

7 Administrative Enforcement Involving a Third Party Excavator

This section describes the enforcement actions and processes involving a third party excavator (that is, an excavator that is not a pipeline operator (i.e., a first party excavator) or a contractor employed by a pipeline operator (i.e., a second party excavator)). While the purpose of this section is to provide Pipeline and Hazardous Materials Safety Administration's (PHMSA's) Office of Pipeline Safety (OPS) personnel with guidance on when to select different enforcement tools and to improve OPS's consistency in implementing the pipeline enforcement program, OPS's decisions and selections regarding enforcement actions are also discretionary involving complex considerations made on a case-by-case basis. For example, the Region¹ is often in the best position to evaluate various subjective considerations, such as a third party excavator's commitment to safety and compliance, and what may be the best approach to further safety and fairness during an investigation.

This section was created as a stand-alone section to cover enforcement actions involving third party excavators for probable violations of 49 C.F.R. Part 196, *Protection of Underground Pipelines from Excavation Activity*. These probable violations include, but are not limited to, when such excavation activity leads to pipeline damage or to a release of the transported commodity. Under 49 U.S.C. § 60114(f), OPS is authorized to exercise this enforcement authority only where States have been determined by OPS to have inadequate damage prevention programs. This determination is based on the criteria established in 49 C.F.R. Part 198, *Regulations for Grants to Aid State Pipeline Safety Programs*.

This section is divided into two parts:

Section 7.1 covers the use of Notices of Probable Violation (NOPV) which allege that a cited requirement was not satisfied by a third party excavator.

Section 7.2 covers the administrative enforcement process for Notices of Probable Violation involving a third party excavator.

¹ In accordance with the Region chain of command.

Table of Contents

7	Administrative Enforcement Involving a Third Party Excavator	1
7.1	Selection of Administrative Enforcement Actions Involving a Third Party Excavator	3
	Enforcement Actions That Allege a Cited Requirement Was Not Satisfied by a Third Party Excavator	3
7.1.1	Notice of Probable Violation	3
7.2	Administrative Enforcement Process Involving a Third Party Excavator - Probable Violations	6
7.2.1	Document Excavation Activity Investigation	19
7.2.2	Prepare Notice Letter to Excavator	23
7.2.3	Issue Notice Letter to Excavator	29
7.2.4	Process Excavator Response to Notice Letter	31
7.2.5	Prepare and Approve Recommendation for Final Order	33
7.2.6	Conduct Hearing	36
7.2.7	Process Final Order	39
7.2.8	Petition for Reconsideration.....	41
7.2.9	Close Case.....	43
7.2.10	Refer Case to the Department of Justice (DOJ) or Other Agency	45
	Table 7-A Selection of Enforcement Documents	47
	Table 7-B Distribution of Enforcement Documents.....	48

7.1 Selection of Administrative Enforcement Actions Involving a Third Party Excavator

This section provides guidance for the selection of administrative enforcement actions involving third party excavators. The regulatory language describing these enforcement actions is in 49 C.F.R. Part 190, Subpart B, *Enforcement*.

Enforcement Actions That Allege a Cited Requirement Was Not Satisfied by a Third Party Excavator

Under 49 C.F.R. Part 196, *Protection of Underground Pipelines from Excavation Activity*, OPS is authorized to exercise enforcement against a third party excavator, where necessary, to support the prevention of excavation damage to pipelines. Historically, States have been primary enforcers of pipeline damage prevention requirements. In an effort to further improve damage prevention efforts, OPS has performed evaluations of these State damage prevention programs to determine whether a State's damage prevention program was effective based on the criteria established in 49 C.F.R. Part 198, *Regulations for Grants to Aid State Pipeline Safety Programs*.

In States determined to have inadequate damage prevention programs (§ 198.53), OPS inspections and investigations can identify a third party excavator in non-compliance with excavation damage prevention regulations (49 C.F.R. Part 196) or an OPS order.

The following sections address how and when to use these enforcement actions.

7.1.1 Notice of Probable Violation

A Notice of Probable Violation alleges the existence of one or more probable violations, and may include a proposed Civil Penalty or proposed Compliance Order for any of the probable violations. A Notice of Probable Violation is a separate letter, and does not include any other enforcement actions. There are no exemptions for any class or category of third party excavators in the final rule for Part 196. If a State has exempted certain persons or actions from that State's damage prevention requirements, the exemptions do not apply to the minimum federal safety standards.

7.1.1.1 When to Use a Notice of Probable Violation

In a State determined to have an inadequate damage prevention program, a Notice of Probable Violation is used to notify a third party excavator of one or more circumstances or conditions that are not in compliance with:

- Protection of Underground Pipelines from Excavation Activity Regulations (49 C.F.R. Part 196).
- Pipeline Safety Laws (49 U.S.C. Chapter 601).
- An order from OPS, such as a Compliance Order or Consent Order.

The region may identify a probable violation through direct observation of facilities, tests, records, procedures, documents, employee activities, etc., while conducting inspections at the facilities or offices. Other circumstances or activities which may result in the identification of a probable violation include, but are not limited to:

- Incident/accident investigations,
- Excavation activity investigations
- Safety-related condition report follow-ups,
- Public complaint investigations,
- “Whistleblower” allegation investigations,
- Reports or information from other Federal or State agencies,

If criminal activity is suspected, refer to Section 2, *Criminal Enforcement and OIG Coordination*, of the Pipeline Safety Enforcement Procedures. If there are probable pipeline safety violations involving suspected criminal activity, OPS should still bring administrative enforcement actions, if appropriate,² even when the criminal activity has been referred to PHMSA’s Office of Chief Counsel and/or the OIG (Department of Transportation’s Office of Inspector General). The Enforcement Division tracks the results of administrative enforcement in SMART Enforcement, so it is important that PHMSA captures these most serious violations in the operator’s enforcement history.³

Possible enforcement actions for a Notice of Probable Violation include:

- A probable violation with a proposed Civil Penalty
- A probable violation with a proposed Compliance Order
- A probable violation with both a proposed Civil Penalty and a proposed Compliance Order
- A probable violation without a proposed Civil Penalty or a proposed Compliance Order

7.1.1.2 When to Use a Proposed Civil Penalty

To reinforce the message of the Notice of Probable Violation, draw attention to the problem area, emphasize the need for lasting attention, and deter the respondent and other third party excavators from committing future violations, a proposed Civil Penalty should be considered.⁴ A Civil Penalty may be proposed for any probable violation, and should generally be proposed if the characteristics of the

² Refer to the first paragraph on page 1 that acknowledges that enforcement actions are also discretionary.

³ Prompt administrative enforcement action also ensures that such action can be completed before the statute of limitations runs out.

⁴ Refer to the first paragraph on page 1 that acknowledges that enforcement actions are also discretionary.

probable violation are consistent with any of the criteria listed in the bullets below, where the probable violation was a:

- Causal factor in an accident/incident.
- Causal factor in any physical damage to a pipeline or pipeline facility, whether a release occurred or not.
- Factor in increasing the severity of consequences of an accident/incident.
- Egregious or willful (see Culpability section in the Excavation Violation Report).⁵
- “Repeat violation” (see definition in Excavation Violation Report).
- Systemic, i.e. if it had repetitive characteristics or demonstrated an underlying deficiency in the third party excavator’s practices, performance, or processes.
- Linked to an economic incentive for noncompliance.

