- **Medical**
 - COBRA coverage begins the first of the month following employee's death
 - Company may pay COBRA for 18 months following the employee's death for dependents at the time of the death (longer if other qualifying events occur or if the beneficiary becomes disabled)
- **Dental**
 - COBRA coverage begins the first of the month following employee's death
 - Company may pay COBRA for XX months following the employee's death for dependents at the time of the death
- **Vision**
 - COBRA coverage begins the first of the month following employee's death
 - Company may pay COBRA for XX months following the employee's death for dependents at the time of the death
- **401(k)**
 - Contributions cease immediately, as pay is not going to an eligible employee
 - Account transfers to beneficiary(ies)
- **Pension Plan**
 - Determine the effective date of benefit payout based on plan rules
- **Stock Incentive Plan**
 - Determine payout based on plan rules
- **Employee Discount or other privileges**
 - Determine date of discontinuation
- **Company Car**
 - Determine the process for return of the vehicle
- **Car Allowance**
 - Determine whether the car allowance will be continued

9. Your Participation in the NTSB Accident Investigation

I. GENERAL CONSIDERATIONS

- A. **The NTSB's foremost concern is safety and determining the cause of the accident.** The NTSB expects you to cooperate and assist them to the best of your abilities. The NTSB expects you to participate in all investigative activities conducted by your groups.
- B. You must also keep in mind, however, that other participants in the investigation may ultimately be your adversaries in litigation arising from the accident. Therefore, you should be very careful about what you say and do, as well as the implications of your comments and actions.
- C. Be aware that there is no legal privilege or protection for communications you have with the NTSB or other parties to the investigation. Everything you say to the NTSB or any other party and everything you do in their presence may be the subject of testimony in a court of law.
- D. Other parties to the investigation may have agendas that are motivated by litigation or business interests. You must be vigilant and challenge or call to the attention of your Party Coordinator anything that does not seem accurate or is peculiar in a way that suggests bias. That goes for draft reports, correspondence, notes, other documents and even comments made during meetings with participants in the investigation.

II. PROVIDING MATERIALS TO THE NTSB AND PHMSA

- A. All requests from the NTSB or PHMSA for records and other materials should be **reported immediately** to the Legal Department or outside counsel and to your Party Coordinator.
- B. **Only the Party Coordinator has authority** to send records and other materials concerning this accident to the NTSB.
- C. No documents, data or other material should be given to anyone, including the NTSB and PHMSA, before that material is reviewed by counsel and the Party Coordinator.
- D. If you believe information that has been requested is proprietary or may reveal business secrets, you should label it as such and bring it to the attention of your Party Coordinator before it is produced. **As a general principle, all company records are proprietary and should be stamped "CONFIDENTIAL" before being turned over to the NTSB or PHMSA.** Doing so permits the prompt disclosure of such documents without delay and tying up resources on reaching such determinations. If the agency approaches the company with a request that the designation be withdrawn for certain documents, then the company has the right to do so.
- E. Retain all original records in a safe, secure location as **only copies of documents should be produced in the investigation.** The NTSB and PHMSA are not entitled to your original records and we cannot risk losing them.
- F. Keep an accurate record of everything you provide for the NTSB and PHMSA. All materials produced should be accompanied by a cover letter signed by your Party Coordinator that lists specifically what is being provided.
- G. You should keep a separate file for materials relating to this accident investigation/litigation, with a separate folder containing copies of all materials and letters sent to the NTSB and PHMSA.
- H. Make the NTSB aware of all requests made by PHMSA and alert them to the fact that you will be responding to such requests. The NTSB has primary jurisdiction over the investigation, and doing so might lead to a reduction in duplicate requests and a better relationship with the NTSB.

III. REVIEWING AND HANDLING NTSB DOCUMENTS AND MATERIALS

- A. All materials received from the NTSB should be immediately forwarded to your Party Coordinator, who will provide copies to counsel.
- B. All draft reports, field notes and other materials circulated by the NTSB for review or comment should be provided to and discussed with counsel and your Party Coordinator before any comments are made.
- C. You should not sign any reports, documents, etc. without first discussing them with counsel.

IV. NTSB INTERVIEW PROCESS

- A. Although the choice is that of the witness, every witness should be represented by counsel during NTSB interviews. Counsel should meet with witnesses in advance to prepare witnesses for depositions.
- B. If you are interviewed and your testimony is recorded, at some point the NTSB will send the transcript for your review and ask that you sign a statement that the transcript is correct. Do not sign and return the statement until you have discussed it with counsel. You have the right to change not only misspellings and other matters of form, but also matters of substance. Errors should be corrected so the Board has accurate information. This is your only opportunity to “correct the record.”
- C. Remember – nothing in an NTSB investigation is “off the record.” The NTSB may rely upon statements made before or after an interview has officially begun or concluded. If you think of something you believe the NTSB should be aware of after your interview has concluded, raise it with counsel, as it might have to be put in context with other information provided to the NTSB.

V. CREATION OF DOCUMENTS RELATING TO THE ACCIDENT

- A. In view of the anticipated litigation, all documents created from this point forward concerning the accident (including correspondence and internal memoranda) **must be approved by the legal department** or outside counsel before being finalized and signed or sent.
- B. You should avoid writing unnecessary documents.
- C. If it is necessary to write a document, stick to factual observations and do not include your personal opinions or speculations.
- D. Be aware that all documents, including your scribbled notes, diary entries, phone messages, emails, letters, etc. will almost certainly be turned over to attorneys who are suing the company. Please take time to think about the implications of what you are writing and how it might be misconstrued in litigation.
- E. If it is necessary to prepare a document relating to the accident, especially those that deal with possible causes of the accident, responsibility, liability or recommended preventive measures, it must be reviewed by counsel in preliminary draft form. All such materials should be clearly marked “preliminary draft” and should follow the form provided in the attachment to this memorandum. **It is imperative that all personnel use the attached format when preparing documents that relate in any way to the accident.** Use of this format is necessary to preserve privileges that protect the candid discussion of legal issues within the company and between the company and its attorneys. Failure to use this format may waive that privilege and result in confidential communications being disclosed to adversaries in litigation. You should prepare direct requests for such approval to your Party Coordinator unless you are dealing directly with the legal department or outside counsel.
- F. Documents that would otherwise be privileged, but pass through too many hands, may lose their privileged status even if they are only circulated within the company. You should therefore distribute documents only through your Party Coordinator.

- G. Again, keep a separate file for all documents created that relate to this investigation.

VI. RETENTION OF RECORDS RELATING TO THE ACCIDENT

- A. **Do not destroy any documents** that existed as of the date of the accident that you believe may refer to any matter relating to this accident. We need to “freeze” two copies of all relevant manuals, and other relevant materials that are periodically updated, to preserve them as they existed on the day of the accident.
- B. You must also preserve documents created after the accident, if you believe they refer to any matter relating to this accident.

VII. SHIPPING ITEMS TO THE NTSB

- A. The following steps should be followed when shipping items to the NTSB:
 1. Release contents to NTSB and have NTSB consign for shipment.
 2. Have counsel review the documents relating to the shipment.
 3. Photograph all items prior to shipment to document their condition.
 4. Keep copies of all bills of lading and other shipping documents.
 5. Request that a company representative be present for any metallurgical or other testing of metallurgical or other pipeline parts/components.

VIII. RETURN OF PIPELINE COMPONENTS BY THE NTSB

- A. At some point, the NTSB may want to return pipeline components and other items to the company. **Do not accept any such components** without prior permission of counsel.
- B. If pipeline components are returned to the company, proper chain of custody documents must be prepared to show who had custody of the given part and to whom, when and where the part was given. Both the person giving the parts and the person accepting the parts must sign the chain of custody receipt.

**PLEASE DISTRIBUTE THIS MEMORANDUM
TO OTHER COMPANY PERSONNEL
WHO ARE WORKING WITH YOU ON THE INVESTIGATION**



Attachment

CONFIDENTIAL COMMUNICATION TO COUNSEL

To: Fox Rothschild

Attn: Morgan W. Campbell

Legal Department

Attn: _____

From: [Employee Name]

Date:

Re: Preparation For Litigation, **[describe specific topic]**

* * * **[body of proposed communication]** * * *

cc: **[Only as directed by counsel]**

[on Company letterhead]

[date]

To: Distribution List
From: [Legal Department Contact]
Subject: NTSB Investigation of _____ and Related Litigation.

The National Transportation Safety Board (NTSB) is conducting an investigation into this accident. The Company is a party to that investigation and is cooperating fully with the NTSB to determine the cause of this accident. While the NTSB investigation is supposed to proceed without regard to the possible consequences for the participants in court, both the information uncovered in the NTSB investigation and the recommendations and conclusions reached by the NTSB may have a substantial impact on the outcome of litigation against the Company as well as our business interests. This fact is not lost on other parties to this investigation, so we must be mindful of it as well.

For these reasons, we have retained the law firm of Fpx Rothschild to assist us during the NTSB investigation. They will work closely with us to protect our interests. Our primary contact is Morgan W. Campbell. His phone numbers are: office: (703) 248-7003, cell: (703) 798-6888. The Company Legal Department contacts are

Any questions about this memorandum or the legal implications of any matter relating to this accident should be directed to these contacts. In addition, we have designated _____ as our Party Coordinator to the NTSB investigation. _____ will be our primary contact with the NTSB and should be made aware of all actions you take in this investigation.

Following the instructions, guidelines and tips will assist you in participating effectively in the NTSB investigation while protecting the interests of the Company.

10. Overview of NTSB Accident Investigation Process

The NTSB has been granted statutory authority to investigate accidents occurring in a number of transportation modes, including aviation, highway, railroad, pipeline and marine. The Safety Board's structure and authority to investigate pipeline accidents is found at 49 U.S.C. §§ 1111, 1131 et seq.

As part of any accident investigation, the NTSB may order a Public Hearing if it finds that such a hearing is in the public interest. There are normally three meetings associated with a major accident investigation: the prehearing conference, the Public Hearing, and the Sunshine Meeting.

A. Prehearing Conference

The prehearing conference is an informal gathering for the purposes of: (a) outlining the procedures to be used at the formal hearing, (b) identifying issues to be investigated and exhibits to be referenced at the hearing, and (c) discussing any matters that the parties may wish to raise.

At the conference, the members of the Board of Inquiry and the Technical Panel will be introduced. The parties will be provided with a list of witnesses to be called at the formal hearing, the areas on which the witnesses will be examined, and the exhibits that will be offered into evidence. See 49 C.F.R. § 845.9. It is the obligation of the parties to advise the Chairman of the Board of Inquiry, at the prehearing conference, of any additional witnesses or exhibits which they desire to offer. If they fail to do so, they risk preclusion of the offered witness(es) or exhibit(s). See 49 C.F.R. § 845.9.

B. Hearing

The active participants at an NTSB hearing are basically divided into three categories: the members of the Board of Inquiry, the members of the Technical Panel, and the parties (with their representatives).

The Board of Inquiry is composed of high-ranking officials from the NTSB, at least one of whom is a member of the NTSB Board itself. The NTSB Board member presides over the hearing as the hearing Chairman. Although generally Board members have a fixed order of rotation in which they preside over hearings, the Chairman of the NTSB, should he/she so desire, may schedule the hearings of other accidents in such a manner that a particular hearing falls to him/her.

The other members of the Board of Inquiry, typically four to five in number, are usually Directors, Deputy Directors, or Section Chiefs of the NTSB, each having expertise in a specialized field. In recent hearings, such as the hearing for the San Bruno pipeline rupture, the five board members have sat en banc and presided as the Board of Inquiry.

Members of the Technical Panel, typically five to ten in number, are also employees of the NTSB and, while being recognized experts in particular specialties, are generally lower in rank than the members of the Board of Inquiry. The type of expertise utilized on the Technical Panel is dictated by the circumstances of the accident. Again, by way of example, in the San Bruno accident, the Panel was composed of subject matter experts in the fields of chemistry, biology/survival factors, mechanical engineering, material science, corrosion engineering, and transportation safety.

The parties themselves constitute the final category of active participants in the Board's inquiry. The chairman of the Board of Inquiry is empowered to designate as parties to the hearing those persons, agencies, companies and associations whose participation in the hearing "is deemed necessary in the public interest and whose special knowledge will contribute to the development of pertinent evidence." 49 C.F.R. § 845.6(a).

Parties must be represented by qualified technical employees, or other employees or spokespersons associated with the entity who do not occupy legal positions. No party may be associated with or represented by any person who also represents claimants or insurers. 49 C.F.R. § 845.6(b). Although no attorneys may represent the parties, counsel and other individuals of the parties' choosing may sit at the party tables and advise the party spokesperson throughout the hearing.

The hearing is not conducted as a trial. Generally the questioning of a witness is started by a single member from the Technical Panel, followed by one or more rounds of questioning by the Board of Inquiry and the party spokespersons.

Although witnesses may have counsel present and may consult counsel (49 C.F.R. § 845.10), objections are not entertained as in the traditional courtroom setting. If an attorney for a witness feels that the questioning is going too far afield, he may let his concerns be known and the presiding Board Member will determine the effect of those concerns. 49 C.F.R. § 845.11. The testimony of the witness, however, may have a significant effect on the subsequent litigation. A verbatim record is made of all testimony at the hearing and copies of the transcript are made available to the public. 49 C.F.R. § 845.14. These transcripts may be, and are, used at subsequent depositions and at trial.

The order of witnesses is roughly in accordance with the following outline: (a) the NTSB Investigator in charge of the accident will outline what has been learned and accomplished in the course of the investigation; (b) eyewitnesses to the accident, such as nearby residents, will then be called upon to recount what they witnessed; (c) first responders may testify as to their observations and actions with respect to the harm caused by the accident; and finally (d) the remaining technical witnesses will be called upon to testify as to general practices adhered to by the company or entity and to discuss any specific facts relevant to the accident. These witnesses often include, in addition to company employees, one or more PHMSA representatives to discuss pertinent regulations and regulatory history, and representatives from industry associations such as the Interstate Natural Gas Association of America, the American Petroleum Institute, and the American Gas Association to discuss industry practices. Also, a representative from the Pipeline Safety Trust might testify.

