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

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

DEC 28 2016

OVERNIGHT EXPRESS MAIL

The Honorable Matt Denn
Attorney General of Delaware
Carvel State Building
8200 N. French Street
Wilmington, DE 19801

Dear Attorney General Denn:

On August 25, 2016, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) conducted an adequacy evaluation of Delaware's enforcement of its excavation damage prevention law, Title 26: Public Utilities, Chapter 8—Underground Utility Damage Prevention and Safety Act, Subchapter I—Underground Utility Damage Prevention and Safety Act. This letter serves as your official notice of our findings and determination. Based on the evaluation, PHMSA has determined that enforcement of Delaware's excavation damage prevention law is **INADEQUATE** due to the State responding no to the following evaluation criterion:

> In the previous calendar year, did the State assess civil penalties and/or other sanctions for violations?

PHMSA conducted the evaluation pursuant to 49 United States Code (USC) § 60114 and 49 Code of Federal Regulations (CFR) Part 198, Subpart D—State Damage Prevention Enforcement Programs. Our representatives met with Robert Howatt, Jerry Platt, Heather Contant, and Matthew Hartigan of the Public Service Commission; Paige Schmittinger of the Delaware Department of Justice; and Bradley Ebaugh, Eric Cimo, and Jason Lyon of Miss Utility of Delmarva. During the evaluation, PHMSA asked a series of standard questions regarding actions that the State executed in calendar year 2015 to enforce the Delaware excavation damage prevention law.

In accordance with 49 CFR Part 198.55, States must be able to demonstrate that they adequately meet the seven Federal criteria that PHMSA uses to assess the effectiveness of the State's damage prevention enforcement programs. These criteria evaluate if the State has the authority to enforce its excavation damage prevention law, whether the State utilizes its authority to issue civil penalties and other appropriate sanctions for violations of the law, and if the State is able to provide documented procedures, processes, and data to demonstrate an effective overall damage prevention enforcement program. The evaluation criteria are attached.

PHMSA representatives stressed during the evaluation the importance of consistent, fair, and balanced enforcement for violations of the excavation damage prevention law as well as data collection and analysis to evaluate the impact of the enforcement program. PHMSA encourages Delaware stakeholders to address these issues in any future legislation or rulemakings.

During the evaluation, PHMSA representatives also noted areas of concern that impact the adequacy of damage prevention enforcement. The Delaware excavation damage prevention law does not specifically require a notification to 911 or similar emergency response number if a pipeline facility is damaged and a release occurs. This is a requirement of 49 USC § 60114, and is found in PHMSA's Final Rule on this matter. According to 49 CFR Part 198.55 (a)(6)(iii), an excavator who causes damage to a pipeline facility:

A. Must report the damage to the operator of the facility at the earliest practical moment following discovery of the damage; and

B. If the damage results in the escape of any PHMSA-regulated natural or other gas or hazardous liquid, must promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.

PHMSA urges all States to review the definitions for excavator and excavation in their excavation damage prevention law to ensure the law does not exempt anyone from the reporting requirements of 49 USC § 60114 and 49 CFR Part 198.55 (a)(6)(iii) (A) and (B). An excavator is defined in 49 CFR Part 196.3 as "any person or legal entity, public or private, proposing to or engaging in excavation."

Effective 30 days from receipt of this letter, the determination will go into effect and PHMSA may enforce the Federal excavation standards defined in 49 CFR Part 196 against an excavator who damages a hazardous liquid or natural gas pipeline in Delaware. It is important to note this does not mean that Delaware is unable to continue its enforcement efforts, only that PHMSA now has the authority to enforce its own Federal minimum excavation damage standards alongside your current efforts. PHMSA recognizes the critical role Delaware officials play in the safety of their pipeline network, and will continue to work together with Delaware officials going forward.

Federal civil penalty levels are as high as $205,638 per violation per day the violation continues, with a maximum civil penalty of $2,056,380 for any related series of violations. Additionally, States that fail to establish an adequate excavation damage prevention law enforcement program within 5 years from the date of the final PHMSA determination notice may be subject to a four (4) percent reduction in PHMSA State Base Grant funding. This grant currently funds up to 80 percent of the cost of the pipeline safety program in the Delaware Public Service Commission.

Delaware has the right under 49 CFR Part 198.59 to submit to PHMSA a written response contesting the inadequacy determination and requesting that the determination be withdrawn within 30 days of receiving this letter. Upon receipt of such notification, PHMSA will review all relevant information and issue a final determination. Please send letters to my attention at the following address:

Mr. Alan K. Mayberry
Associate Administrator for Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue SE, Suite E22-321
Washington, DC 20590

Additionally, PHMSA evaluation of State damage prevention law enforcement will occur annually; however, if Delaware takes action to establish an adequate enforcement program prior to the annual evaluation, Delaware may request that PHMSA review and reconsider the State's designation of inadequate.

PHMSA strongly believes that effective damage prevention programs—including enforcement—are best addressed at the State level. Excavation damage continues to be a leading cause of hazardous liquid and natural gas pipeline incidents resulting in fatalities, serious injury, and environmental damage. Damaging a pipeline during excavation poses a serious safety risk to excavators, the public living and working in proximity to the excavation site, and the environment. Nationwide statistics show that effective enforcement of State excavation damage prevention laws reduces excavation damage and pipeline incidents, resulting in increased safety.

PHMSA encourages Delaware damage prevention stakeholders to work with policy makers to pass legislation addressing the inadequacies in the State's excavation damage prevention program. We stand ready to assist Delaware stakeholders in improving enforcement of your excavation damage prevention law. PHMSA offers its assistance to work with your State to address this deficiency. If you have any questions or need additional information, please contact our Damage Prevention Team by email at excavation.enforcement@dot.gov or phone at (804) 556-4678.

Sincerely,

Alan K. Mayberry
Associate Administrator for Pipeline Safety

Enclosure

cc: The Honorable Jack Markell, Office of the Governor, State of Delaware
Dallas Winslow, Chair, Delaware Public Service Commission
Jerry Platt, Program Manager, Delaware Public Service Commission
Matt Ruddo, Director, Customer Relations, One Call Concepts
Bradley Ebaugh, President, Miss Utility of Delmarva

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
   Mail responses to:
   Alan Mayberry
   Acting Associate Administrator for Pipeline Safety
   Pipeline and Hazardous Materials Safety Administration
   U.S. Department of Transportation
   1200 New Jersey Avenue, SE, Suite E22-207
   Washington, DC 20590
3. PHMSA issues a final decision to states that contested a notice of inadequacy
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% 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.