7.1.1.3 When to Use a Proposed Compliance Order

A Compliance Order should be proposed when the characteristics of the probable violation are such that corrective action is necessary to:

- Bring the third party excavator into compliance;
- Ensure that a similar non-compliance will not recur;
- Promptly correct the third party excavator’s processes or performance where they are so serious that a substantial safety issue may result without this correction; or
- Ensure that any adverse safety impacts due to the probable violation are mitigated promptly and fully.

7.1.1.4 When to Use a Probable Violation Without a Proposed Civil Penalty or a Proposed Compliance Order

A Probable Violation without a proposed Civil Penalty or proposed Compliance Order may be proposed when the characteristics are such that the circumstances do not warrant a proposed Civil Penalty or proposed Compliance Order. By utilizing the Probable Violation in this way, the historical record of violations are maintained and can be duly considered in the future in the determination of repeat violations or to constitute a history of non-compliance, even when a Civil Penalty or Compliance Order is not proposed.

⁵ If criminal activity is suspected see Section 7.1.1 of these Enforcement Procedures.

7.2 Administrative Enforcement Process Involving a Third Party Excavator - Probable Violations

This section describes the enforcement process involving a third party excavator using Notices of Probable Violation. As stated above, the primary enforcement tool available to OPS when enforcing 49 C.F.R. Part 196 against third party excavators is to allege a probable violation using a Notice of Probable Violation. At any point in time before a Final Order is issued, the third party excavator can request to enter into a Consent Agreement and Order with OPS. In these cases, the standard Consent Agreement and Order process would apply.

This section uses cross-functional diagrams as its structure to provide a reference to each process step and decision point as a case proceeds from initiation to closure. The diagrams identify individual responsibilities for completing each step, and how documents and information flow between different individuals and organizations in processing cases. These cross-functional diagrams and accompanying narrative address the actions associated with the most common enforcement cases. They do not attempt to cover every possible enforcement situation. Enforcement cases are sometimes quite complex and may involve actions not depicted in this section.

The diagrams also provide the structure to locate a narrative description of some key process steps. The steps with **bold borders** in the diagrams (see illustration below) contain a reference to subsection numbers where additional narrative description is provided.

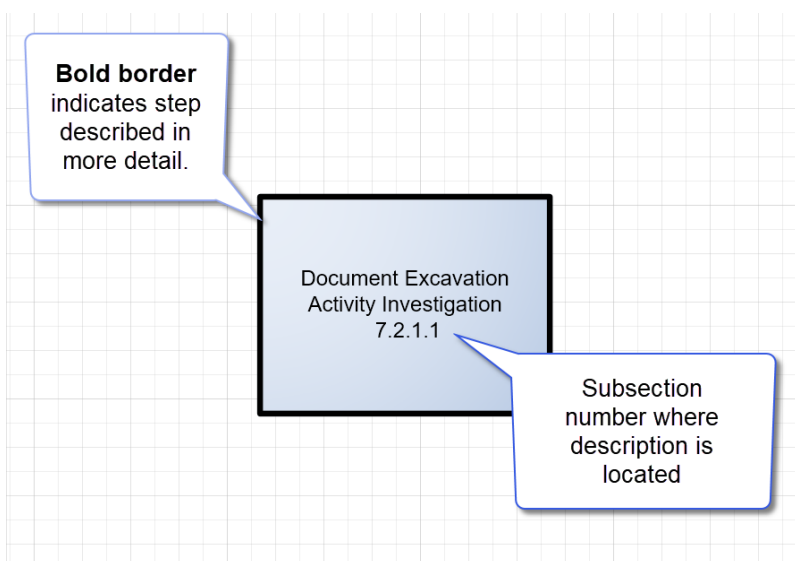


Table 7-A provides a summary for the selection of enforcement documents, including references to templates.

Table 7-B provides a matrix for the minimum required distribution for each enforcement document.

Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 7 of 51

The cross-functional diagram for processing probable violations is organized into 10 major activities, each shown on a separate sheet in Figure 7.2, as follows:

Sheet 1	Document Excavation Activity Investigation (page 9)
Sheet 2	Prepare Notice Letter to Excavator (page 10)
Sheet 3	Issue Notice Letter to Excavator (page 11)
Sheet 4	Process Excavator Response to Notice Letter (page 12)
Sheet 5	Prepare and Approve Recommendation for Final Order (page 13)
Sheet 6	Conduct Hearing (page 14)
Sheet 7	Process Final Order (page 15)
Sheet 8	Petition for Reconsideration (page 16)
Sheet 9	Close Case (page 17)
Sheet 10	Refer Case to Department of Justice (DOJ) or other Agency (page 18)

The following diagram and accompanying process descriptions identify the Region Director as responsible for certain steps in the enforcement process. Many of these responsibilities can be delegated to Region staff at the Region Director's discretion. However, the Region Director is ultimately responsible for the correct and timely completion of these steps.