Once the hearing has been completed, each party to the investigation may make a submission to the NTSB setting forth proposed findings, a proposed probable cause, and proposed safety recommendations. 49 C.F.R. § 845.13. It is always advisable to take this additional step to ensure that a party's point of view is understood.

C. Sunshine Meeting

This is the public meeting at which the members of the Board formally receive the draft accident report from the NTSB technical staff and vote on the findings, conclusions, probable cause and safety recommendations. It is called a "Sunshine" meeting because it is open to the public. However, only NTSB personnel may participate in the Sunshine Hearing. The public, including the parties to the investigation, and accident victims and family members, may attend, but may not participate in any way. The participants are generally specialists from the NTSB technical staff, NTSB management and the entire NTSB Board.

One or two weeks prior to the Board Sunshine Meeting, the pipeline operator should make every effort to meet with individual Board members. Meeting with Board members separately will ensure compliance with the Sunshine Act, which precludes a quorum of Board members from jointly conducting official agency business. These meetings provide an excellent opportunity to raise key issues directly with each Board member as well as discuss matters raised in the party submission.

11. PHMSA Reporting Requirements

- Reporting requirement applies to those events which cause death, personal injury requiring hospitalization, \$50,000 or more in property damage, or involve unintentional gas loss of 3 million cubic feet or more, results in an emergency shutdown of an LNG facility, or is otherwise significant in the judgment of the operator. See 49 C.F.R. § 191.3.
- The appropriate form (depending on whether the affected system is a distribution system or a transmission/gathering system, or whether it involves an LNG facility) must be completed and filed with PHMSA no later than 30 days after an incident. See 49 C.F.R. §§ 191.9 and 191.15.
- When additional relevant information is obtained, the operator must file a supplemental report. See 49 C.F.R. § 191.9; 49 C.F.R. § 191.15.
- The NTSB has jurisdiction over any pipeline accident involving a fatality, substantial property damage, or significant injury to the environment, regardless of whether the pipeline at issue is a distribution or transmission line. See 49 U.S.C. § 1131.
- If the requirements for classification as a reportable incident are not met, the event might still trigger the need for filing a condition report as specified in 49 C.F.R. § 195.55. Such reports must be filed within 5 working days of the operator's determination that the condition exists, but not later than 10 working days after an operator's representative discovers the condition. See 49 C.F.R. § 191.25.
- Corrective Action Orders ("CAO") issued by PHMSA will include a requirement to file monthly reports updating the status of the corrective actions undertaken by the pipeline operator. It is important that such reports be reviewed by counsel. Also, if the NTSB is investigating the accident at issue, the monthly reports submitted to PHMSA should also be provided to the NTSB.
- A maximum civil penalty of \$200,000 per day, not to exceed a total of \$2,000,000, may be levied on the company for failure to follow the reporting requirements. See 49 U.S.C. § 60122(a).



Tips for Completing PHMSA Incident Reports

- Do not speculate on causation or other matters, instead, complete the form's mandatory fields using confirmed facts or, in the absence of known facts, the most reliable information available. Bear in mind that the reports should be provided to the NTSB and might be relied upon by the NTSB. Also, adverse parties in subsequent litigation might take advantage of information submitted by the operator that proves to be inaccurate. Given the fact that the operator has the opportunity (actually, the duty) to file supplemental reports once it is in receipt of additional information, initial reports should be cautious and conservative. For example, Section G of the Incident Report Form requests that the operator characterize the cause of the accident (corrosion, natural force, excavation damage, other outside force, material failure, equipment failure, incorrect operation, or other). The "other" category (G8 on the form) allows the operator to indicate that the incident is "still under investigation." Selecting this category for accidents under investigation by the

NTSB is appropriate because the NTSB has primary jurisdiction over the investigation and will be in the early stages of its investigation at the time the report is due. Also, it is the safest option with respect to potential civil litigation, as it allows the operator to avoid blaming itself or others based on incomplete and potentially inaccurate information. For example, metallurgical examination by the NTSB will not be undertaken and/or completed within 30 days of an accident.

- Initial and subsequent reports to PHMSA should be reviewed by counsel to ensure they do not contain any statements that would be problematic with respect to the NTSB.
- Incident reporting forms for distribution and transmission pipelines are attached hereto.

12. NTSB Statutory Authority and Related Sections (49 U.S.C. §§ 1101 – 1155)

§ 1101 Definitions

Section 2101(17a) of title 46 and section 40102(a) of this title apply to this chapter. In this chapter, the term “accident” includes damage to or destruction of vehicles in surface or air transportation or pipelines, regardless of whether the initiating event is accidental or otherwise.

§ 1114 Disclosure, availability, and use of information

a) General.—

(1) Except as provided in subsections (b), (c), (d), and (f) of this section, a copy of a record, information, or investigation submitted or received by the National Transportation Safety Board, or a member or employee of the Board, shall be made available to the public on identifiable request and at reasonable cost. This subsection does not require the release of information described by section 552(b) of title 5 or protected from disclosure by another law of the United States.

(2) The Board shall deposit in the Treasury amounts received under paragraph (1) to be credited to the appropriation of the Board as offsetting collections.

(b) Trade Secrets.—

(1) The Board may disclose information related to a trade secret referred to in section 1905 of title 18 only—

(A) to another department, agency, or instrumentality of the United States Government when requested for official use;

(B) to a committee of Congress having jurisdiction over the subject matter to which the information is related, when requested by that committee;

(C) in a judicial proceeding under a court order that preserves the confidentiality of the information without impairing the proceeding; and

(D) to the public to protect health and safety after giving notice to any interested person to whom the information is related and an opportunity for that person to comment in writing, or orally in closed session, on the proposed disclosure, if the delay resulting from notice and opportunity for comment would not be detrimental to health and safety.

(2) Information disclosed under paragraph (1) of this subsection may be disclosed only in a way designed to preserve its confidentiality.

(3) Protection of Voluntary Submission of Information.—

Notwithstanding any other provision of law, neither the Board, nor any agency receiving information from the Board, shall disclose voluntarily provided safety-related information if that information is not related to the exercise of the Board’s accident or incident investigation authority under this chapter and if the Board finds that the disclosure of the information would inhibit the voluntary provision of that type of information.

...

(e) Drug Tests.—

(1) Notwithstanding section 503(e) of the Supplemental Appropriations Act, 1987 (Public Law 100–71, 101 Stat. 471), the Secretary of Transportation shall provide the following information to the Board when requested in writing by the Board:

(A) any report of a confirmed positive toxicological test, verified as positive by a medical review officer, conducted on an officer or employee of the Department of Transportation under post-accident, unsafe practice, or reasonable suspicion toxicological testing requirements of the Department, when the officer or employee is reasonably associated with the circumstances of an accident or incident under the investigative jurisdiction of the Board.

(B) any laboratory record documenting that the test is confirmed positive.

(2) Except as provided by paragraph (3) of this subsection, the Board shall maintain the confidentiality of, and exempt from disclosure under section 552(b)(3) of title 5—

(A) a laboratory record provided the Board under paragraph (1) of this subsection that reveals medical use of a drug allowed under applicable regulations; and

(B) medical information provided by the tested officer or employee related to the test or a review of the test.

(3) The Board may use a laboratory record made available under paragraph (1) of this subsection to develop an evidentiary record in an investigation of an accident or incident if—

(A) the fitness of the tested officer or employee is at issue in the investigation; and

(B) the use of that record is necessary to develop the evidentiary record.

(f) Foreign Investigations.—

(1) **In general.**—Notwithstanding any other provision of law, neither the Board, nor any agency receiving information from the Board, shall disclose records or information relating to its participation in foreign aircraft accident investigations; except that—

(A) the Board shall release records pertaining to such an investigation when the country conducting the investigation issues its final report or 2 years following the date of the accident, whichever occurs first; and

(B) the Board may disclose records and information when authorized to do so by the country conducting the investigation.

(2) Safety recommendations.—

Nothing in this subsection shall restrict the Board at any time from referring to foreign accident investigation information in making safety recommendations.

§ 1131 General Authority

(a) **General.**—

(1) The National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of—

(A) an aircraft accident the Board has authority to investigate under section 1132 of this title or an aircraft accident involving a public aircraft as defined by section 40102(a)(37) [1] of this title other than an aircraft operated by the Armed Forces or by an intelligence agency of the United States;

(B) a highway accident, including a railroad grade crossing accident, the Board selects in cooperation with a State;

(C) a railroad accident in which there is a fatality or substantial property damage, or that involves a passenger train;

(D) a pipeline accident in which there is a fatality, substantial property damage, or significant injury to the environment;

(E) a major marine casualty (except a casualty involving only public vessels) occurring on or under the navigable

waters, internal waters, or the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988, or involving a vessel of the United States (as defined in section 2101(46) 1 of title 46), under regulations prescribed jointly by the Board and the head of the department in which the Coast Guard is operating; and

(F) any other accident related to the transportation of individuals or property when the Board decides—

(i) the accident is catastrophic;

(ii) the accident involves problems of a recurring character; or

(iii) the investigation of the accident would carry out this chapter.

(2)

(A) Subject to the requirements of this paragraph, an investigation by the Board under paragraph (1)(A)–(D) or (F) of this subsection has priority over any investigation by another department, agency, or instrumentality of the United States Government. The Board shall provide for appropriate participation by other departments, agencies, or instrumentalities in the investigation. However, those departments, agencies, or instrumentalities may not participate in the decision of the Board about the probable cause of the accident.

(B) If the Attorney General, in consultation with the Chairman of the Board, determines and notifies the Board that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act, the Board shall relinquish investigative priority to the Federal Bureau of Investigation. The relinquishment of investigative priority by the Board shall not otherwise affect the authority of the Board to continue its investigation under this section.

(C) If a Federal law enforcement agency suspects and notifies the Board that an accident being investigated by the Board under subparagraph (A), (B), (C), or (D) of paragraph (1) may have been caused by an intentional criminal act, the Board, in consultation with the law enforcement agency, shall take necessary actions to ensure that evidence of the criminal act is preserved.

(3) This section and sections 1113, 1116(b), 1133, and 1134(a) and (c)–(e) of this title do not affect the authority of another department, agency, or instrumentality of the Government to investigate an accident under applicable law or to obtain information directly from the parties involved in, and witnesses to, the accident. The Board and other departments, agencies, and instrumentalities shall ensure that appropriate information developed about the accident is exchanged in a timely manner.

...

(c) Accidents Not Involving Government Misfeasance or Nonfeasance.—

(1) When asked by the Board, the Secretary of Transportation or the Secretary of the department in which the Coast Guard is operating may—

(A) investigate an accident described under subsection (a) or (b) of this section in which misfeasance or nonfeasance by the Government has not been alleged; and

(B) report the facts and circumstances of the accident to the Board.

(2) The Board shall use the report in establishing cause or probable cause of an accident described under subsection (a) or (b) of this section.

...

(e) Accident Reports.—

The Board shall report on the facts and circumstances of each accident investigated by it under subsection (a) or (b) of this section. The Board shall make each report available to the public at reasonable cost.

§1134 Inspections and Autopsies

(a) Entry and Inspection. An officer or employee of the National Transportation Safety Board

(1) on display of appropriate credentials and written notice of inspection authority, may enter property where a transportation accident has occurred or wreckage from the accident is located and do anything necessary to conduct an investigation; and

(2) during reasonable hours, may inspect any record, process, control, or facility related to an accident investigation under this chapter.

...

(c) Avoiding Unnecessary Interference and Preserving Evidence. In carrying out subsection (a)(1) of this section, an officer or employee may examine or test any vehicle, vessel, rolling stock, track, or pipeline component. The examination or test shall be conducted in a way that

(1) does not interfere unnecessarily with transportation services provided by the owner or operator of the vehicle, vessel, rolling stock, track, or pipeline component; and

(2) to the maximum extent feasible, preserves evidence related to the accident, consistent with the needs of the investigation and with the cooperation of that owner or operator.

(d) Exclusive Authority of Board. Only the Board has the authority to decide on the way in which testing under this section will be conducted, including decisions on the person that will conduct the test, the type of test that will be conducted, and any individual who will witness the test. Those decisions are committed to the discretion of the Board. The Board shall make any of those decisions based on the needs of the investigation being conducted and, when applicable, subsections (a), (c), and (e) of this section.

(e) Promptness of Tests and Availability of Results. An inspection, examination, or test under subsection (a) or (c) of this section shall be started and completed promptly, and the results shall be made available.

(f) Autopsies.

(1) The Board may order an autopsy to be performed and have other tests made when necessary to investigate an accident under this chapter. However, local law protecting religious beliefs related to autopsies shall be observed to the extent consistent with the needs of the accident investigation.

(2) With or without reimbursement, the Board may obtain a copy of an autopsy report performed by a State or local official on an individual who died because of a transportation accident investigated by the Board under this chapter.

§1153 Judicial Review

(a) General. The appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia Circuit may review a final order of the National Transportation Safety Board under this chapter. A person disclosing a substantial interest in the order may apply for review by filing a petition not later than 60 days after the order of the Board is issued.

§1154 Discovery and use of cockpit and surface vehicle recordings and transcripts

(b) Reports. 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.

13. Accident/Incident Investigation Procedures (49 C.F.R. Part 831)

Sec. 831.1 Applicability of this subpart.

(a) Except as provided in Subpart E of this part regarding marine casualties, and unless specified by the National Transportation Safety Board (NTSB), the provisions of this subpart apply to all NTSB investigations conducted under its statutory authority.

(b) Consistent with its statutory authority, the NTSB conducts investigations of transportation accidents that include, but are not limited to: accidents, collisions, crashes, derailments, explosions, incidents, mishaps, ruptures, or other similar accidents. Use of the term "accident" throughout this part includes all such occurrences.

