

What Does the June 3 U.S. DOT Restart Order Require, Mean, and Raises Questions About TransCanada's Pipeline Safety?

Much news has appeared as a result of the U.S. Department of Transportation's June 3, 2011 issuance of an Order permitting TransCanada to restart its Pipeline I. The news suggests problems are resolved. But, there is more to this.

The U.S. Department of Transportation's actual *Order* is far from comforting. The Order suggests significant problems are present, and that U.S. DOT deems it necessary to impose basic safety and inspection requirements on TransCanada as conditions for reinvigorating its first pipeline, which crosses eastern Nebraska from Cedar County in the north to Jefferson County in the south.

A massive second pipeline is proposed by TransCanada about 150 miles to the west, across the counties of Boyd, Holt, Wheeler, Greeley, Nance, and on south.

The Department of Transportation's Order, issued by the associate administrator for pipeline safety, Jeffrey D. Wiese¹, contains these preliminary *findings*:

1. Two (2) spills occurred in May 2011.
2. The larger spill, in North Dakota, was discovered by a local citizen who notified TransCanada.
3. A threaded connection failed to cause the first leak. When the materials were tested, it was discovered that "cracks at the root of the thread likely as a result of over-torque during installation," caused the breakage.
4. Metallurgical testing at the second site on another nipple preliminarily suggests that this nipple failed because of "cyclical fatigue," i.e., it simply tired out from the use to which it was put in normal operations, and then failed.
5. A third leak, a transmitter fitting leak, occurred at the Roswell pump station, but it was minor and did not meet reportable criteria.

¹ The Order may be read at www.phmsa.dot.gov/staticfiles/phmsa/DownloadableFiles/320115006H_CAO_06032011.pdf.

Corrective Action Order

When reportable spills occur, it is not mandatory for the Department of Transportation to issue a corrective Order, or to take any action. As Mr. Wiese's June 3 Order notes, 49 USC § 60112 provides for the issuance of a formal Corrective Action Order, after reasonable notice and opportunity for hearing. Such an Order may include suspension or restricted use of the pipeline, physical inspection, testing, repair, replacement or other corrective action. The basis for making a determination that a pipeline facility is hazardous, requiring corrective action, appears at 49 CFR § 190.233.

Notably, Mr. Wiese enclosed a copy of the federal regulation with the corrective Order issued on June 3. This regulation should be so basic to TransCanada that the mere enclosure of a copy might be seen as disciplinary in a significant sense.

Mr. Wiese stated:

After evaluating the foregoing preliminary findings of fact, I find that the continued operation of the pipeline without corrective measures would be hazardous to life, property and the environment. Additionally, after considering the circumstances surrounding the May 7 and May 29, 2011 failures, the proximity of the pipeline to populated areas, water bodies, public roadways and high consequence areas, the hazardous nature of the product the pipeline transports, the ongoing investigation to determine the cause of the failures, and the potential for the conditions causing the failures to be present elsewhere on the pipeline, I find that a failure to issue this Order expeditiously to require immediate corrective action would result in likely serious harm to life, property and the environment. Accordingly, this Corrective Action Order mandating immediate corrective action is issued without prior notice and opportunity for hearing. The terms and conditions of this Order are effective upon receipt.

The corrective action required is extensive. It is reminiscent to DOMINALAW Group pc llo of a banking cease and desist order, requiring aggressive action to correct matters under threat that failure to do so could result in federal intervention to take over operations, or remove management, or otherwise systematically impose greater regulations on the offending institution. DOMINALAW Group pc llo does not suggest that the June 3 Order is in the nature of a banking cease and desist order. But it is a significant federal order.

These corrective steps are required:

1. Submit a written re-start plan for prior approval.
2. Include in the re-start plan specific steps, including adequate staffing and patrolling of all pump stations during the re-start. Re-start in daylight. Summarize all modifications in the plan.
3. Complete mechanical and metallurgical testing and failure analysis of the failed pipe parts.
4. Within sixty (60) days of the Order conduct a review of all Keystone facilities and submit a report to the Director as follows:
 - A. Compile all available data on previous failures of similar small diameter piping components;
 - B. Prepare a list by location that includes all sizes of pipe, sizes of components or fittings, material strength, manufacturers, length of pipe segments, purpose of piping, and whether or not it was modified by a contractor at initial construction; and
 - C. Submit a report to the Director documenting items A and B.
5. Within forty-five (45) days, TransCanada is required to summarize by location all Issues and Incident Tracker (IIT) reports, and copies of other media, including movies, etc. to provide backup support evidence or documentation for issues reported through the IIT reports, and a compilation of reports, memos or other correspondence produced within the company as a result, and provide status of the work on the IIT reported element, and review for similarity all IIT reports and interview all field personnel associated with the facilities to get input about a risk model and method to analyze risks associated with each issue in the IIT report, and implement a risk model and analysis that prioritizes issues for action.
6. A remedial work plan is required within ninety (90) days. It imposes extensive conditions.
7. Thereafter, monthly reports must be submitted to the Department of Transportation's Pipeline Hazardous Materials Safety Administration. In addition, TransCanada is requested, but not required, to maintain

documentation of costs associated with implementation of the corrective action.

8. The Order has teeth. Failure to comply with it may result in assessment of civil penalties and proceedings by the U.S. Attorney General under 49 USC § 60120.

Section 60120 permits the Secretary of Transportation to request that the Attorney General bring a civil action in district court to enforce orders of the Department of Transportation, and obtain temporary or permanent injunctions, punitive damages, assessment of civil damages and similar factors. The civil penalties may be in the amount of “not more than \$100,000 for each violation. A separate violation occurs for each day the violation continues. The maximum civil penalty . . . for a related series of violations is \$1,000,000.”

What Does the Order Suggest?

One cannot help but read the DOT’s extensive Order and question TransCanada’s preparedness to build a pipeline across the unique, variant, and fragile, Nebraska Sand Hills, and the underlying Ogallala Aquifer. In the Sand Hills, load-bearing capacities of soils vary from foot to foot and mile to mile, and could easily vary significantly from one end of a length of pipe to another. Nothing suggests preparedness to deal with these construction issues.