U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
Washington, D.C. 20590

March 13, 2020

OVERNIGHT EXPRESS MAIL

Ms. Charlotte Lane
Chairman
West Virginia Public Service Commission
201 Brooks Street
Charleston, WV 25301

Dear Chairman Lane:

As you 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 November 19, 2019, a representative of the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) conducted an evaluation of West Virginia'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 West Virginia's enforcement of its excavation damage prevention law is inadequate at this time.

There is one criterion that West Virginia has not fully implemented to meet the requirements of 49 CFR § 198.55. Specifically, to meet the requirements of § 198.55(a)(3), West Virginia must assess civil penalties and other appropriate sanctions for violations at levels sufficient to deter noncompliance and make publicly available information that demonstrates the effectiveness of the enforcement program. We understand that West Virginia has a new excavation damage prevention law and that the enforcement authority (the West Virginia Damage Prevention Board) is fully operational as of January 2020. PHMSA is encouraged by West Virginia's progress toward adequately enforcing its excavation damage prevention law.

Please be advised that if West Virginia 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 West Virginia Public Service Commission. Also, excavators in West Virginia who fail to comply with

federal excavation safety requirements and damage a pipeline may face federal enforcement action.

West Virginia may, under 49 CFR § 198.59, submit to PHMSA a written response within 30 days from receipt of this notice challenging the determination of inadequacy by providing additional information relevant to the determination. Upon receipt of such a 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 West Virginia does not submit such a response, this notice will serve as PHMSA's final determination under 49 CFR § 198.61. PHMSA's evaluation of West Virginia's enforcement of its excavation damage prevention law will occur annually; however, if West Virginia acts to establish an adequate enforcement program prior to the annual evaluation, West Virginia may request that PHMSA review and reconsider this designation. PHMSA stands ready to continue working with your state on improving the enforcement of your excavation damage prevention law.

In closing, PHMSA appreciates your dedication to safety and encourages the West Virginia Public Service Commission and the West Virginia 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 Mr. Sam Hall, Senior Program Manager, at (804) 551-3876 or by email at Sam.Hall@dot.gov.

Sincerely,

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

Enclosure

cc: Ms. Mary Friend, Director, Pipeline Safety,
West Virginia Public Service Commission
Mr. Tom Taylor, Executive Director, West Virginia 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 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
   Deputy Associate Administrator
   Office of Pipeline Safety
   Pipeline and Hazardous Materials Safety Administration
   U.S. Department of Transportation
   1200 New Jersey Avenue SE
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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.