Figure 7.2

Notice of Probable Violation Process

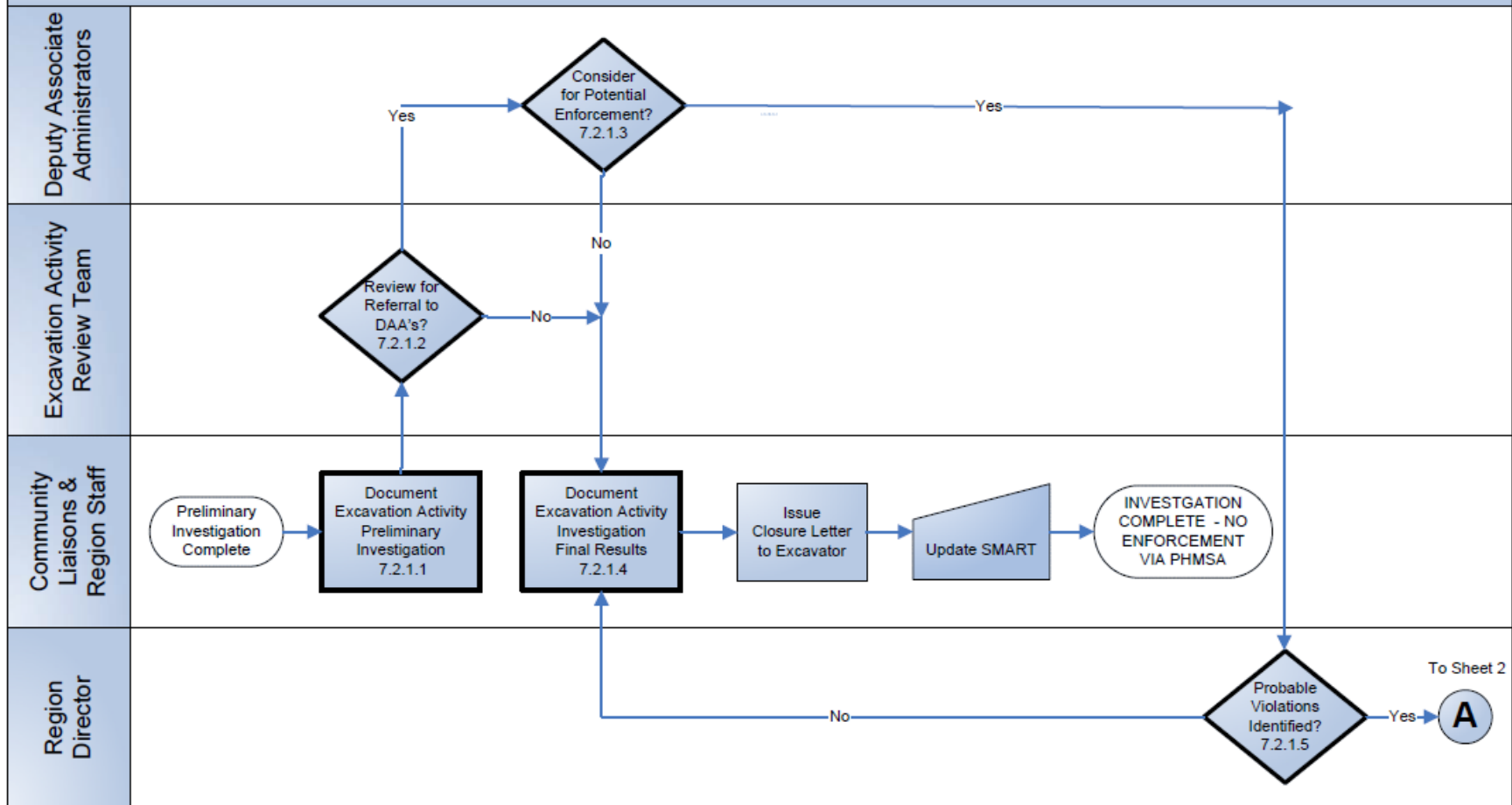
Cross-Functional Diagram

Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 9 of 51

Fig. 7.2 Excavation Enforcement - Notice of Probable Violation Process

Sheet 1 of 10 Document Excavation Activity Investigation

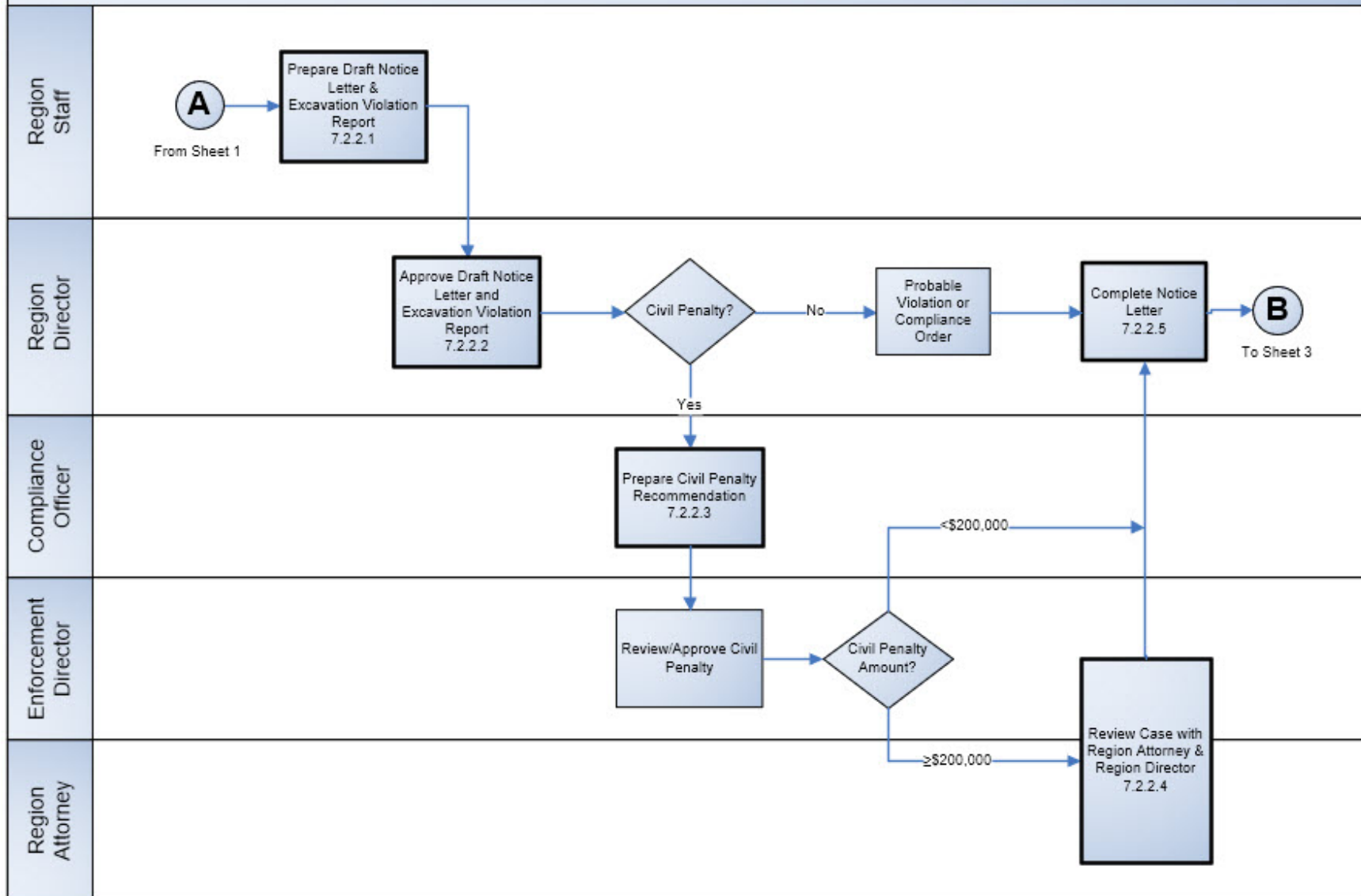


Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 10 of 51

Fig. 7.2 Excavation Enforcement - Notice of Probable Violation Process