(c) Throughout this part, the term "IIC" means the NTSB investigator-in-charge.

Sec. 831.2 Responsibility of the NTSB.

The NTSB is required to investigate -

(a) Aviation accidents as described in subpart B of this part;

(b) Highway accidents as described in subpart C of this part;

(c) Railroad, pipeline, and hazardous materials accidents as described in subpart D of this part; and

(d) Any accident that occurs in connection with the transportation of people or property that, in the judgment of the NTSB, is catastrophic, involves problems of a recurring nature or would otherwise carry out the intent of its authorizing statutes. This authority includes selected events involving the transportation of hazardous materials, including their release.

Sec. 831.3 Authority of Directors.

Subject to the provisions of § 831.2 of this part and part 800 of this chapter, the Directors of the Office of Aviation Safety, Office of Highway Safety, or Office of Railroad, Pipeline and Hazardous Materials Investigations, may order an investigation into any transportation accident.

Sec. 831.4 Nature of Investigation.

(a) *General.* The NTSB conducts investigations, or has them conducted, to determine the facts, conditions, and circumstances relating to an accident. The NTSB uses these results to determine one or more probable causes of an accident, and to issue safety recommendations to prevent or mitigate the effects of a similar accident. The NTSB is required to report on the facts and circumstances of accidents it investigates. The NTSB begins an investigation by monitoring the situation and assessing available facts to determine the appropriate investigative response. Following an initial assessment, the NTSB notifies persons and organizations it anticipates will be affected as to the extent of its expected investigative response.

(b) *NTSB products.* An investigation may result in a report or brief of the NTSB's conclusions or other products designed to improve transportation safety. Other products may include factual records, safety recommendations, and other safety information.

(c) NTSB investigations are fact-finding proceedings with no adverse parties. The investigative proceedings are not subject to the Administrative Procedure Act (5 U.S.C. 551 et seq.), and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity, as they are not adjudicatory proceedings.

Sec. 831.5 Priority of NTSB Investigations.

(a) *Relationships with other agencies.*

(1) Except as provided in 49 U.S.C. 1131(a)(2)(B) and (C) regarding suspected criminal actions, an investigation conducted under the authority of the NTSB has priority over any investigation conducted by another Federal agency.

(2) The NTSB will provide for appropriate participation by other Federal agencies in any NTSB investigation. Such agencies may not participate in the NTSB's probable cause determination.

(3) The NTSB has first right to access wreckage, information, and resources, and to interview witnesses the NTSB deems pertinent to its investigation.

(4) As indicated in § 831.9(c) of this part, the NTSB has exclusive authority to decide when and how the testing and examination of evidence will occur.

(5) The NTSB and other Federal agencies will exchange information obtained or developed about the accident in the course of their investigations in a timely manner. Nothing in this section prohibits the NTSB from sharing factual information with other agencies.

(6) *Incident command system.* The NTSB recognizes the role of incident command systems to address emergencies. The NTSB does not assume the role of a first responder agency.

(i) The NTSB IIC or his designee will participate in the incident command system to identify and coordinate investigative needs related to the preservation and collection of information and evidence.

(ii) The NTSB may collect information and evidence from the incident command in a timely and reasonable manner so as not to interfere with its operations.

(b) *Investigations by other Federal agencies.*

(1) Nothing in this section limits the authority of any Federal agency to conduct an investigation of an accident or incident under applicable provisions of law or to obtain information directly from parties involved in, and witnesses to, a transportation accident. Other agencies are expected to coordinate with the NTSB IIC to avoid interference with, and duplication of, the NTSB's investigative efforts. These agencies will not participate in the NTSB's probable cause determination.

(2) The NTSB recognizes that state and local agencies may conduct activities related to an accident under investigation by the NTSB. These agencies will not participate in the NTSB's probable cause determination.

(3) Except as described in § 831.30 of this part regarding highway investigations, the NTSB may request that a Federal agency provide to the NTSB the results of that agency's investigation of an accident when such investigation is intended to result in safety improvements or remedial action. The NTSB will not routinely request regulatory enforcement records or investigation results.

Sec. 831.6 Request to Withhold Information.

(a) *Applicability.* This section applies to information the NTSB receives from any source that may be subject to the Trade Secrets Act (18 U.S.C. 1905) or the Freedom of Information Act (FOIA, 5 U.S.C. 552).

(b) *Disclosure.* The NTSB is authorized by 49 U.S.C. 1114(b) to disclose, under certain circumstances, confidential commercial information that would otherwise be subject to penalties for disclosure under the Trade Secrets Act, or excepted from disclosure under FOIA. The NTSB may exercise this authority when disclosure is necessary to support a key finding, a safety recommendation, or the NTSB's statement of probable cause of an accident.

(c) *Disclosure procedures.* Information submitted to the NTSB that the submitter believes qualifies as a trade secret or as confidential commercial information subject either to the Trade Secrets Act or Exemption 4 of FOIA must be so identified by the submitter on each page that contains such information. In accordance with 49 U.S.C. 1114(b), the NTSB will provide the submitter of identified information (or information the NTSB has reason to believe qualifies as subject to the Trade Secrets Act or Exemption 4 of FOIA) the opportunity to comment on any disclosure contemplated by the NTSB. In all instances in which the NTSB decides to disclose such information pursuant to 49 U.S.C. 1114(b) or 5 U.S.C. 552, the NTSB will provide at least 10 days' advance notice to the submitter.

(d) Voluntarily provided safety information.

(1) The NTSB will not disclose safety-related information voluntarily submitted to the NTSB if the information is not related to the exercise of the NTSB's investigation authority, and if the NTSB finds disclosure of the information might inhibit the voluntary provision of that type of information.

(2) The NTSB will review voluntarily provided safety information for confidential content, and will de-identify or anonymize any confidential content referenced in its products.

(e) *Other.* Any person may make written objection to the public disclosure of any other information, such as interview summaries or transcripts, contained in any report or document filed, or otherwise obtained by the NTSB, stating the grounds for such objection. The NTSB on its own initiative or if such objection is made, may order such information withheld from public disclosure, when, in its judgment, the information may be withheld under the provisions of an exemption to the FOIA (see part 801 of this chapter), and its release is found not to be in the public interest.

Sec. 831.7 Representation during an interview.

(a) Any person interviewed in any manner by the NTSB has the right to be accompanied during the interview by no more than one representative of the witness's choosing. The representative -

(1) May be an attorney;

(2) May provide support and counsel to the witness;

(3) May not supplement the witness's testimony; and

(4) May not advocate for the interests of a witness's other affiliations (e.g., the witness's employer).

(b) An investigator conducting the interview may take any necessary action (including removal of the representative from the interview) to ensure a witness's representative acts in accordance with the provisions of paragraph (a) of this section during the interview, and to prevent conduct that may be disruptive to the interview.

Sec. 831.8 Investigator-in-Charge.

In addition to the subpoena and deposition authority delegated to investigative officers under this chapter, a person designated as IIC for an investigation is authorized to -

(a) Organize, conduct, control, and manage the field phase of an investigation, even when a Board Member is present;

(b) Coordinate all resources and supervise all persons (including persons not employed by the NTSB) involved in an on-site investigation; and

(c) Continue his or her organizational and management responsibilities through all phases of the investigation, including consideration and adoption of a report or brief determining one or more probable causes of an accident.

Sec. 831.9 Authority during investigations.

(a) *General authority of investigators.* To carry out the statutory responsibilities of the agency, an NTSB investigator may -

(1) Conduct hearings;

(2) Administer oaths;

(3) Require, by subpoena or otherwise, the production of evidence and witnesses;

(4) Enter any property where an accident subject to the NTSB's jurisdiction has occurred, or wreckage from any

such accident is located, and take all actions necessary to conduct a complete investigation of the accident;

(5) Inspect, photograph, or copy any records or information (including medical records pursuant to paragraph (b)(2) of this section), and correspondence regardless of the date of their creation or modification, for the purpose of investigating an accident;

(6) Take possession of wreckage, records or other information if it determines such possession is necessary for an investigation; and

(7) Question any person having knowledge relevant to a transportation accident.

(b) *Subpoenas.* The NTSB may issue a subpoena, enforceable in Federal District Court, to obtain testimony or evidence related to an accident, including but not limited to personal electronic devices.

(1) The NTSB's authority to issue subpoenas includes access to medical records and specimens.

(2) For purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, and the regulations promulgated by the DHHS, 45 CFR 164.501 et seq., the NTSB is a "public health authority" to which protected health information may be disclosed by a HIPAA "covered entity" without the prior written authorization of the subject of the records. In addition, the NTSB may issue a subpoena to gain access to such information.

(c) *Examination of evidence.* In accordance with 49 U.S.C. 1134(d), the NTSB has exclusive authority to decide timing, manner and method of testing and examination of evidence, and extraction of data.

Sec. 831.10 Autopsies and postmortem testing.

When a person dies as a result of having been involved in a transportation accident within the jurisdiction of the NTSB -

(a) The NTSB is authorized to obtain, with or without reimbursement, a copy of a report of autopsy performed by a State or local authority on such person.

(b) The NTSB may order an autopsy or other postmortem tests of any person as may be related to its investigation of a transportation accident. The IIC may direct that an autopsy or other test be performed if necessary for an investigation. Provisions of local law protecting religious beliefs with respect to autopsies shall be observed to the extent they are consistent with the needs of the investigation.

Sec. 831.11 Parties to the Investigation.

(a) *Participants.*

(1) The IIC may designate one or more entities to serve as parties in an investigation. Party status is limited to those persons, Federal, state, or local government agencies and organizations whose employees, functions, activities, or products were involved in the accident and that can provide suitable qualified technical personnel to actively assist in an investigation. To the extent practicable, a representative proposed by party organizations to participate in the investigation may not be a person who had direct involvement in the accident under investigation.

(2) Except for the FAA, no entity has a right to participate in an NTSB investigation as a party.

(3) The participation of the Administrator of the FAA and other Federal entities in aviation accident investigations is addressed in § 831.21 of this part.

(4) Participants in an investigation (e.g., party representatives, party coordinators, and/or the larger party organization) must follow all directions and instructions from NTSB representatives. Party status may be revoked or suspended if a party fails to comply with assigned duties and instructions, withholds information, or otherwise acts in a manner prejudicial or disruptive to an investigation.

(b) *Prohibitions on serving as party representatives.*

(1) In accordance with § 845.6 of this chapter, no party representative may occupy a legal position or be a person who also represents claimants or insurers.

(2) Failure to comply with these provisions may result in sanctions, including loss of party status.

(c) *Disclosures.*

(1) The name of a party and its representative may be disclosed in documents the NTSB places in the public docket for the investigation.

(2) The NTSB may share information considered proprietary or confidential by one party with other parties during the course of an investigation, but will preserve the confidentiality of the information to the greatest extent possible.

(3) Section 831.6(d) of this part describes how the NTSB will handle voluntarily submitted safety information, and the NTSB's determination whether to share any such information. The NTSB will de-identify the source of such information when deciding to share it.

(d) *Party agreement.* Except for representatives of other Federal agencies, all party representatives must sign the "Statement of Party Representatives to NTSB Investigation" (Statement) upon acceptance of party status. Failure to timely sign the statement may result in sanctions, including loss of party status. Representatives of other Federal agencies, while not required to sign the Statement, will be provided notice of and must comply with the responsibilities and limitations set forth in the agreement.

(e) *Internal review by a party.*

(1) To assure coordination of concurrent efforts, a party to an investigation that conducts or authorizes a review of its own processes and procedures as a result of an accident the NTSB is investigating, by signing the party agreement, agrees to, in a timely manner -

(i) Inform the IIC of the nature of the review; and

(ii) Provide the IIC with the findings from the review.

(2) If the findings from a review contain privileged information - ,

(i) The submitting party must inform the IIC that the review contains privileged information;

(ii) The submitting party must identify the privileged content at the time of submission to the IIC; and

(iii) The NTSB must, if informed that such information is being submitted, review the information for relevancy to the investigation, and determine whether public disclosure of the information is necessary for the investigation.

(3) The NTSB may use the protections described in § 831.6 of this part, as applicable, to protect certain findings from public disclosure.

(4) Investigations performed by other Federal agencies during an NTSB investigation are addressed in § 831.5 of this part.

Sec. 831.12 Access to and Release of Wreckage, Records, Mail, and Cargo.

(a) Only persons authorized by the NTSB IIC may be permitted access to wreckage, records, mail, or cargo.

(b) Wreckage, records, mail, and cargo in the NTSB's custody will be released when the NTSB determines it has no further need for such items. Recipients of released wreckage must sign an acknowledgement of release provided by the NTSB.

Sec. 831.13 Provision and dissemination of investigative information.

(a) *Applicability.* This section applies to:

- (1) Information related to the accident or incident;
- (2) Any information collected or compiled by the NTSB as part of its investigation, such as photographs, visual representations of factual data, physical evidence from the scene of the accident, interview statements, wreckage documentation, flight data and cockpit voice recorder information, and surveillance video; and
- (3) Any information regarding the status of an investigation, or activities conducted as part of the investigation.

(b) *Provision of information.* All information described in paragraph (a) of this section and obtained by any person or organization participating in the investigation must be promptly provided to the NTSB, except where the NTSB authorizes the party to retain the information.

