



U.S. Department
of Transportation
**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Ave., S.E.
Washington, DC 20590

DEC 22 2015

OVERNIGHT EXPRESS MAIL

Mr. Joshua Epel
Chairman
Colorado Public Utilities Commission
1560 Broadway, Suite 250
Denver, Colorado 80202

Dear Mr. Epel:

On July 23, 2015, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) published its Pipeline Damage Prevention Program Final Rule (49 FR 43835-43869) that may likely impact Colorado. The rule includes new criteria and procedures to determine the adequacy of State damage prevention enforcement programs, administrative procedures for States to contest a notice of inadequacy, the Federal requirements PHMSA will enforce against excavators for violations in States with inadequate damage prevention laws and programs, and the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised. These new rules become effective on January 1, 2016. Please refer to the included guidance brief for background on this new regulation.

Excavation damage continues to be a leading cause of hazardous liquid and natural gas pipeline incidents resulting in death, serious injury, and environmental damage. Damaging a pipeline during an excavation poses a serious safety risk to excavators, the general public living and working in proximity to the excavation site, and the environment. Nationwide statistics show that effective enforcement of State's one-call laws reduces excavation damage and pipeline incidents, and results in increased safety.

In early 2016, PHMSA will initiate State evaluations to determine if State damage prevention one-call laws allow for adequate enforcement. As of the date of this letter, the Colorado one-call law, Title 9, Article 1.5 Excavation Requirements, does not include an enforcement mechanism.

PHMSA will evaluate Colorado's damage prevention enforcement program. It appears that the lack of an enforcement mechanism in Colorado's one-call law will weigh heavily towards finding the enforcement program inadequate. We would like to meet with you in early 2016 (prior to a formal finding) to conduct an evaluation and understand if there are potential changes to the Colorado one-call law or other factors that may impact the determination of inadequacy for your State.

An inadequate determination means that PHMSA may use Federal excavation standards to take enforcement action against an excavator who damages a hazardous liquid or natural gas pipeline in Colorado. Federal civil penalty levels are \$200,000 for each violation for each day the violation continues with a maximum civil penalty of \$2,000,000 for any related series of violations. Additionally, States that fail to establish an adequate one-call law enforcement program, within five years from the date of the final PHMSA determination notice, may be subject to a 4 percent reduction in PHMSA State Base Grant funding. These grants currently fund the pipeline safety program with the Colorado Public Utilities Commission.

PHMSA strongly believes that effective damage prevention programs, including enforcement, are best addressed at the State level. We very much appreciate the efforts to address damage prevention in your State, as well as many of the existing and strong damage prevention programs in Colorado. PHMSA representatives have also met with interested parties in Colorado and will continue to reach out periodically to offer support.

PHMSA stands ready to assist Colorado in developing effective State one-call law enforcement. We offer resources including subject matter experts; grant funding; letters of support; coordination with State and national pipeline safety, damage prevention, and excavator stakeholders who are willing to share experiences and lessons learned from other States; safety workshops; and presentations to Colorado stakeholders to foster success in improving their damage prevention programs. If we can be of any further assistance, please contact our Damage Prevention Team by email at excavation.enforcement@dot.gov or by phone at (804) 556-4678.

Sincerely,



Alan K. Mayberry
Deputy Associate Administrator
for Policy and Programs

cc: The Honorable John Hickenlooper, Office of the Governor, State of Colorado
Joseph Molloy, Chief, Gas Pipeline Safety, Colorado Public Utilities Commission
J.D. Maniscalco, Executive Director, Colorado 811

United States Department of Transportation (USDOT)
Pipeline and Hazardous Materials Safety Administration (PHMSA)
Pipeline Safety: Pipeline Damage Prevention Programs
49 CFR 196 – Protection of Underground Pipelines from Excavation Activity
49 CFR 198 – Regulations for Grants to Aid State Pipeline Safety Programs
Effective January 1, 2016

Background

49 USC § 60114 provides the United States Department of Transportation with back stop authority to conduct administrative civil enforcement proceedings against excavators who damage hazardous liquid and natural gas pipelines in a State that has failed to adequately enforce its excavation damage prevention or one-call laws.

PHMSA published a Final Rule on July 23, 2015, that establishes:

1. Criteria and procedures for determining the adequacy of state pipeline excavation damage prevention law enforcement programs
2. An administrative process for making adequacy determinations
3. Federal requirements PHMSA will enforce in States with inadequate excavation damage prevention law enforcement programs
4. The adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised

Criteria to be used to Evaluate State Damage Prevention Programs

1. Does the State have enforcement authority including civil penalties?
2. Is there a designated enforcement body?
3. Is the State using its authority and making enforcement records available to the public?
4. Does the State have a reliable means of learning about damages?
5. Does the State have damage investigation practices that are adequate to determine the at-fault party when damage occurs?
6. At a minimum, does State law require:
 - a. Excavators must call 811 before digging
 - b. Excavators must “respect the marks”
 - c. If damage to a pipeline occurs:
 - i. Excavator must report damage to operator at earliest practical moment
 - ii. If release occurs, excavator must call 911
7. Are exemptions from the DP law limited? Written justification of exemptions is required.

Administrative Process for States to Contest Notices of Inadequacy

1. PHMSA issues a notice of inadequacy to the State in accordance with 49 CFR 190.5
2. State will have 30 days to submit written response
3. PHMSA issues final decision
4. State may petition PHMSA to reconsider at any time following a finding of inadequacy; PHMSA will respond not later than the date of the next annual review
5. States that fail to establish an adequate enforcement program within five years of effective date of final rule may be subject to 4 percent reduction in base grant funding

Federal Standard for Excavators

1. Call 811 before excavating
2. Wait for pipeline operators to establish and mark the location of underground pipelines before excavating
3. Excavate with proper regard for the marks, take all practicable steps to prevent excavation damage
4. ~~Make additional use of one-call as necessary~~
5. ~~Any contact with pipelines must be reported to operator at earliest practical moment~~
6. If there is a release, excavator must call 911

There are no exemptions in the new regulation for calling 811 prior to excavation. PHMSA understands many States have one-call law exemptions and will be considerate of those exemptions when undertaking Federal enforcement action.

For More Information

<http://phmsa.dot.gov/pipeline/safety-awareness-and-outreach/excavator-enforcement/>

Contact Our Damage Prevention Team

Our team of damage prevention professionals, Sam Hall, Annmarie Robertson, and Steve Fischer, are available to answer questions pertaining to this final rule, State one call laws, and damage prevention. They may be reached at excavation.enforcement@dot.gov.