Sheet 2 of 10 Prepare Notice Letter to Excavator

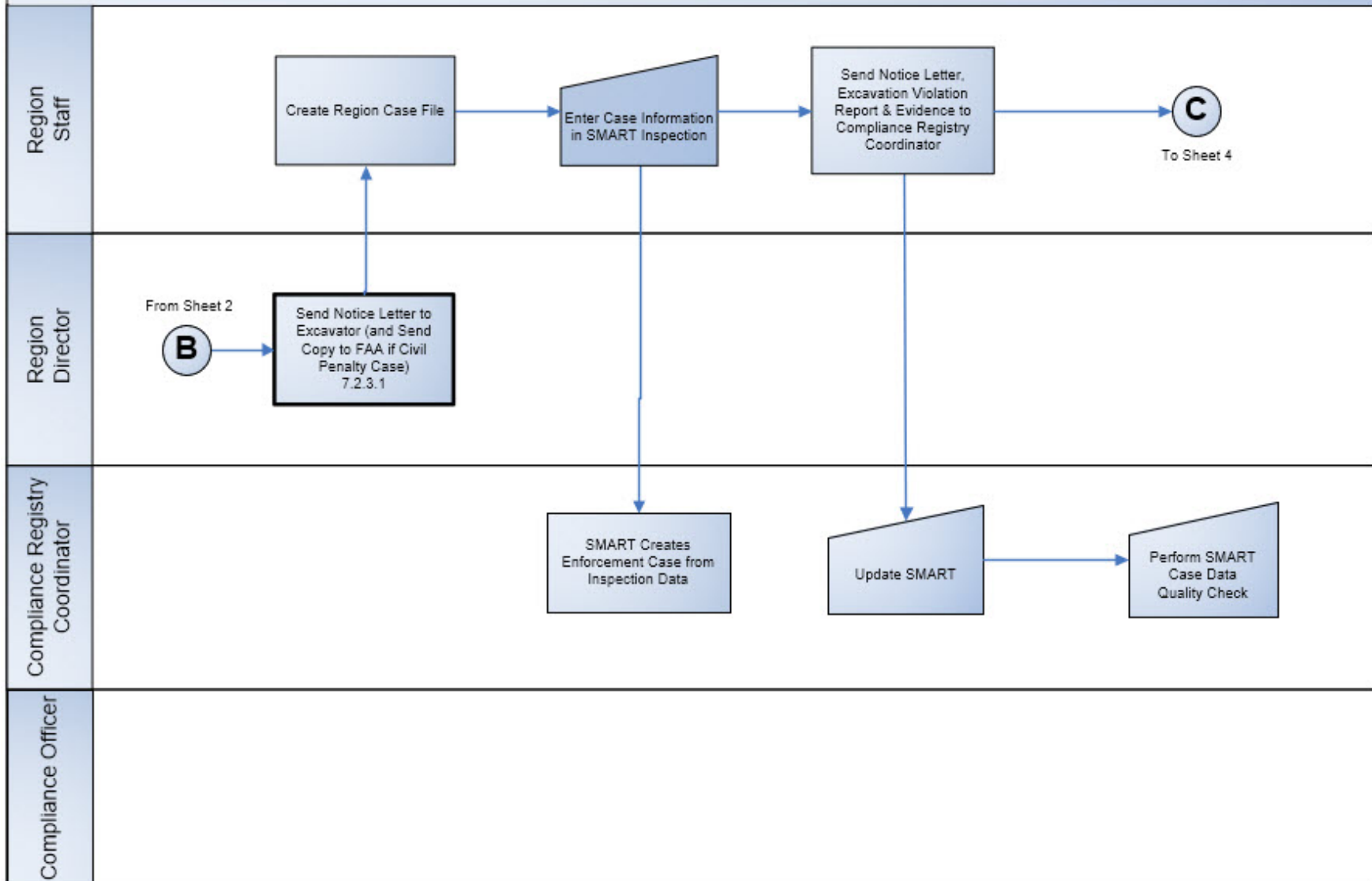


Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 11 of 51

Fig. 7.2 Excavation Enforcement - Notice of Probable Violation Process

Sheet 3 of 10 Issue Notice Letter to Excavator

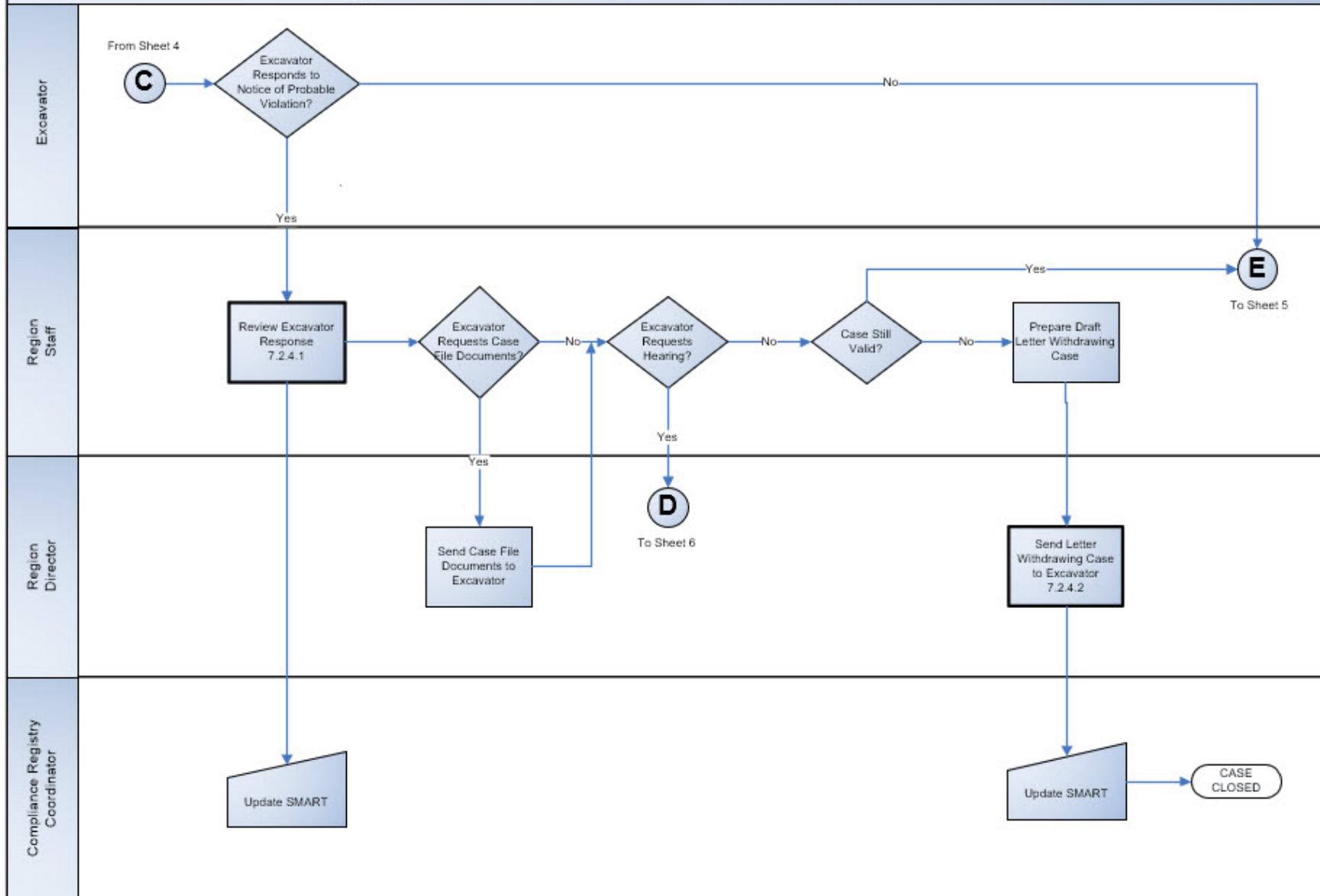


Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 12 of 51

Fig. 7.2 Excavation Enforcement - Notice of Probable Violation Process