(c) *Release of information.* Parties are prohibited from releasing information obtained during an investigation at any time prior to the NTSB's public release of information unless the release is consistent with the following criteria:

- (1) Information released at the scene of an accident -
 - (i) Is limited to factual information concerning the accident and the investigation released in coordination with the IIC; and
 - (ii) Will be made by the Board Member present at the scene as the official spokesperson for the NTSB. Additionally, the IIC or representatives from the NTSB's Office of Safety Recommendations and Communications may release information to media representatives, family members, and elected officials as deemed appropriate.
- (2) The release of information described in paragraph (a)(1) of this section by the NTSB at the scene of an accident does not authorize any party to the investigation to comment publicly on the information during the course of the investigation. Any dissemination of factual information by a party may be made only as provided in this section.
- (3) A party may disseminate information related to an investigation to those individuals within its organization who have a need to know for the purpose of addressing a safety issue including preventive or remedial actions. If such internal release of information results in a planned safety improvement, the party must inform the IIC of such planned improvement in a timely manner before it is implemented.
- (4) Any other release of factual information related to the investigation must be approved by the IIC prior to release, including:
 - (i) Dissemination within a party organization, for a purpose not described in paragraph (b)(3) of this section;
 - (ii) Documents that provide information concerning the investigation, such as written directives or informational updates for release to employees or customers of a party;
 - (iii) Information related to the investigation released to an organization or person that is not a party to the investigation;
- (d) The release of recordings or transcripts from certain recorders may be made only in accordance with the statutory limitations of 49 U.S.C. 1114(c) and (d).

Sec. 831.14 Proposed Findings.

(a) *General.* Any party to the investigation designated under § 831.11 may submit to the NTSB written proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed probable cause, and/or proposed safety recommendation(s) designed to prevent future accidents.

(b) Timing of submissions. The IIC will inform parties when submissions are due. All written submissions must be received by the IIC by the due date. If there is a Board meeting, the due date will be set prior to the date the matter is published in the Federal Register.

Sec. 831.15 Civil penalties.

The NTSB is required by the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 104 Stat. 890, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74, sec. 701, 129 Stat. 584 (codified at 28 U.S.C. 2461 note) to adjust the maximum amount of each civil monetary penalty within its jurisdiction by the rate of inflation. Accordingly, for violations of 49 U.S.C. 1132, 1134(b), 1134(f)(1), or 1136(g), the NTSB may assess a civil penalty pursuant to 49 U.S.C. 1155(a) no greater than \$1,617 against any person, except a member of the armed forces of the United States or an employee of the Department of Defense subject to the Uniform Code of Military Justice, when the member or employee is performing official duties.

[82 FR 47402, Oct. 12, 2017]

14. Sections of OSHA Regulations Relevant to Accident Site

Federal regulations regarding personal protective equipment are set forth in 29 C.F.R. § 1030(d). The regulations include the following:

(3) Personal protective equipment

(i) Provision. When there is occupational exposure, the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices. Personal protective equipment will be considered "appropriate" only if it does not permit blood or other potentially infectious materials to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucous membranes under normal conditions of use and for the duration of time which the protective equipment will be used.

Regarding bloodborne pathogens, the regulations state:

Bloodborne pathogens § 1910.1030.

(a) Scope and Application. This section applies to all occupational exposure to blood or other potentially infectious materials as defined by paragraph (b) of this section.

(b) Definitions. For purposes of this section, the following shall apply:

"Bloodborne Pathogens" means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV) and human immunodeficiency virus (HIV).

An exposure control plan is required:

(c) Exposure control

(1) Exposure Control Plan.

(i) Each employer having an employee(s) with occupational exposure as defined by paragraph (b) of this section shall establish a written Exposure Control Plan designed to eliminate or minimize employee exposure.

(ii) The Exposure Control Plan shall contain at least the following elements:

(A) The exposure determination required by paragraph(c)(2),

(B) The schedule and method of implementation for paragraphs (d) Methods of Compliance, (e) HIV and HBV Research Laboratories and Production Facilities, (f) Hepatitis B Vaccination and Post-Exposure Evaluation and Follow-up, (g) Communication of Hazards to Employees, and (h) Recordkeeping, of this standard, and

(C) The procedure for the evaluation of circumstances surrounding exposure incidents as required by paragraph (f)(3)(i) of this standard.

(iii) Each employer shall ensure that a copy of the Exposure Control Plan is accessible to employees in accordance with 29 C.F.R. § 1910.1020(e).

(iv) The Exposure Control Plan shall be reviewed and updated at least annually and whenever necessary to reflect new or modified tasks and procedures which affect occupational exposure and to reflect new or revised employee positions with occupational exposure.

The regulations also provide that employee training is required for those that may face exposure. The regulation states as follows:

(ii) Training shall be provided as follows:

(A) At the time of initial assignment to tasks where occupational exposure may take place;

(B) At least annually thereafter.

(iii) [Reserved]

(v) Annual training for all employees shall be provided within one year of their previous training.

(v) Employers shall provide additional training when changes such as modification of tasks or procedures or institution of new tasks or procedures affect the employee's occupational exposure. The additional training may be limited to addressing the new exposures created.

See 29 U.S.C. § 1910.1030(g)(2)(ii).



Civil Litigation

15. Attorney-Client Privilege and Work Product Protection

This memorandum sets forth the basic requirements for establishing the attorney-client privilege and maintaining work product protection. It is important for parties to a lawsuit to understand these concepts and comply with the strict rules that govern them. Failure to understand and follow these rules can result in the disclosure of otherwise confidential documents.

Parties should also be aware that different jurisdictions apply different rules, and that reasonable judges can disagree on whether a document is privileged. Thus, no matter how carefully documents are prepared, there is always a chance that they will ultimately be disclosed in litigation. For this reason, parties should be very careful about what is said in such documents. If there is a sensitive issue that needs to be discussed with counsel, it should probably be dealt with in a meeting or a teleconference.

In many instances both the attorney-client privilege and work product protection will apply to a document. If in doubt, indicate the document is both and abide by the rules for each.

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege generally attaches to two main types of communications. The first is a communication made in confidence between a client and an attorney for the purpose of seeking or providing legal advice. These communications are privileged because a client and an attorney should be able to speak freely in seeking or providing legal advice.

The second type is a communication from a client to an attorney containing factual information intended to keep the attorney apprised of continuing developments in a legal matter. This type of communication is privileged because an attorney must be provided with relevant facts in order to give sound and informed advice. In fact, the first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye toward the legally relevant.

Any communication with an attorney that does not fall within one of these two groups is at risk of being disclosed in litigation. Thus, parties should include language in their communications with counsel that confirms the purpose of the communication and states an understanding that the matter is privileged.

For corporations, an additional rule may apply. In some jurisdictions, the attorney-client privilege attaches only to communications made by a member of the corporation's "control group." The control group is essentially "top management" of a corporation, generally those with the authority to make final decisions regarding legal representation. Some jurisdictions expand the control group to include employees who advise top management in areas relevant to the litigation. Generally, if a decision would not normally be made on a given topic without the advice or opinion of a certain employee, that employee is considered part of the control group for issues within his or her areas of responsibility or expertise.

In some jurisdictions, the attorney-client privilege is waived if an otherwise privileged document is created by or disclosed to a person who is not in the "control group" of a corporation. In all jurisdictions, the privilege is waived if shown to someone outside the company, with limited exceptions for litigation consultants.

The major points to remember are:

- Mark documents "ATTORNEY-CLIENT PRIVILEGED"
- Documents must be directed to an attorney
- Documents must be created by top management (the "control group")
- Documents must not be disclosed outside the control group
- Communications should reference a request for legal advice

- Communications should state that factual information is relevant to legal issues and provided for use by counsel, at counsel's request, as appropriate
- Assume the document will be disclosed: say nothing in writing that would be damaging if revealed to the public or opponents

WORK PRODUCT PROTECTION

The work product doctrine protects from disclosure documents and tangible things "prepared in anticipation of litigation or for trial" by or for a party or its representative. The rule for this doctrine varies by jurisdiction, but it generally protects documents prepared or obtained because of the litigation. Work product protects materials that would reveal the theories, mental impressions, or litigation plans of a party's attorney. It may also extend to non-attorneys who create trial preparation materials on behalf of the party or the party's attorney, including consultants and investigators.

There is no control group test, but work product can be waived if documents are disclosed to persons outside the company. Nevertheless, work product materials should only be disclosed to those who are involved in handling the litigation and have a need to know.

The major points to remember are:

- Mark document "WORK PRODUCT"
- Indicate document was prepared in anticipation of litigation
- Indicate document was prepared at the request of counsel, if appropriate
- Work product documents can be created by an attorney, a client or a consultant
- Documents must not be disclosed outside the company, preferably only to those involved in litigation with a need to know
- Assume the document will be disclosed: say nothing in writing that would be damaging if revealed to the public or opponents



16. Sample Internal Memo Re: Work Product

Date: October XX, 201X
Interoffice Correspondence

To: Distribution

Subject: _____ Accident on [date] Litigation and NTSB Investigation

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION ATTORNEY WORK PRODUCT IN ANTICIPATION OF LITIGATION

We [anticipate][have already received] court actions against [COMPANY] as a result of the accident. In addition, the National Transportation Safety Board (NTSB) is conducting an investigation into the probable cause of the accident. [COMPANY] is a party to the NTSB investigation which is supposed to proceed without regard to the possible consequences for the participants in the courts.

However, both the information uncovered in the NTSB investigation and the conclusions and recommendations that the Board will eventually reach as a result of this investigation may have a substantial effect on the outcome of litigation against [COMPANY]. We have, therefore, asked [Law Firm] to assist [COMPANY] during the NTSB investigation and to work closely with us to defend [COMPANY]'s interests.

The [COMPANY] Legal Department contacts are Attorneys _____, and Paralegal _____. All requests from the NTSB for access to [COMPANY]'s records should be reported to the Legal Department or outside counsel as soon as they are received. NO MATERIAL SHOULD BE SENT TO ANYONE (INCLUDING THE NTSB AND PHMSA) BEFORE THAT MATERIAL IS REVIEWED BY COUNSEL.

IN ADDITION, IN VIEW OF THE PENDING LITIGATION, ALL DOCUMENTS CREATED FROM THIS POINT FORWARD (INCLUDING CORRESPONDENCE AND INTERNAL MEMORANDA) MUST BE APPROVED BY THE LEGAL DEPARTMENT OR OUTSIDE COUNSEL BEFORE BEING FINALIZED AND SIGNED. _____ will be acting as [COMPANY]'s accident investigation coordinator and is working with the NTSB at the direction of [COMPANY]'s Legal Department and outside counsel. Please funnel all requests for approval of such documents through .

General observations, guidelines and tips to help you get ready for these legal proceedings include the following:

**CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT IN ANTICIPATION OF LITIGATION**

1. **NTSB INVESTIGATION.** The NTSB investigation is important because it will generate new information affecting [COMPANY]'s defense and will focus on issues that may become important in the litigation.
 - a. All drafts circulated by the NTSB will be reviewed by counsel.
 - b. Challenge anything you think is peculiar in an NTSB draft. It may be the basis for an adverse collateral finding later on, or an attempt by another party to improperly lay blame on [COMPANY]. Use the disclaimer language attached to this memo when signing drafts (after review by counsel).
 - c. Keep a copy of everything you give to the NTSB and keep a file with these documents.
 - d. Counsel will prepare all witnesses for the NTSB Hearing and will advise the Company spokesperson before, during and after the Hearing.
 - e. Retain all original records in a safe, secure location. The NTSB and PHMSA are not entitled to our original records and we might not get them back. Use a cover letter, with a copy to _____, to record precisely which documents are being provided to the NTSB or PHMSA. When the NTSB releases the scene, be sure to retain all pipeline parts that might be at issue in the investigations and litigation. Document the chain of custody for all pipeline parts with a receipt showing who had the part and to whom, when and where the part was given. Both the person giving and accepting the part should sign the receipt. Parts for which a receipt is signed should be kept under lock and key. BE SURE xxxxxxxxxxxxxxxx IS INFORMED BEFOREHAND OF YOUR INTENDED ACTIONS.

2. **DOCUMENTS.** Documents, including memos, notes and computer printouts, existing prior to the accident as well as those created from the date forward may have serious implication for anticipated litigation against [COMPANY]. Therefore, please adhere to the following guidelines:
 - a. Do not destroy any documents that existed prior to that you believe may refer to any matters relating to the accident. We will "freeze" two copies of all relevant manuals as of the accident
 - b. Avoid writing any unnecessary documents, since they may need to be provided to lawyers representing people suing [COMPANY]. If it is necessary to write a document, stick to facts and avoid opinions and speculation. You should be aware that all documents, including your scribbled notes, diary entries and comments on memos written by someone else, may eventually be reviewed by lawyers suing [COMPANY]. Please take the time to think carefully about the implications of that which you put on paper.
 - c. If it is necessary to prepare a document relating to the accident, especially those that refer to possible causes of the accident, responsibility, liability or recommended preventative measures, those documents must be reviewed with counsel in preliminary form. Mark the review copy a "preliminary draft" to preserve your routine practice of discarding superseded materials. Attached to this memo is a format to be followed for all such documents. It is imperative that all Personnel use this format when preparing documents that are in any way related to the accident. The reason for this format is that, although documents relating to the accident may be subject to inspection and copying by counsel for parties suing [COMPANY], an exception to this rule may apply to "privileged documents." Privileged documents are those considered confidential communications to our counsel in preparation for litigation. That includes documents the Legal Department, outside counsel or other [COMPANY] representative have asked you to prepare to assist in [COMPANY]'s defense. Use of this format will help us preserve that privilege. Failure to do so may waive [COMPANY]'s privilege.
 - d. We will need to account for all documents relating to the accident, including documents generated after the accident. Please keep a separate file of materials relating to this accident. Please keep a separate folder within your accident file for communications with counsel. That file should be labeled "Confidential Litigation File."

