



U.S. Department
of Transportation

1200 New Jersey Avenue, SE
Washington, DC 20590

**Pipeline and Hazardous
Materials Safety
Administration**

March 19, 2020

Via Electronic Delivery

Mr. Mahesh Albuquerque
Division Director
Colorado Department of Labor and Employment
Division of Oil and Public Safety
633 17th Street, Suite 500
Denver, CO 80202

Dear Mr. Albuquerque:

As you may know, excavation damage continues to be a leading cause of pipeline failures, a number of which have resulted in fatalities, serious injuries, and environmental damage. Nationwide statistics show that effective enforcement of state damage prevention laws reduces excavation damage and pipeline incidents, resulting in enhanced public safety.

On September 26, 2019, a representative of the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) conducted an evaluation of Colorado's enforcement of its excavation damage prevention law. PHMSA conducted this evaluation pursuant to 49 United States Code § 60114 and 49 Code of Federal Regulations (CFR) Part 198, Subpart D -- State Damage Prevention Enforcement Programs. Based on this evaluation, PHMSA determined that Colorado's enforcement of its excavation damage prevention law continues to be inadequate.

In our June 28, 2019 letter regarding this matter, PHMSA noted two areas that impacted the overall rating at that time. Since that letter was issued, Colorado began using its excavation damage prevention enforcement authority. Also, Colorado has received excavation damage incident complaints involving regulated pipelines, investigated those complaints and taken enforcement actions. Further, Colorado has developed excavation damage prevention procedures and policies to conduct investigations and enforcement.

However, Colorado law allows a home rule community to establish its own excavation damage prevention enforcement program, in lieu of participating in the excavation damage prevention enforcement program administered by the Colorado Division of Oil and Public Safety (CDOPS),

as set forth in Title 9, Article 1.5, C.R.S. Documents reviewed during and after the September 26, 2019 evaluation demonstrated that the CDOPS contacted all home rule communities to determine if the communities would defer excavation damage prevention enforcement to CDOPS or establish their own excavation damage prevention enforcement program. Of the 96 home rule communities, 23 have deferred and CDOPS has enforced penalties for pipeline excavation damage incidents that occurred in home rule communities on several occasions. It is our understanding that the remaining home rule communities have not deferred to the CDOPS for enforcement.

To meet the requirements of 49 CFR § 198.55(a)(2), Colorado must designate an agency or other body as the authority responsible for enforcement of the excavation damage prevention law for the entire state. While we appreciate the efforts undertaken to determine if the rest of Colorado home rule communities intend to establish enforcement programs, or waive that right and defer to the CDOPS, the state is not in full compliance with 49 CFR § 198.55(a)(2) at this time.

Please be advised that if Colorado fails to establish an adequate excavation damage prevention enforcement program by September 1, 2021, the state may be subject to a four percent reduction in PHMSA's State Base Grant funding. This grant currently provides funding for up to 80 percent of the qualified costs of the pipeline safety program incurred by the Colorado Public Service Commission. Also, excavators in Colorado who fail to comply with the federal excavation safety requirements and damage a pipeline may face federal enforcement actions.

Colorado may, under 49 CFR § 198.59, submit to PHMSA a written response within 30 days from receipt of this letter challenging the determination of inadequacy by providing additional information relevant to the determination. Upon receipt of such notification response, PHMSA will review all additional information provided and will issue a final determination. The response must be sent to:

Massoud Tahamtani
Deputy Associate Administrator, Policy and Programs
Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue SE
Suite E22-321
Washington, DC 20590

If Colorado does not submit such a response, this notice will serve as PHMSA's final determination under 49 CFR § 198.61. PHMSA's evaluation of Colorado's enforcement of its damage prevention law will occur annually; however, if Colorado acts to establish an adequate enforcement program prior to the annual evaluation, Colorado may request that PHMSA review and reconsider this designation. PHMSA stands ready to continue working with your state on improving enforcement of your excavation damage prevention law.

Mr. Mahesh Albuquerque
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PHMSA appreciates your dedication to safety and encourages the Department of Labor and Employment and the Colorado damage prevention stakeholder community to continue to support safety outreach initiatives throughout the year. These efforts include the National Safe Digging Month in April, the National Safety Month in June, and the National 811 Day in August. Should you have any questions regarding this letter, please contact Annmarie Robertson, our Senior Program Manager of Outreach and Engagement, at (317) 964-1670 or by email at Annmarie.Robertson@dot.gov.

Sincerely,



Massoud Tahamtani
Deputy Associate Administrator, Policy and Programs
Office of Pipeline Safety

Enclosure

cc: Mr. Eric Kirkpatrick,
Colorado Underground Damage Prevention Safety Commission
Ms. Jeannette Jones,
Colorado Underground Damage Prevention Safety Commission
Mr. Joseph Molloy, Colorado Public Service Commission
Mr. J.D. Maniscalco, Colorado 811
(Note: cc: copies will be delivered electronically)

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 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. **Federal civil penalty levels are as high as \$218,647 for each day the violation continues, with a maximum penalty of \$2,186,465 for a related series of violations.**

On July 23, 2015, PHMSA published a Final Rule that established:

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, and
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 that:
 - a. Excavators must call 811 before digging,
 - b. Excavators must “respect the marks,” and
 - c. If damage to a pipeline occurs:
 - i. Excavator must report damage to operator at earliest practical moment; and
 - ii. If a release occurs, excavator must call 911.
7. Are exemptions from the damage prevention law limited? Written justification of exemptions is required.

ADMINISTRATIVE PROCESS FOR STATES TO CONTEST NOTICES OF INADEQUACY

1. PHMSA will issue a notice of inadequacy to a state in accordance with 49 CFR § 190.5.
2. States have 30 days from receipt of the notice to submit a written response by mail to:
Massoud Tahamtani
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Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
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Washington, DC 20590
3. PHMSA will issue a final decision to a state that contests a notice of inadequacy.
4. States may petition PHMSA to reconsider its determination at any time following a finding of inadequacy; PHMSA will respond not later than the date of the next annual review to any such petition.
5. States that fail to establish an adequate enforcement program in accordance with 49 CFR § 198.55 within five years of the finding of inadequacy may be subject to a 4 percent reduction in base grant funding.

FEDERAL STANDARDS 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 and 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 the earliest practical moment.
6. If there is a release, the excavator must call 911.

There are no exemptions in the damage prevention regulation for calling 811 prior to excavation.

FOR MORE INFORMATION

www.phmsa.dot.gov/pipeline/excavator-final-rule/about-excavation-enforcement-final-rule

CONTACT OUR DAMAGE PREVENTION TEAM

Our team of damage prevention professionals, Sam Hall, Annmarie Robertson, Steve Fischer, and David Appelbaum 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.