Sheet 4 of 10 Process Excavator Response to Notice Letter



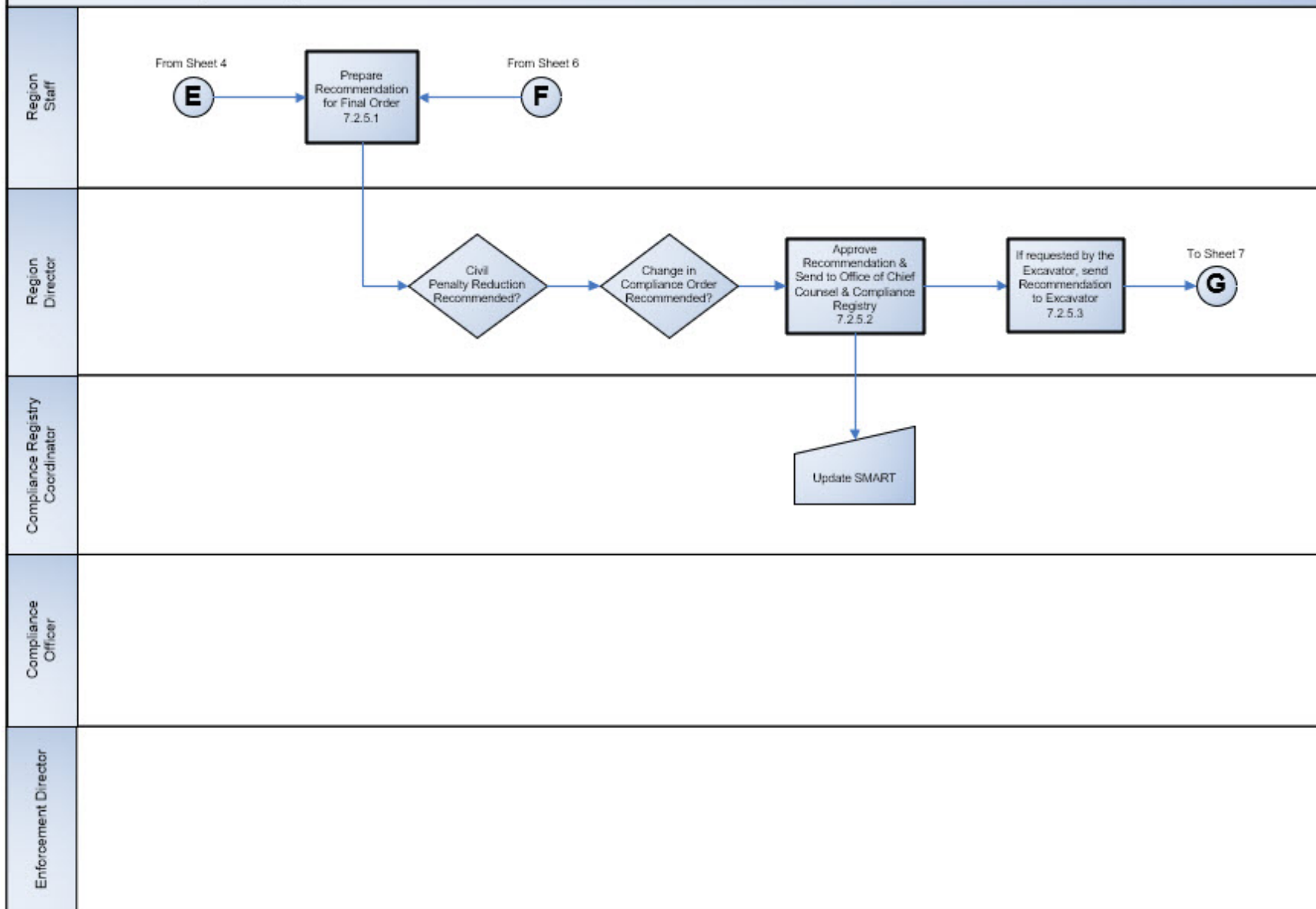
Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 13 of 51

Fig. 7.2 Excavation Enforcement - Notice of Probable Violation Process

Sheet 5 of 10

Prepare and Approve Recommendation for Final Order



Pipeline Safety Enforcement Procedures	<p>Section 7 February 20, 2018 Page 14 of 51</p>
---	--

Pipeline Safety Enforcement Procedures	<div> Section 7 February 20, 2018 Page 14 of 51 </div>
---	--