- e. Documents that might otherwise be privileged but that pass through too many hands prior to receipt by counsel may also waive [COMPANY]'s privilege. Therefore, distribution of all privileged documents must be conducted by counsel through [Party Coordinator or legal counsel]. Please do not routinely or otherwise send copies of privileged documents to anyone other than legal counsel (again, through Party Coordinator). Please do not prepare any documents at the request of non-[COMPANY] personnel unless you have first discussed the matter with counsel. The best practice is to check with counsel if you have any questions or concerns prior to preparing any documents or communicating with any outside personnel.
3. DEPOSITIONS. Any [COMPANY] employee may be deposed. Counsel will brief all [COMPANY] personnel to be deposed. Depositions and investigations may inquire into prior oral as well as written statements. Therefore, don't give interviews, statements or opinions regarding the accident to ANYONE. Casual remarks about sensitive material can be the subject of extensive witness examination.
4. PROPRIETARY INFORMATION. If you think you have been asked for any [COMPANY] business secret or proprietary material, label it as such so that it will receive special attention by counsel.

Please distribute copies of this memo to others who are working with you on the litigation and NTSB investigation.

CONFIDENTIAL COMMUNICATION TO COUNSEL

MEMORANDUM

PRELIMINARY DRAFT (IF APPROPRIATE)

TO: [Outside Counsel]
Legal Department

FROM: (Employee)

DATE:

RE: Litigation Preparation Involving the _____ Accident on _____ [date]

The purpose of this memorandum is to transmit confidential information to counsel in preparation for anticipated litigation involving the _____ accident on _____ [date]. These matters include the following:

17. Discovery of Electronically Stored Information (ESI)

Production of Documents, Electronically Stored Information (ESI) – Rule 34

- A party may request production of any designated documents or electronically stored information- including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained.

Limitations on ESI Discovery – Rule 26(b)(2)

- Party must provide ESI that is “reasonably accessible”
 - ESI that is not used in regular ongoing activities may also need to be provided should the computer systems make the ESI readily accessible, e.g., some archived materials.
- Party need not provide discovery of ESI from sources party identifies as “not reasonably accessible because of undue burden or cost.” Rule 26(b)(2)(B).
 - Burden on producing party to show ESI is not reasonably accessible because of undue burden or cost.
 - Court may order discovery if requesting party shows good cause. Cost of discovery may be shifted in whole or in part to requesting party.
- Generally, a party does not have to produce backed-up data, deleted information, information on systems no longer in use, etc., unless readily accessible. However, sources of information not searched must be identified.
- Must search all active servers, PC’s, laptops, PDA’s, telephones, peripheral equipment, such as printers, etc., unless a claim can be made that it is unduly burdensome and costly due to the amount or type of hardware involved and/or lack of qualified personnel to conduct the searches.

ESI Preservation

- Common law and statutory duties to preserve evidence are unchanged by new rules.
 - ESI that may ultimately be deemed not reasonably accessible must be preserved pending a ruling that it may too burdensome and/or costly to preserve.
 - May necessitate deactivation of auto-delete or over-write programs.
- Document Retention Policy must address ESI to avoid claims of spoliation of evidence.
 - Use of auto-delete programs, etc. as part of a standardized company retention and deletion program is permissible.
 - Notice of claims or litigation may require cessation of standard destruction policies, including auto-delete programs.

18. 10 Tips on Avoiding Document Retention Disasters

"LexisNexis - Applied Discovery White Paper"

1. Practice competent pre-litigation planning: Develop a policy and enforce it. Know what is being stored, and how long the company must keep it to comply with applicable statutes and court rulings in the subject jurisdiction. Be sure to include electronic data in the policy.
2. Involve the company's technology department in decisions regarding the policy's parameters and methods for enforcement. Remember that the IS or IT department is usually charged with a duty to keep the system from losing any data, and those departments may not realize the implications of keeping too much data for too long.
3. Establish clear accountability for the enforcement of the policy. While an executive-level technology employee may be responsible for overall enforcement, be sure the staff handling daily procedures is educated about the importance of the policy and held accountable for following the guidelines in place. Know in advance who may be called upon to testify about the company's document retention procedures and educate that person in advance of the crisis.
4. Educate all of the company's computer users about the pitfalls of electronic communications. Here is a good rule of thumb for email-before hitting "send," consider whether you would want your employer, your mother, or a jury to read the message. If the answer is no, the message should not be sent. Employees should have no false expectations of the privacy in any information on the company's computer system.
5. Teach employees how to manage their electronic data. As a routine matter, decide which business documents must be kept and which can be discarded on a regular basis. Educate employees about these decisions. Advise them about the legal ramifications of deleting information once the company is on notice of a law suit or other legal document request.
6. If the policy states that certain unnecessary records will be purged at regular intervals - whether electronic or paper - be sure the policy is consistently followed.
7. Consider segregating business email and personal email applying different retention standards. A company may even wish to set standards for automatic deletion of emails unless the author or recipient makes a conscious decision to store the message as a business record.
8. Immediately reconsider and be prepared to suspend regular retention and destruction procedures when litigation or a legal document request is pending or imminent. Have a plan in place for quickly notifying all necessary staff when this action must be taken.
9. Involve the technology department again when litigation or any form of document request is imminent. Make informed decisions about how best to alter the company's usual retention policy, if necessary.
10. Periodically conduct an internal audit of the company's retention policy. It will be easier to argue the policy is reasonable if it is reexamined and any necessary adjustments are made on a regular basis.

While no document retention policy can provide a fail-safe plan for avoiding liability at the hands of electronic data, an educated, methodical approach to retention and destruction of electronic documents will fare well in the eyes of most courts.



19. Retention and Preservation of ESI

When litigation is anticipated:

1. ___ Determine whether a duty to take affirmative steps to retain potentially discoverable information has arisen. [See End Note No. 1, below]

___ Has a claim or suit been made or filed?

___ Is a claim or suit probable?

2. ___ Identify main issues on which a claim may be based.
3. ___ Identify company individual who will be responsible for coordinating all discovery, including ESI.
4. ___ Coordinate with key personnel:
 - (a) ___ Company's duty to preserve potentially discoverable information [Failure to preserve information may lead to additional suits for spoliation and/or summary granting of plaintiff's claims]
 - (b) ___ Main issues raised by claim
 - (c) ___ Identify all personnel who may have discoverable information.
5. ___ Coordinate with individual(s) responsible for electronic/computer equipment to suspend all automatic deletion, overwrite and/or destruction programs.
 - > Identify any such programs that it is not possible or practicable to suspend.
 - > Identify alternative retention methods where suspension of deletion programs is not practicable, e.g., archiving of materials relevant to known claim issues before auto-deletion or preservation of a hard copy.
6. ___ Distribute retention memorandum to all individuals who may have potentially discoverable information:
 - (a) ___ Do not destroy potentially discoverable information, whatever its form, that relates to: [Identify issues raised by the claim and time period]
 - (b) ___ Identify sources of potentially discoverable information, both hard copy and digitally based:
 - ___ traditional hardcopy files
 - ___ servers
 - ___ PCs
 - ___ Laptops
 - ___ PDAs
 - ___ Back-up tapes, disks, etc.
 - ___ external storage such as flash drives
 - ___ disks (floppy/CD/DVD)
 - ___ telephones
 - ___ cell phones
 - ___ peripheral equipment: fax machines, printers
 - ___ [other]
 - (c) ___ Identify types of data and materials to be retained:
 - ___ hard copies of documents
 - ___ electronically created or stored versions of documents
 - ___ email
 - ___ IM messages

- ___ voice mail
- ___ draft copies of documents

- (d) ___ Suspend normal and/or automatic destruction procedures. Identify alternative retention procedures where needed.
7. ___ Identify all no longer utilized hardware, such as old PCs, laptops, cell phones, PDAs, etc., that may contain discoverable information, and retain the hardware in a centralized location.
- Retain all software, applications, etc. that are necessary to retrieve information from obsolete or unused hardware.
8. ___ Identify all sources of discoverable information that is held by third-parties, e.g., off-site servers for company computer systems, email or telephones.
9. ___ Coordinate with third-party computer service providers to retain potentially discoverable information and/or suspend automatic deletion programs.

END NOTES

The question of whether litigation is “probable,” in the context of when a duty to preserve material arises, is a factual one. There is no bright line that can be drawn. Some guidance can be taken from the ABA’s Civil Discovery Standards that states “[w]hen a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents....” American Bar Association, Section of Litigation, Civil Discovery Standards, Standard 10 (2004). Further guidance comes from the Federal Court in New York where the court stated that the obligation to preserve arises “where a party is on notice that litigation is likely to be commenced.” *Anderson v. Sotheby’s Inc. Severance Plan*, 2005 WL 2583715 at *3 (S.D.N.Y. Oct. 11, 2005).

The ABA has defined “probable” in the context of auditor’s letters to mean “[t]he chance of the future event or events are likely to occur.” American Bar Association, Auditor’s Letter Handbook, at 15.

A similar standard has been applied in defining “in anticipation of litigation” within the work product doctrine. For example, the Fourth Circuit stated that a party could reasonably anticipate litigation “following an actual event or series of events that reasonably could result in litigation.” *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

Experience shows that in the context of tort litigation following an accident, whether litigation is probable against a given party seems likely driven by (1) the extent to which the actions or product of the party is apparently related to the cause of the accident, and (2) whether death, serious injury or substantial property damage occurred.

Criminal Investigations

20. Potential Criminal Issues Relating to a Pipeline Accident

I. INTRODUCTION

As discussed in preceding chapters, after a major accident a pipeline operator will face investigations or inquiries from the NTSB, PHMSA, legislative bodies, the media, customers, adverse parties in civil litigation, and others. In certain situations, however, the operator might also have to deal with a criminal investigation. The impetus might be allegations brought by a company whistleblower, facts coming to light as a result of the numerous investigations discussed above, or political pressures on prosecutors. Allegations could include improper operational or safety practices, record keeping, or integrity management. Such allegations could result in a range of charges, from false statements to manslaughter. This document lays out some of the legal and other issues involved in criminal investigations.

II. FEDERAL JURISDICTION

The United States Department of Justice may assert that there is federal jurisdiction over an accident under a number of different theories, including violation of environmental laws, the 1994 Pipeline Safety Act (recodifying the 1979 Hazardous Liquid Pipeline Safety Act and the Natural Gas Pipeline Safety Act of 1968), and the Pipeline Safety Improvement Act of 2002 (P.L. 107-355) (expanding criminal liability for pipeline damage to cases where damage was not caused “knowingly and willfully”),⁴ 1 federal safety standards, and the Clean Water Act.

III. SUBSTANTIVE LAW

A. Involuntary Manslaughter

The U.S. federal government can impose criminal liability on both individuals and corporations for pipeline accidents. Thus, when an accident results in fatalities, manslaughter charges may be brought against the pipeline operator and its employees. Charges of voluntary manslaughter are unlikely because voluntary manslaughter requires the specific intent to harm, see 18 U.S.C. § 1112(a), which is usually not present in pipeline accidents. However, charges of involuntary manslaughter may be appropriate. Although there are two types of involuntary manslaughter, the one most applicable in the context of a pipeline accident is the type colloquially referred to as “gross negligence” or “criminal negligence.” Under federal law, this type of involuntary manslaughter occurs where an individual causes “the unlawful killing of a human being without malice” while “[i]n the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.” *Id.* In other words, criminal charges can be brought even where there is no intent to cause harm or to act wrongfully, and what constitutes lack of due caution can be interpreted differently from one prosecutor to the next. A failure to comply with regulations governing integrity management, for example, could lead to manslaughter charges in the event a fatality ensues.

An example of this type of involuntary manslaughter can be found in the federal indictment recently issued against two employees of BP for their role in the 2010 Gulf oil spill. Well Site Leaders Robert Kaluza and Donald Vidrine were indicted by a federal grand jury for involuntary manslaughter for failing to adequately supervise several key safety tests that were performed on the Deepwater Horizon drilling rig. See Indictment at 5-6, *United States v. Kaluza & Vidrine*, No. 2:12-cr-00265-SRD-ALC (filed Nov. 14, 2012), available at <http://www.justice.gov/iso/opa/resources/2520121115143638743323.pdf> (noting that, despite “significant indications that the well was not secure, defendants . . . failed to phone engineers onshore at that time to alert them to the problems”). According to the indictment, the defendants’ conduct amounted to gross negligence. *Id.* at 6.

B. Federal Statutes Pertaining to Falsifications

A number of other federal statutes are applicable to criminal conduct resulting from pipeline accidents. Under 18 U.S.C. § 1001(a), an individual may be held criminally liable if he: “(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.” Although prosecutions under 18 U.S.C. § 1001(a) may target statements made during

⁴ 1 The Natural Gas Pipeline Safety Act of 1968, the 1979 Hazardous Liquid Pipeline Safety Act, the 1994 Pipeline Safety Act, and the Pipeline Safety Improvement Act of 2002 are collectively codified at 49 U.S.C. § 60101 et seq.

the course of a criminal investigation, the false statements statute also applies to written or oral statements made prior to the onset of an investigation, such as falsification of maintenance checks. If records are required to be kept by law or regulation, falsification of those records may constitute a criminal violation whether or not the false records are ever produced to the government.

C. Federal Statutes Pertaining to Obstruction of Justice

Prosecutors often bring obstruction of justice charges against individuals or companies, even where the individuals and companies are not prosecuted for the underlying offenses. There are several federal obstruction of justice statutes available to prosecutors, and obstruction of justice charges are possible under 18 U.S.C. §§ 1510-1520 when—with the specific intent to impede the investigation—a company or individual prevents the communication of material information to law enforcement officials, falsifies documents pertaining to an investigation, or persuades witnesses not to cooperate.⁵

Considering how common it is for prosecutors to charge obstruction of justice, company employees must be especially careful not to engage in any potentially obstructive conduct after a criminal investigation has commenced. When a pipeline operator first learns that it or its employees are the subject of a criminal investigation, or as soon as an investigation can be reasonably anticipated, the company should ensure that its employees do not destroy potentially relevant evidence. This will typically require the pipeline operator to notify its employees, often through a document retention memorandum, that the employees are not to destroy any evidence, whether in paper or electronic format, that could potentially be relevant to the pending investigation. Assuming the pipeline operator has already retained criminal defense counsel at this point, counsel can advise the operator as to the appropriate measures for guaranteeing that all relevant materials are preserved and retained.