Fig. 7.2 Excavation Enforcement - Notice of Probable Violation Process

Sheet 6 of 10 Conduct Hearing

```

graph TD
    subgraph Region_Staff [Region Staff]
        D((D)) -- From Sheet 4 --> Prep_Notify[Prepare Notification to Schedule Hearing]
        Prep_Notify --> Send_Notify[Send Notification to Schedule Hearing to Presiding Official 7.2.6.1]
        Send_Notify --> Prep_Hear[Prepare for Hearing 7.2.6.3]
        Prep_Hear --> Attend_PV[Attend Hearing & Present Excavator's Case]
        Attend_PV --> Provide_Evid{Provide Additional Evidence After Hearing?}
        Provide_Evid -- No --> F((F))
        Provide_Evid -- Yes --> Review_Evid[Review Additional Evidence]
        Review_Evid --> F
    end

    subgraph Excavator
        Attend_PV
    end

    subgraph Region_Director [Region Director]
        Send_Notify
        Prep_Hear
        Attend_PV
    end

    subgraph Compliance_Registry_Coordinator [Compliance Registry Coordinator]
        Update_SMART1[/Update SMART/]
        Update_SMART2[/Update SMART/]
        Update_SMART3[/Update SMART/]
        Update_SMART4[/Update SMART/]
    end

    subgraph Compliance_Officer [Compliance Officer]
        Update_SMART1
        Update_SMART2
        Update_SMART3
        Update_SMART4
    end

    subgraph Enforcement_Director [Enforcement Director]
        Update_SMART1
        Update_SMART2
        Update_SMART3
        Update_SMART4
    end

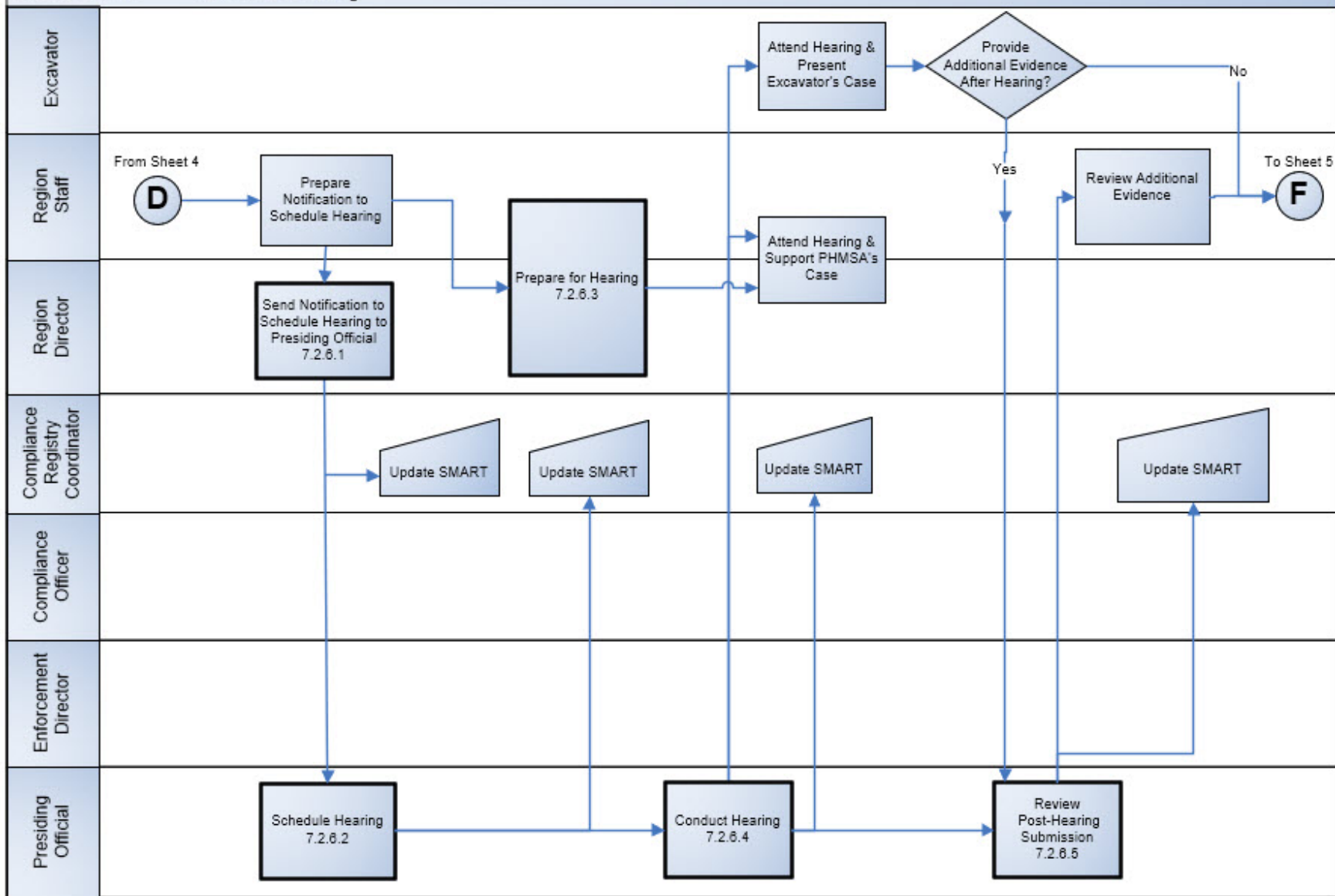
    subgraph Presiding_Official [Presiding Official]
        Schedule_Hear[Schedule Hearing 7.2.6.2]
        Conduct_Hear[Conduct Hearing 7.2.6.4]
        Review_Sub[Review Post-Hearing Submission 7.2.6.5]
    end

    Send_Notify --> Schedule_Hear
    Prep_Hear --> Conduct_Hear
    Attend_PV --> Conduct_Hear
    Provide_Evid --> Review_Sub
    Review_Evid --> Review_Sub

    Schedule_Hear --> Update_SMART1
    Conduct_Hear --> Update_SMART2
    Review_Sub --> Update_SMART3
    F --> Update_SMART4
  
```

The flowchart illustrates the process for conducting a hearing. It begins with Region Staff (D) preparing a notification to schedule a hearing. This notification is sent to the Presiding Official (7.2.6.2) and the Region Director. The Region Director then prepares for the hearing (7.2.6.3). The Excavator attends the hearing and presents their case. The Region Director also attends and supports the PHMSA's case. A decision is made on whether to provide additional evidence after the hearing. If yes, the evidence is reviewed. The process then moves to the Review Post-Hearing Submission (7.2.6.5) by the Presiding Official. The Compliance Registry Coordinator and Compliance Officer update the SMART system at various points in the process. The process concludes with a final update to SMART (F) and a transition to Sheet 5.

Sheet 6 of 10 Conduct Hearing

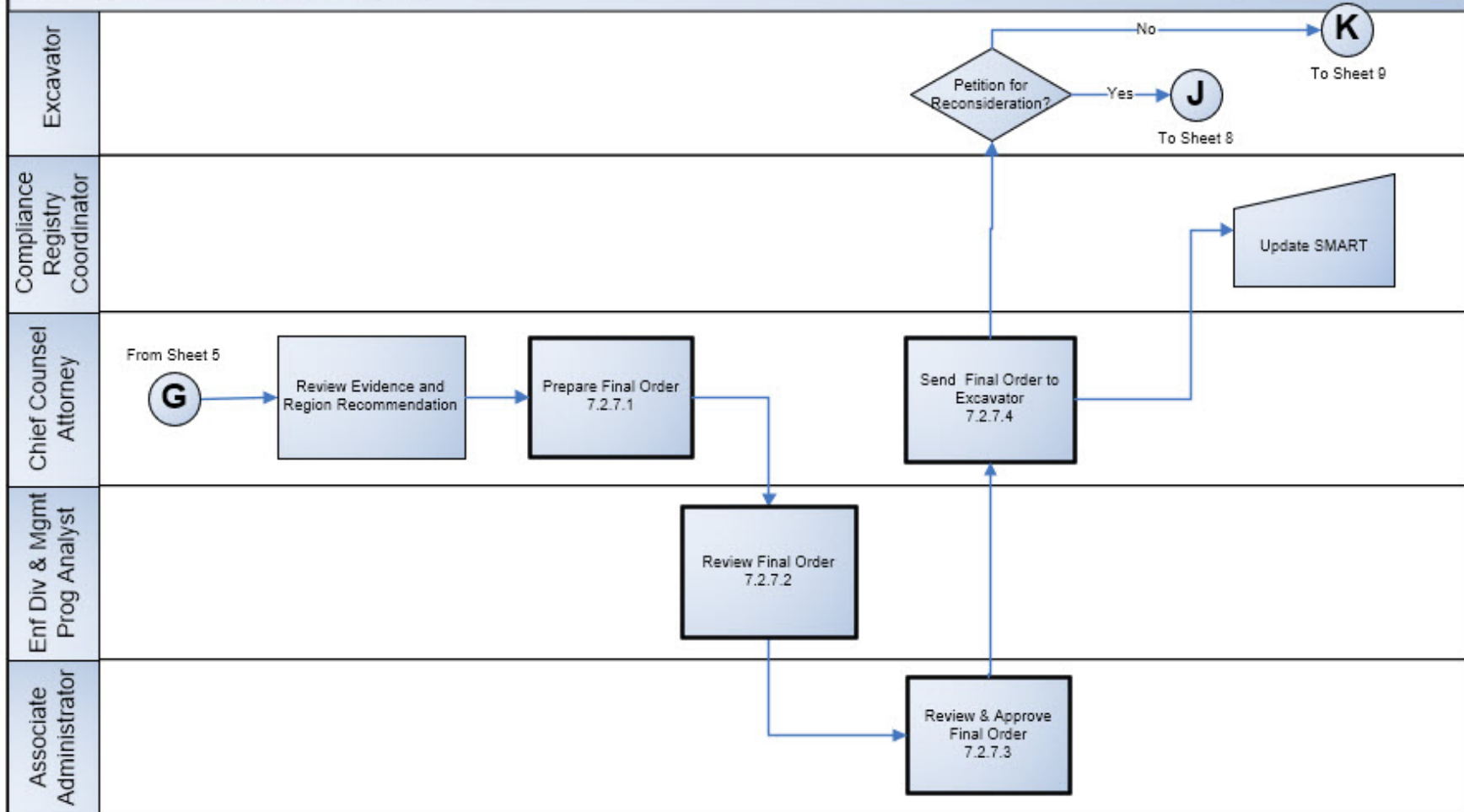


Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 15 of 51

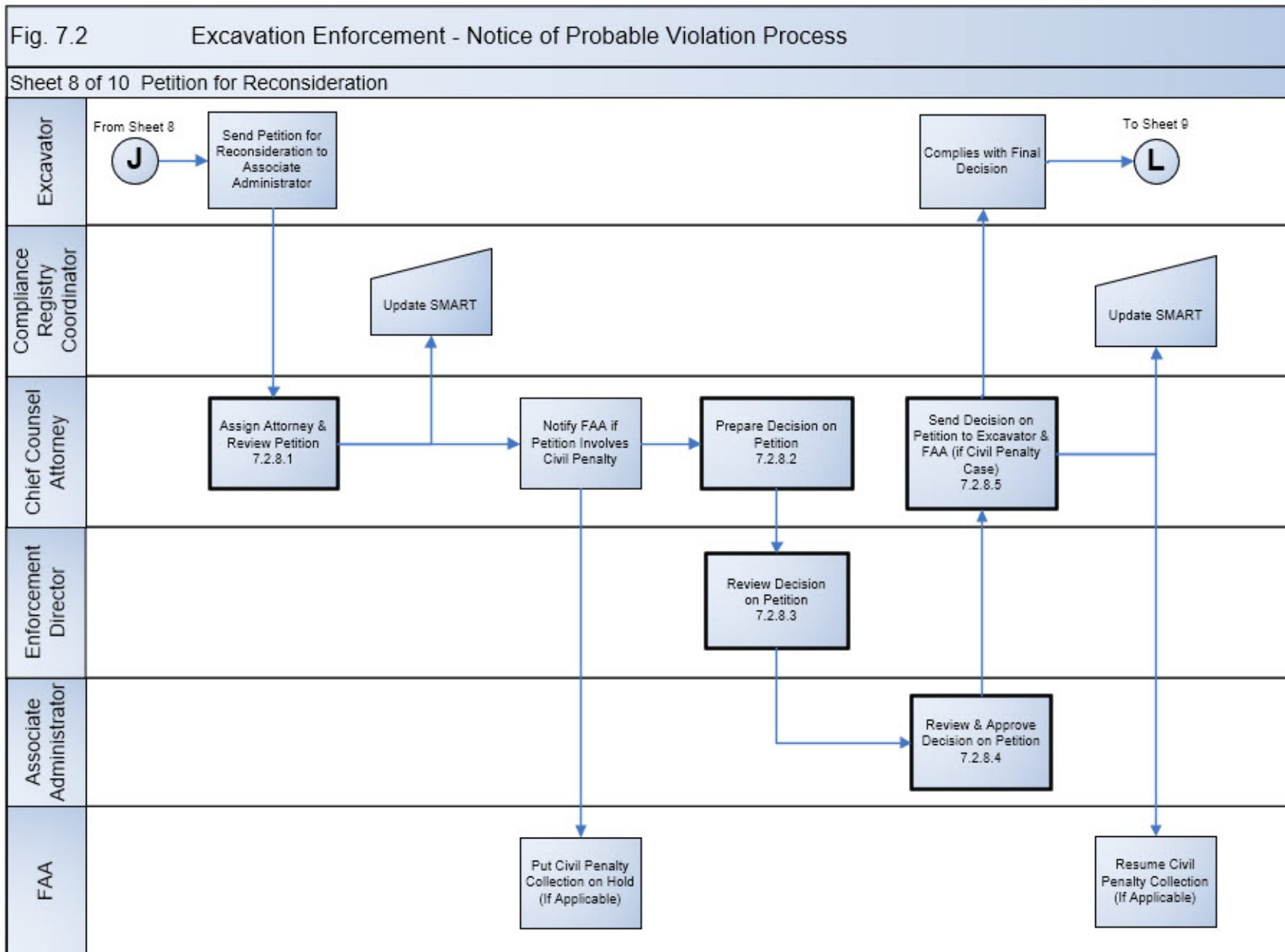
Fig. 7.2 Excavation Enforcement - Notice of Probable Violation Process