D. Federal Criminal Statutes Pertaining to Obstructing Agency Proceedings

Under 18 U.S.C. § 1505, individuals can face fines and imprisonment, and companies can face fines, if they obstruct an investigation or proceeding of any department or agency of the United States, or an inquiry of a Congressional committee. Pipeline companies have been found guilty of violating this statute in the context of NTSB investigations. Obstruction charges can stem from thwarting NTSB requests by withholding, concealing, altering, removing, misrepresenting, or destroying documents. Accordingly, it is important to institute careful document retention, collection and review protocols at the outset of an investigation to ensure proper compliance with NTSB requests.

E. Federal Criminal Statutes Pertaining to Pipeline Safety

In addition to the federal criminal statutes discussed above, which can be applied to pipeline accidents, there is a specific statute that applies to pipeline safety issues. 49 U.S.C. § 60123 provides both felony and misdemeanor charges for a range of political violations related to the integrity of pipeline facilities and safety in constructing and maintaining them.⁶ These violations are as follows:

Pursuant to 49 U.S.C. § 60123(b), a person may be imprisoned for any term of years up to life for knowingly and willfully damaging or destroying a pipeline facility where death results to any person.⁷

Where a person knowingly and willfully engages in excavation activity without either using a one-call notification system to determine the location of underground facilities or paying attention to other appropriate location markings, and causes injury or significant property damage, imprisonment for up to five years is authorized. 49 U.S.C. § 60123(d).

⁵Where two or more individuals agree to commit obstruction of justice or to violate the false statements statute, they also subject themselves to liability under 18 U.S.C. § 371, the federal conspiracy statute.

⁶This statute also provides for imprisonment up to five years for any person who knowingly and willfully violates section 60114(b), which pertains to marking of facilities in the vicinity of demolition, excavation, tunneling, or construction; section 60118(a), which pertains to compliance with safety standards for pipeline owners and operators; and section 60128, which pertains to prohibited excavations for dumping within pipeline rights-of-way.

⁷A pipeline facility is defined by this statute as including “an interstate gas pipeline facility, an interstate hazardous liquid pipeline facility, or either an intrastate gas pipeline facility or intrastate hazardous liquid pipeline facility that is used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.”

In addition, section 60123(c) provides for misdemeanor charges (punishable by imprisonment for one year or less) where a person knowingly and willfully damages or destroys a pipeline sign that is required by law or regulation.

IV. LIABILITY

In addition to imposing criminal liability on a company's employees for their role in alleged illegal conduct, the government can also impose criminal liability on the company itself. Corporate criminal liability was first recognized in the 1909 case of *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909). In holding that a corporation may be criminally liable for the acts of its agents, the court in *New York Central* noted that "to give [corporations] immunity from all punishment . . . would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at." Id. at 485-86.

Since 1909, courts have held corporations criminally liable by imputing the criminal intent of the corporation's employees to the corporate entity under the tort law principle of respondeat superior. See Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 MINN. L. REV. 1095, 1103 (1991). Under this theory, a corporation is criminally liable for the acts of its agents who "(1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation." Id.

However, the "within the scope of employment" element has been rendered almost meaningless in the criminal law context, as courts have considered criminal conduct to be within the scope of employment even where it was forbidden by corporate policy. Id. An example of this is the 1972 case of *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972). In this case, a hotel's agent threatened suppliers with loss of the hotel's business if they did not contribute money to a trade association to which the hotel belonged. Id. at 1002. Although such a threat was against both corporate policy and the express instructions given to the agent, the court held the corporation criminally liable. See id. at 1004 (emphasizing that "[s]uch liability may attach without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions").

Corporate vicarious liability in a criminal context has been upheld where the agent's conduct was not only unauthorized, but in direct contravention of the corporation's policies and express instructions. However, a comprehensive and rigorous compliance program may persuade prosecutors to exercise their discretion to refrain from criminally charging a company for the reckless or intentional acts of its employees. See U.S. Attorney's Manual § 9-28.300, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.300.

V. EXAMPLES

On June 10, 1999, a petroleum pipeline operated by Olympic Pipe Line ruptured in Bellingham, Washington, causing a gas explosion, three deaths, and extensive environmental damage. Press Release, U.S. Department of Justice, Two Pipeline Companies and Three Employees Enter Pleas in Criminal Case Arising from the June 1999 Gasoline Pipeline Rupture in Bellingham, Washington (December 11, 2002), available at <http://www.oig.dot.gov/sites/dot/files/pdfdocs/pr021212.pdf>. The case was investigated by the Environmental Protection Agency ("EPA") and the Office of Inspector General for the Department of Transportation, with assistance from the FBI and state and local authorities. Id.

A criminal investigation by the EPA resulted in an indictment under the Clean Water Act and the Federal Hazardous Liquid Pipeline Safety Act. See Daryl C. McClary, Olympic Pipe Line accident in Bellingham kills three youths on June 10, 1999 (June 11, 2003), available at http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=5468. The indictment charged Olympic Pipe Line and Equilon Pipeline, the company that ran the pipeline in 1999, with felony violations of the Hazardous Liquid Pipeline Safety Act and misdemeanor violations of the Clean Water Act. Id. The indictment also named multiple Olympic employees, including a vice president and a supervisor.

In October 2002, the NTSB found that Olympic's Supervisory Control and Data Acquisition ("SCADA") system did not remain responsive to controller commands, that Olympic's development of the SCADA system was inadequately managed, that Olympic failed to properly inspect excavation work, and that Olympic did not properly follow-up on ILI data showing pipeline anomalies. National Transportation Safety Board, Pipeline Rupture and Subsequent Fire in Bellingham, Washington, June 10, 1999, Pipeline Accident Report NTSB/PAR-02/02, available at <http://www.ntsb.gov/doclib/reports/2002/PAR0202.pdf>.

Two months after the NTSB's final report, Olympic pleaded guilty to a felony violation of the Hazardous Liquid Pipeline Safety Act and two Clean Water Act misdemeanors, and Equilon followed suit with no-contest pleas to the same violations. See McClary, supra. As a result of these pleas, Olympic and Equilon became the first pipeline

companies to be convicted under the 1979 Hazardous Liquid Pipeline Safety Act. Id. Olympic and Equilon were ordered to pay fines and penalties totaling \$36 million, which, according to the Inspector General, marked the largest monetary penalty ever imposed in a pipeline rupture case. Press Release, U.S. Department of Transportation Office of Inspector General, Two Olympic Pipeline Executives Jailed in First-Ever Jail Terms in Pipeline Rupture Case (June 19, 2003), available at <http://www.oig.dot.gov/library-item/3133>. In addition, two of Olympic's executives were convicted and became the first pipeline managers to receive prison sentences in a rupture case. Id.

VI. RESPONDING TO A CRIMINAL INVESTIGATION

A. Preparing for the Eventuality of Criminal Prosecution

After an accident involving death or serious injury, pipeline operators should prepare for the eventuality of criminal prosecution. After taking the normal steps to collect and preserve all available evidence and witness statements, the company should retain criminal defense counsel in all locations where the company conducts substantial business. The company should then seek counsel's help to analyze the facts against applicable criminal statutes and Justice Department guidelines. Importantly, any decision by federal authorities to pursue a criminal case would be predicated on an analysis of the Justice Department's U.S. Attorney's Manual. The most important factors that are considered are: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation's history of similar misconduct; (4) the existence and effectiveness of a compliance program; and (5) the corporation's remedial actions. See U.S. Attorney's Manual § 9-28.300.

B. Responding to a Search Warrant

Securing criminal defense counsel prior to the onset of a criminal investigation will also enable individual and corporate defendants to effectively respond in the event that the government executes a search warrant. While there are several ways in which a company may learn that it is the subject of a criminal investigation, one way is to have its headquarters raided by federal agents searching for documents and other evidence. Although it is difficult to prepare for such an event, having already retained criminal defense counsel can help alleviate some of the disruption and frustration caused by this experience. Searches and seizures in criminal cases are governed by Federal Rule of Criminal Procedure 41, and a defense attorney can help to ensure that the government complies with this rule in its entirety.

In the event that an attorney is not available at the time the search warrant is executed, there are several important rules that pipeline operators and their employees should understand. Search warrants are issued by magistrate judges upon probable cause, and must describe "with particularity" the documents to be searched, the things to be seized, and the general location of such documents. Government agents are not permitted to search outside designated areas for things not described. For this reason, it is often a good idea for a company representative to shadow the government agents during the ongoing search to ensure that they comply with the warrant's requirements. This will also enable the company employees to protect all privileged materials, as it is easy for agents to inadvertently seize this evidence. Further, Rule 41 requires the officers to prepare an inventory of all property seized during the search, so, where possible, company employees should assist in preparing the inventory to guarantee its accuracy. Finally, the Federal Rules of Criminal Procedure allow all individuals "aggrieved by an unlawful search and seizure of property, or by the deprivation of property" to file a motion for the property's return. Therefore, it is important to verify that all search warrants are valid and lawfully executed, as the pipeline operator may otherwise be entitled to legal remedies. See Appendix A for a checklist that pipeline operators should consult when responding to a search warrant.

C. Responding to Government Requests for Interviews: Fifth Amendment Considerations

Another issue that corporations often face during the course of a government investigation is that of its employees' Fifth Amendment privilege against self-incrimination. Individuals have a Fifth Amendment guarantee against testimonial compulsion, which gives them the right to refuse to provide any information to the government that may incriminate them. This privilege has been interpreted broadly, as the Supreme Court has made clear that individuals may invoke the Fifth Amendment privilege even where the individual's response would not, in and of itself, support a conviction for a federal offense. In *Hoffman v. United States*, 341 U.S. 479, 486 (1951), the Court held that the privilege also extends to answers that would "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." According to the Court, "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Id. at 486-87.

Unfortunately, the Fifth Amendment privilege against self-incrimination is a personal one, and therefore cannot be invoked by an organization, such as a corporation. See *United States v. White*, 322 U.S. 694, 700-01, 704 (1944) (explaining that corporations do not enjoy a Fifth Amendment privilege against incrimination, as “the privilege [is] limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records”). However, despite the fact that a pipeline operator could not assert the Fifth Amendment privilege on behalf of its employees, the statements that its employees or agents make during the course of their employment constitute “admissions” against the pipeline operator. Thus, the company should prepare employees prior to any statements the employees make to safety organizations, such as the NTSB.

This creates a difficult situation for the pipeline operator, as it must carefully balance the individual's constitutional rights against the possibility that the operator's conduct in preparing its employees could be misconstrued as obstruction of justice. In order to ensure that the company does not engage in obstructive conduct in preparing its employees to speak to the government, the company's defense counsel should establish a protocol for advising employees of their rights in these situations. As employees are often visited by law enforcement agents while outside of the office, employees should be advised of their rights as soon as a criminal investigation can reasonably be anticipated. Importantly, the pipeline operator should communicate to its employees that: (1) they have the right to meet with the government; (2) they have the right to refuse to meet with the government; (3) they have the right to set conditions for the meeting; (4) they have the obligation to tell the truth if they meet with the government; and (5) they have the obligation to inform company counsel if they meet with the government. Companies that follow this protocol will be in a better position to avoid obstruction of justice charges for influencing their employees' testimony or dissuading their employees from cooperating with the government investigation. See Appendix B for a sample Advice of Rights form.

In the event of an accident resulting in death or serious injury, pipeline operators should always anticipate a criminal case. An ounce of prevention is the name of the game: advance preparation may save the company, its agents, and its employees from years of expense and exposure.

Appendix A - Search Warrant Checklist

The material contained in this summary should be viewed only as a general summary of the law by Fox Rothschild and not as a substitute for legal consultation in any particular case.

PRIOR TO ARRIVAL: Fax a letter to the U.S. Attorney advising of the prohibition against ex parte interviews of company employees. Pack (1) paper for notes; (2) two copies of the letter faxed to the U.S. Attorney; and (3) telephone numbers for local judges and magistrates (e.g., County Bar directory).

ON THE SCENE:

Arrival: Make a note of your time of arrival.

Negotiate: You may not interfere with the search. Pledge cooperation to and negotiate with the agent in charge and the prosecutor while still representing the client.

The Agent: Find the agent in charge and exchange identification and business cards with him. Ask him the name and telephone number of the prosecutor handling the case.

Employee Interviews: Advise the agent in charge that *ex parte* interviews are prohibited and you have so advised the U.S. Attorney. Give him a copy of the letter faxed to the U.S. Attorney. Ask him that *ex parte* interviews cease or you be allowed access to a telephone to arrange that a judge or magistrate stop the interviews. Notify as many employees as possible that they do not have to submit to an interview or make any statements.

The Search Warrant: Obtain a copy of the Search Warrant ("**Warrant**") and, if possible, the Application and Affidavit for Search Warrant, and any continuation sheets made a part thereof ("**Affidavit**"). You are only entitled to the Affidavit if the *Warrant* contains language such as: "Affidavit(s) having been made before me and *made a part hereof*. . ." or "I am satisfied that the affidavit(s) *which are incorporated herein*" In short, unless the Warrant expressly incorporates the Affidavit, you are not entitled to the Affidavit. Immediately examine the Warrant and answer these questions:

- Is the *date* of the search on or before the last date permitted by the Warrant?
- Is the *time* of the search during the time ordered in the Warrant?
- Is the property being searched the property described in the Warrant?
- Does the Warrant, and the Application, if available to you, appear to be signed by a federal magistrate or a state judge?
- Does the Warrant at the top correctly state the county or district in which the property being searched is located?

If the answer to any of these questions is "no," ask the agent in charge of the search that the search immediately terminate and the agents leave the property.

Supervisors: Attempt to form a group to follow your instructions and instruct them to observe agents and employees in their areas and to make notes of key observations, such as:

- property *searched*
- property *seized*

- persons present
- persons interviewed
- focus of search
- communications

The Entry: While fresh in their mind, ask witnesses exactly what the agents did and said when they first entered the property.

The Witnesses: Obtain the identity of and business cards from as many persons present as possible, including all agents.

The Search: Monitor and make notes of the search to the extent possible. What property is being seized from what areas and is that property described in the Warrant? Tell an agent if you believe that the property being seized is not described in the Warrant and make notes when your input is overruled or ignored. Make your own personal inventory as best as possible of number or volume and type of property seized.

Privileged Property: Ask that property which you believe is protected by the attorney-client privilege or some other privilege either be left behind or put in a box which is taped completely around, i.e., sealed. Make notes when your input is overruled or ignored.

The Receipt: A receipt or inventory of the property seized must be given to the person from whom the property was taken. This receipt is so general that it should not be signed by you or the client, though an agent will likely ask that one of you do so. On the other hand, inform the agents if you perceive omissions or inaccuracies in the receipt.

Critical Documents: Ask the agent in charge if he will seize copies of rather than original critical documents or, in the alternative, if copies may be retained prior to seizure of originals.

Agent Misconduct: Be alert to agent misconduct (e.g., searching an employee's purse, barring an employee from leaving though employee promises not to return, barring an employee from leaving unless and until interviewed, threatening employees, etc.) and make notes thereof.

Debriefing: After departure of the agents, interview or schedule interviews of all employees who have made a statement to an agent. Also interview or schedule interviews of all supervisors regarding their observations and instruct them to personally prepare memoranda of their observations. Use a tape recorder for interviews if at all possible.

Departure: Do not leave until the agents leave and the search is completed. Make certain you have (1) a copy of the Warrant; (2) a copy of the Affidavit, if available to you; (3) a copy of the receipt; and (4) your notes and materials before you leave the scene.

TACTICS AND DEFENSES IN DEALING WITH SEARCH WARRANTS

A. Background

1. The Fourth Amendment to the United States Constitution provides that all “persons” (a corporation, partnership, or sole proprietorship is a “person” for Fourth Amendment purposes) are protected against unreasonable searches, inspections, and seizures of their premises, files, and records. The Fourth Amendment also limits the government’s power to issue warrants for searches and seizures. The government must have probable cause to believe a crime has occurred prior to the issuance of a warrant. Further, a search warrant must describe, with particularity, the place to be searched and/or any items to be seized.

2. Probable cause is a threshold requirement for the issuance of any search warrant authorizing a government intrusion on privacy. Generally, the law requires that a “neutral and detached” magistrate review the facts and circumstances articulated by the government, prior to the issuance of a warrant, to determine whether or not probable cause exists for a search or seizure. Probable cause for a search or seizure must be based on more than the government’s mere suspicion of illegal activity. Probable cause requires that the government possess reasonable grounds to believe that the specific items or persons to be searched for and/or seized are located on the property to which entry is sought. Thus, probable cause for a search can become “stale” if too long a time passes and it becomes likely that the items sought are no longer on the premises.

3. The Fourth Amendment protects “persons” and their expectations of privacy – wherever they exist. Accordingly, there can be no “search or seizure,” as defined by the Fourth Amendment, if the government does not intrude upon an expectation of privacy. For example, a search conducted following the consent of a suspect or “target” of an investigation will be upheld by courts, even in the absence of probable cause or a search warrant. In the absence of a warrant, it is important that the target of an investigation demonstrate and maintain an expectation of privacy regarding its premises, records, and files to defeat any potential claim of consent to a search. By consenting to the government’s intrusion, a target gives up its expectation of privacy, thereby losing all Fourth Amendment protection.

4. Over the years, searches and seizures conducted by the government have generated a vast amount of litigation. As a result, interpreting the Fourth Amendment, recognizing exceptions to the probable cause and expectation-of-privacy standards, and raising other relevant issues, such as challenging the government’s use of informant testimony to establish probable cause, are exceedingly complex tasks which require legal counsel who is experienced in litigating criminal procedure issues. Moreover, the earliest possible retention of counsel, for the purpose of obtaining advice on the particular matter giving rise to the government’s search, is critical to ensure that the target of the government’s investigation is afforded the fullest protection of its rights under the law.

B. How To Respond to a Search Warrant

The factual details and circumstances surrounding the execution of the warrant are critical to defending the criminal investigation. It is therefore important to note and record the conduct of the agents during the search, in as much detail as possible, so that counsel may use whatever facts are helpful to challenge the warrant or the use of proceeds from the warrant and to develop potential issues for litigation.

1. Once a search is announced, counsel must be notified immediately and must proceed forthwith to the scene. Warrants are often executed by large numbers of federal agents who disperse rapidly throughout the facility and have little patience for amenities. Counsel’s role under these circumstances is delicate but vital.

2. Tell the agents or officers that counsel has been retained with regard to the investigation for which the warrant was issued and that individuals present on the premises may not be interrogated by the agents or officers without first advising counsel that they wish to contact such individuals.

3. Note what language the government agents or officers use when demanding entry to the premises. The common law requires that an agent state his or her identity and purpose prior to

entry. In the absence of a warrant, do not be persuaded by an agent's claim of authority or a threat to obtain a warrant. Permitting a search without a warrant could be construed as a voluntary consent to the search and could eliminate the protections of the Fourth Amendment. Also be wary of an employee's inadvertent consent to a search in the absence of a warrant. (For example, an office manager may possess sufficient authority over corporate files to consent to the government's search of those files.)

4. Read the warrant and obtain a copy of it and any other documents or affidavits attached to the warrant. A search warrant should contain the following information:

- a. The date on which it is issued.
- b. An authorization addressed to an officer or agent who is empowered to execute the warrant.
- c. The identity of the issuing authority and the date when the application for the warrant was made.
- d. The identity of the applicant and all persons whose affidavits were submitted in support of the application.
- e. The issuing authority's finding of reasonable cause for the warrant.
- f. The identity of the place to be searched and the location, usually a street address, of the place to be searched.
- g. The items constituting the object of the search.
- h. The time of day or night and the period of time, usually five to ten days from the date the warrant was issued, during which the execution of the warrant is authorized.
- i. The period of time, usually not more than five days, following execution of the warrant within which it must be returned to the issuing authority.

5. Counsel should note the names of all officers executing the warrant, identify the Agent In Charge, and identify all witnesses to the search. Counsel then should pledge cooperation, and seek to engage the agents in an accommodation to limit disruption of the facility. Counsel should offer to direct agents to areas where the material identified in the warrant is likely to be found. The agents cannot be required by counsel to search only in designated areas, but often they will accept reasonable limits on the areas to be searched.

6. Counsel must review the warrant carefully, noting the area to be searched and the items to be seized, which are specified on the face of the warrant.

7. Counsel should seal off the search area from the rest of the facility to minimize disruption and avoid chance encounters between agents and employees.

8. Notify all employees that, upon the advice of counsel, they may but are not obligated to discuss any aspect of the investigation with the agents or officers.

9. Advise all employees that their persons and/or personal effects are not subject to search unless an individual is specifically identified in the warrant. A search warrant for a premises will not authorize a search of any individual found there unless the warrant specifies that the individual may be searched or if there is probable cause to believe the individual is involved in an illegal activity.

10. Advise employees that they should not attempt to prevent the search from taking place since agents may use non-deadly force, if necessary, to execute the warrant.

11. If the search extends beyond the limits of the warrant, or if the warrant contains facial

inadequacies or defects, such as a misidentification of the company or the wrong address, these matters should be called to the agents' attention immediately. This will foreclose a later claim by the government that the warrant was executed in good faith.

12. Counsel should accompany the agents and make detailed notes as to what areas are searched and what materials are seized. These notes are often more helpful than the formal inventory that the agents are required to leave with the company. This is especially true when the agents seize large quantities of documents that may be necessary to the ongoing business of the company. Counsel's detailed notes are essential in light of the Government's history of sometimes failing to return complete sets of seized documents. In lieu of notes, counsel can dictate the course of the search into a tape recorder. Use of a video recorder is also proper but should not be employed if the agents object to its use.

13. Record in detail any aspect of the search which appears to exceed the scope of the warrant, e.g., places searched or persons questioned which were not authorized by the warrant.

14. Note whether the agents or officers leave the premises and return later to conduct an additional search. Such "gaps" in the search may require a second warrant.

15. As an additional precaution, counsel should request that the agents permit the company to photocopy selected original documents before they are removed from the premises. Alternatively, counsel should seek a commitment from the Agent In Charge that the company will be permitted access to and an opportunity to duplicate all the documents once they are in federal custody.

16. Counsel should seek to prevent the seizure of any attorney-client materials located in the areas to be searched. If agents do seize such materials, counsel should immediately notify attorneys for the government, suggest an agreement that such documents not be removed from the premises or, alternatively, that such documents be placed in a sealed envelope, pending agreement on the nature and disposition of the material.

17. As a general proposition, counsel should attempt to monitor the search to detect overreaching by the agents, clues as to the reason for the search, and any grounds for suppression based on overreaching. Counsel should note if the agents appear familiar with the office layout or files. Counsel should attempt to determine the nature of the investigation based on the type of files that the agents are reviewing.

18. Obtain a receipt, prepared by the agent in the presence of witnesses to the search, for all items seized.

19. Upon the advice of corporate counsel, request that employees not discuss the search or investigation with the news media. If photographers or television cameras arrive, however, company executives should not attempt to dodge or duck from the cameraperson since these photographs can be highly prejudicial.



21. Crimes and Criminal Procedure (18 U.S.C. § 1512)

Sec. 1512. Tampering with a Witness, Victim, or an Informant

(a) (1) Whoever kills or attempts to kill another person, with intent to

- (A) prevent the attendance or testimony of any person in an official proceeding;
- (B) prevent the production of a record, document, or other object, in an official proceeding; or
- (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to

- (A) influence, delay, or prevent the testimony of any person in an official proceeding;
- (B) cause or induce any person to
 - (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
 - (ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
 - (iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
 - (iv) be absent from an official proceeding to which that person has been summoned by legal process; or
- (C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is

- (A) in the case of a killing, the punishment provided in sections 1111 and 1112;
- (B) in the case of
 - (i) an attempt to murder; or
 - (ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years; and
- (C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so,

or engages in misleading conduct toward another person, with intent to

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

...

FEDERAL GUIDELINES FOR TREATMENT OF CRIME VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM - - Section 6 of Pub. L. 97-291, as amended by Pub. L. 98-473, title II, Sec. 1408(b), Oct. 12, 1984, 98 Stat. 2177, provided that: "(a) Within two hundred and seventy days after the date of enactment of this Act [Oct. 12, 1982], the Attorney General shall develop and implement guidelines for the Department of Justice consistent with the purposes of this Act [see Short Title of 1982 Amendment note set out under section 1501 of this title]. In preparing the guidelines the Attorney General shall consider the following objectives: "(1) Services to victims of crime. - Law enforcement personnel should ensure that victims routinely receive emergency social and medical services as soon as possible and are given information on the following - "(A) availability of crime victim compensation (where applicable); "(B) community-based victim treatment programs; "(C) the role of the victim in the criminal justice process, including what they can expect from the system as well as what the system expects from them; and "(D) stages in the criminal justice process of significance to a crime victim, and the manner in which information about such stages can be obtained. "(2) Notification of availability of protection. - A victim or witness should routinely receive information on steps that law enforcement officers and attorneys for the Government can take to protect victims and witnesses from intimidation. "(3) Scheduling changes. - All victims and witnesses who have been scheduled to attend criminal justice proceedings should either be notified as soon as possible of any scheduling changes which will affect their appearances or have available a system for alerting witnesses promptly by telephone or otherwise. "(4) Prompt notification to victims of serious crimes. - Victims, witnesses, relatives of those victims and witnesses who are minors, and relatives of homicide victims should, if such persons provide the appropriate official with a current address and telephone number, receive prompt advance notification, if possible, of - "(A) the arrest of an accused; "(B) the initial appearance of an accused before a judicial officer; "(C) the release of the accused pending judicial proceedings; and "(D) proceedings in the prosecution and punishment of the accused (including entry of a plea of guilty, trial, sentencing, and, where a term of imprisonment is imposed, a hearing to determine a parole release date and the release of the accused from such imprisonment). "(5) Consultation with victim. - The victim of a serious crime, or in the case of a minor child or a homicide, the family of the victim, should be consulted by the attorney for the Government in order to obtain the views of the victim or family about the disposition of any Federal criminal case brought as a result of such crime, including the views of the victim or family about - "(A) dismissal; "(B) release of the accused pending judicial proceedings; "(C) plea negotiations; and "(D) pretrial diversion program. "(6) Separate waiting area. - Victims and other prosecution witnesses should be provided prior to court appearance a waiting area that is separate from all other witnesses. "(7) Property return. - Law enforcement agencies and prosecutor should promptly return victim's property held for evidentiary purposes unless there is a compelling law enforcement reason for retaining it. "(8) Notification to employer. - A victim or witness who so requests should be assisted by law enforcement agencies and attorneys for the Government in informing employers that the need for victim and witness cooperation in the prosecution of the case may necessitate absence of that victim or witness from work. A victim or witness who, as a direct result of a crime or of cooperation with law enforcement agencies or attorneys for the Government, is subjected to serious financial strain, should be assisted by such agencies and attorneys in explaining to creditors the reason for such serious financial strain. "(9) Training by federal law

enforcement training facilities. - Victim assistance education and training should be offered to persons taking courses at Federal law enforcement training facilities and attorneys for the Government so that victims may be promptly, properly, and completely assisted. "(10) General victim assistance. - The guidelines should also ensure that any other important assistance to victims and witnesses, such as the adoption of transportation, parking, and translator services for victims in court be provided. "(b) Nothing in this title shall be construed as creating a cause of action against the United States. "(c) The Attorney General shall assure that all Federal law enforcement agencies outside of the Department of Justice adopt guidelines consistent with subsection (a) of this section." [Amendment of section 6 of Pub. L. 97-291 by Pub. L. 98-473, set out above, effective 30 days after Oct. 12, 1984, see section 1409(a) of Pub. L. 98-473, set out as an Effective Date note under section 10601 of Title 42, The Public Health and Welfare.]

Appendix

22. 49 U.S.C. § 1111: Organization and Administration of NTSB

§ 1111. General Organization

(a) Organization. The National Transportation Safety Board is an independent establishment of the United States Government.

(b) Appointment of members. The Board is composed of 5 members appointed by the President, by and with the advice and consent of the Senate. Not more than 3 members may be appointed from the same political party. At least 3 members shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in accident reconstruction, safety engineering, human factors, transportation safety, or transportation regulation.

(c) Terms of office and removal. The term of office of each member is 5 years. An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, is appointed for the remainder of that term. When the term of office of a member ends, the member may continue to serve until a successor is appointed and qualified. The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.

(d) Chairman and Vice Chairman. The President shall designate, by and with the advice and consent of the Senate, a Chairman of the Board. The President also shall designate a Vice Chairman of the Board. The terms of office of both the Chairman and Vice Chairman are 2 years. When the Chairman is absent or unable to serve or when the position of Chairman is vacant, the Vice Chairman acts as Chairman.

(e) Duties and powers of Chairman. The Chairman is the chief executive and administrative officer of the Board. Subject to the general policies and decisions of the Board, the Chairman shall

- (1) appoint and supervise officers and employees, other than regular and full-time employees in the immediate offices of another member, necessary to carry out this chapter [49 U.S.C. §§ 1101 et seq.];
- (2) fix the pay of officers and employees necessary to carry out this chapter [49 U.S.C. §§ 1101 et seq.];
- (3) distribute business among the officers, employees, and administrative units of the Board; and
- (4) supervise the expenditures of the Board.

(f) Quorum. Three members of the Board are a quorum in carrying out duties and powers of the Board.

(g) Offices, bureaus, and divisions. The Board shall establish offices necessary to carry out this chapter [49 U.S.C. §§ 1101 et seq.], including an office to investigate and report on the safe transportation of hazardous material. The Board shall establish distinct and appropriately staffed bureaus, divisions, or offices to investigate and report on accidents involving each of the following modes of transportation:

- (1) aviation.
- (2) highway and motor vehicle.
- (3) rail and tracked vehicle.
- (4) pipeline.
- (5) marine.

(h) Chief Financial Officer. The Chairman shall designate an officer or employee of the Board as the Chief Financial Officer. The Chief Financial Officer shall

- (1) report directly to the Chairman on financial management and budget execution;
- (2) direct, manage, and provide policy guidance and oversight on financial management and property and inventory control; and

(3) review the fees, rents, and other charges imposed by the Board for services and things of value it provides, and suggest appropriate revisions to those charges to reflect costs incurred by the Board in providing those services and things of value.

(i) Board member staff. Each member of the Board shall select and supervise regular and full-time employees in his or her immediate office as long as any such employee has been approved for employment by the designated agency ethics official under the same guidelines that apply to all employees of the Board. Except for the Chairman, the appointment authority provided by this subsection is limited to the number of full-time equivalent positions, in addition to 1 senior professional staff at a level not to exceed the GS 15 level and 1 administrative staff, allocated to each member through the Board's annual budget and allocation process.

(j) Seal. The Board shall have a seal that shall be judicially recognized.

23. Authority of NTSB (49 U.S.C. § 1131)

§ 1131. General Authority

(a) General.

(1) The National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of

(A) an aircraft accident the Board has authority to investigate under section 1132 of this *title* [49 U.S.C. § 1132] or an aircraft accident involving a public aircraft as defined by section 40102(a)(37) of this *title* [49 U.S.C. § 40102(a)(37)] other than an aircraft operated by the Armed Forces or by an intelligence agency of the United States;

(B) a highway accident, including a railroad grade crossing accident, the Board selects in cooperation with a State;

(C) a railroad accident in which there is a fatality or substantial property damage, or that involves a passenger train;

(D) a pipeline accident in which there is a fatality, substantial property damage, or significant injury to the environment;

(E) a major marine casualty (except a casualty involving only public vessels) occurring on or under the navigable waters, internal waters, or the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988 [43 U.S.C. § 1331 note], or involving a vessel of the United States (as defined in section 2101(46) of title 46), under regulations prescribed jointly by the Board and the head of the department in which the Coast Guard is operating; and

(F) any other accident related to the transportation of individuals or property when the Board decides

(i) the accident is catastrophic;

(ii) the accident involves problems of a recurring character; or

(iii) the investigation of the accident would carry out this chapter [49 U.S.C. §§ 1101 et seq.].

(2) (A) Subject to the requirements of this paragraph, an investigation by the Board under paragraph (1)(A)-(D) or (F) of this subsection has priority over any investigation by another department, agency, or instrumentality of the United States Government. The Board shall provide for appropriate participation by other departments, agencies, or instrumentalities in the investigation. However, those departments, agencies, or instrumentalities may not participate in the decision of the Board about the probable cause of the accident.

(B) If the Attorney General, in consultation with the Chairman of the Board, determines and notifies the Board that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act, the Board shall relinquish investigative priority to the Federal Bureau of Investigation. The relinquishment of investigative priority by the Board shall not otherwise affect the authority of the Board to continue its investigation under this section.

(C) If a Federal law enforcement agency suspects and notifies the Board that an accident being investigated by the Board under subparagraph (A), (B), (C), or (D) of paragraph (1) may have been caused by an intentional criminal act, the Board, in consultation with the law enforcement agency, shall take necessary actions to ensure that evidence of the criminal act is preserved.

(3) This section and sections 1113, 1116(b), 1133, and 1134(a) and (c)-(e) of this title [49 U.S.C. §§ 1113, 1116(b), 1133, and 1134(a) and (c)-(e)] do not affect the authority of another department, agency, or

instrumentality of the Government to investigate an accident under applicable law or to obtain information directly from the parties involved in, and witnesses to, the accident. The Board and other departments, agencies, and instrumentalities shall ensure that appropriate information developed about the accident is exchanged in a timely manner.

(b) Accidents involving public vessels.

(1) The Board or the head of the department in which the Coast Guard is operating shall investigate and establish the facts, circumstances, and cause or probable cause of a marine accident involving a public vessel and any other vessel. The results of the investigation shall be made available to the public.

(2) Paragraph (1) of this subsection and subsection (a)(1)(E) of this section do not affect the responsibility, under another law of the United States, of the head of the department in which the Coast Guard is operating.

(c) Accidents not involving government misfeasance or nonfeasance.

(1) When asked by the Board, the Secretary of Transportation or the Secretary of the department in which the Coast Guard is operating may

(A) investigate an accident described under subsection (a) or (b) of this section in which misfeasance or nonfeasance by the Government has not been alleged; and

(B) report the facts and circumstances of the accident to the Board.

(2) The Board shall use the report in establishing cause or probable cause of an accident described under subsection (a) or (b) of this section.

(d) Accidents involving public aircraft. The Board, in furtherance of its investigative duties with respect to public aircraft accidents under subsection (a)(1)(A) of this section, shall have the same duties and powers as are specified for civil aircraft accidents under sections 1132(a), 1132(b), and 1134(a), (b), (d), and (f) of this title [49 U.S.C. §§ 1132(a), 1132(b), and 1134(a), (b), (d), and (f)].

(e) Accident reports. The Board shall report on the facts and circumstances of each accident investigated by it under subsection (a) or (b) of this section. The Board shall make each report available to the public at reasonable cost.

24. Drug and Alcohol Testing Regulations – Operators of Pipeline Facilities (49 C.F.R. Part 199)

§ 199.3 Definitions.

As used in this part

Covered employee, employee, or individual to be tested means a person who performs a covered function, including persons employed by operators, contractors engaged by operators, and persons employed by such contractors.

Covered function means an operations, maintenance, or emergency-response function regulated by part 192, 193, or 195 of this chapter that is performed on a pipeline or on an LNG facility.

Performs a covered function includes actually performing, ready to perform, or immediately available to perform a covered function.

Drug Testing:

§ 199.105 Drug tests required.

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

(b) Post-accident testing.

(1) As soon as possible but no later than 32 hours after an accident, an operator must drug test each surviving covered employee whose performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on specific information that the covered employee's performance had no role in the cause(s) or severity of the accident.

(2) If a test required by this section is not administered within the 32 hours following the accident, the operator must prepare and maintain its decision stating the reasons why the test was not promptly administered. If a test required by paragraph (b)(1) of this section is not administered within 32 hours following the accident, the operator must cease attempts to administer a drug test and must state in the record the reasons for not administering the test.

§ 199.115 Contractor employees.

With respect to those employees who are contractors or employed by a contractor, an operator may provide by contract that the drug testing, education, and training required by this part be carried out by the contractor provided:

(a) The operator remains responsible for ensuring that the requirements of this part are complied with; and

(b) The contractor allows access to property and records by the operator, the Administrator, and if the operator is subject to the jurisdiction of a state agency, a representative of the state agency for the purpose of monitoring the operator's compliance with the requirements of this part.

Alcohol Testing:

§ 199.221 Use following an accident.

Each operator shall prohibit a covered employee who has actual knowledge of an accident in which his or her performance of covered functions has not been discounted by the operator as a contributing factor to the accident from using alcohol for eight hours following the accident, unless he or she has been given a post-accident test under § 199.225(a), or the operator has determined that the employee's performance could not have contributed to the accident.

§ 199.225 Alcohol tests required.

Each operator shall conduct the following types of alcohol tests for the presence of alcohol:

(a) Post-accident.

(1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section must be based specific information that the covered employee's performance had no role in the cause(s) or severity of the accident.

(2)(i) If a test required by this section is not administered within 2 hours following the accident, the operator shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by paragraph (a) is not administered within 8 hours following the accident, the operator shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(ii) [Reserved]

(3) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the operator or operator representative of his/her location if he/she leaves the scene of the accident prior to submission to such test, may be deemed by the operator to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(b) Reasonable suspicion testing.

(1) Each operator shall require a covered employee to submit to an alcohol test when the operator has reasonable suspicion to believe that the employee has violated the prohibitions in this subpart.

(2) The operator's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.

(3) Alcohol testing is authorized by this section only if the observations required by paragraph (b)(2) of this section are made during, just preceding, or just after the period of the work day that the employee is required to be in compliance with this subpart. A covered employee may be directed by the operator to undergo reasonable suspicion testing for alcohol only while the employee is performing covered functions; just before the employee is to perform covered functions; or just after the employee has ceased performing covered functions.

(4)(i) If a test required by this section is not administered within 2 hours following the determination under paragraph (b)(2) of this section, the operator shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the determination under paragraph (b)(2) of this section, the operator shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test. Records shall be submitted to PHMSA upon request of the Administrator.

(ii) [Reserved]

(iii) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, an operator shall not permit a covered employee to report for duty or remain on duty requiring the performance of covered functions while the employee is under the influence of or impaired by alcohol, as shown by the behavioral, speech, or performance indicators of alcohol misuse, nor shall an operator permit the covered employee to perform or continue to perform covered functions, until:

(A) An alcohol test is administered and the employee's alcohol concentration measures less than 0.02; or

(B) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following the determination under paragraph (b)(2) of this section that there is reasonable suspicion to believe that the employee has violated the prohibitions in this subpart.

(iv) Except as provided in paragraph (b)(4)(ii), no operator shall take any action under this subpart against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an operator with the authority independent of this subpart from taking any action otherwise consistent with law.

(c) Return-to-duty testing. Each operator shall ensure that before a covered employee returns to duty requiring the performance of a covered function after engaging in conduct prohibited by §§ 199.215 through 199.223, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(d) Follow-up testing.

(1) Following a determination under § 199.243(b) that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each operator shall ensure that the employee is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional in accordance with the provisions of § 199.243(c)(2)(ii).

(2) Follow-up testing shall be conducted when the covered employee is performing covered functions; just before the employee is to perform covered functions; or just after the employee has ceased performing such functions.

(e) Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04. Each operator shall retest a covered employee to ensure compliance with the provisions of § 199.237, if an operator chooses to permit the employee to perform a covered function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04.

§ 199.245 Contractor employees.

(a) With respect to those covered employees who are contractors or employed by a contractor, an operator may provide by contract that the alcohol testing, training and education required by this subpart be carried out by the contractor provided:

(b) The operator remains responsible for ensuring that the requirements of this subpart and part 40 of this title are complied with; and

(c) The contractor allows access to property and records by the operator, the Administrator, any DOT agency with regulatory authority over the operator or covered employee, and, if the operator is subject to the jurisdiction of a state agency, a representative of the state agency for the purposes of monitoring the operator's compliance with the requirements of this subpart and part 40 of this title.

Checklist for Post-Accident Testing

- Do you conduct post-accident testing when the employee's performance either contributes to the accident or cannot be completely discounted as a contributing factor?
- Do you make the decision not to conduct post-accident testing based on a determination, using the best information available at the time of the determination, that the employee's performance has not contributed to the accident?
- Do you conduct post-accident drug testing as soon as possible, but no later than 32 hours after the accident?

- Do you conduct post-accident alcohol testing as soon as practicable, but no later than 8 hours after the accident?
- Do you prepare and maintain a report stating the reasons the post-accident alcohol test is not conducted within 2 hours of the accident?
- Do you cease attempts to conduct post-accident alcohol testing 8 hours after the accident and do you prepare and maintain a report stating the reasons the post-accident alcohol test is not conducted within 8 hours of the accident?
- Do you make the determination that an employee refused to submit to post accident testing after the employee is identified for testing and does not remain readily available?
- Do you ensure that a covered employee is allowed to leave the scene of an accident for a period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care?





Attorney Advertisement
© 2022 Fox Rothschild LLP. All rights reserved.

All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice and should not be used or taken as legal advice for specific situations. This publication does not create, and receipt of it does not constitute, an attorney-client relationship between Fox Rothschild LLP and the recipient. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.