Sheet 7 of 10 Process Final Order



Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 16 of 51

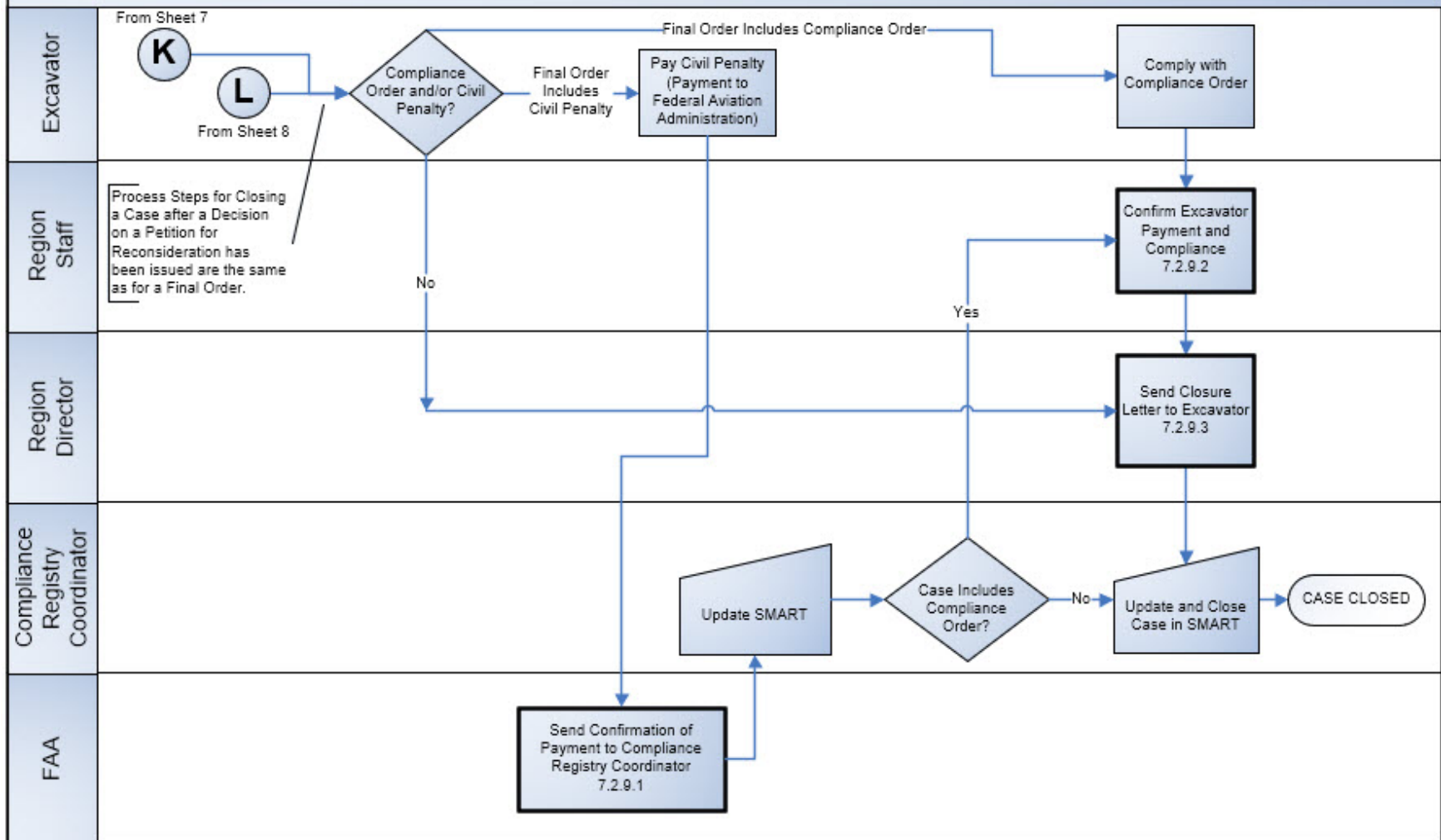


Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 17 of 51

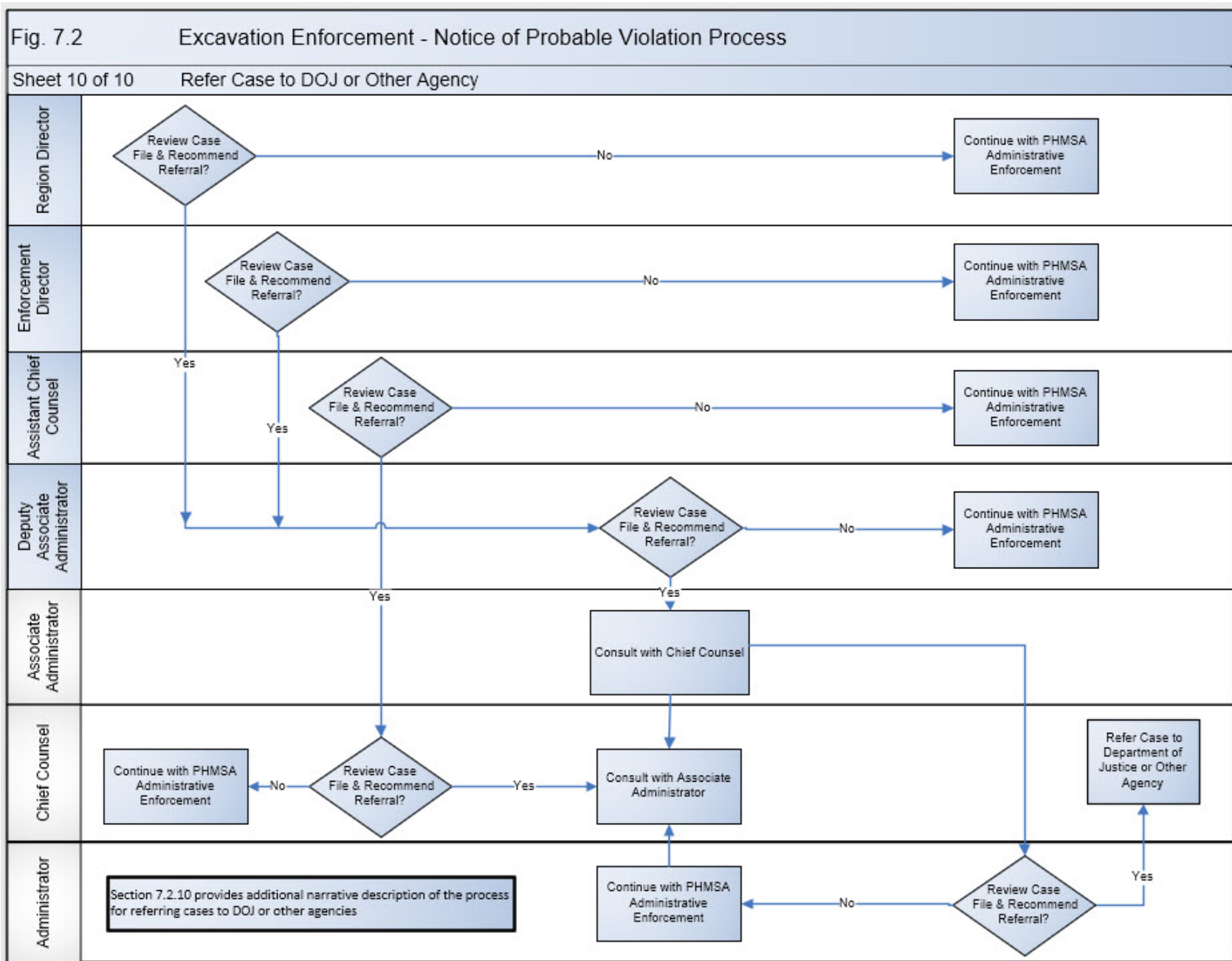
Fig. 7.2 Excavation Enforcement - Notice of Probable Violation Process

Sheet 9 of 10 Close Case



Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 18 of 51



7.2.1 Document Excavation Activity Investigation

Investigations of excavation activity are documented using the Excavation Activity Investigation forms, and supplemented as needed with evidence collected and additional notes and materials.

Figure 7.2, Sheet 1, *Document Excavation Activity Investigation*, illustrates the overall process steps and individual responsibilities as they pertain to enforcement. The following discussion provides further explanation of steps identified by bold borders in the cross-functional diagram.

7.2.1.1 Document Excavation Activity Preliminary Investigation

Input: Input for documenting excavation activity may include, but not be limited to:

- Evidence files,
- Investigator notes (including interview notes),
- Responses to investigation questions,
- Completed Excavation Activity Investigation form(s) – Parts 1-5,
- One-Call Center documentation,
- Third party excavator documentation,
- Operator documentation,
- First Responder documentation,
- Telephone records from involved One-Call Center(s), emergency response authority(ies), third party excavator, operator(s), and/or others,
- Photographs,
- Operator's or other's root cause analysis of pipeline failure mechanism or excavation-related damage,
- Others' investigations of the incident, e.g. emergency response entities, underground facility operators, pipeline marking contractors, etc.
- Relevant in-place Final Order, Compliance Order or Consent Order issued to the third party excavator, and
- Any other material generated or obtained by the Accident Investigation Division, the Community Liaison, and/or Region staff that is relevant to the determination of compliance or non-compliance with 49 C.F.R. Part 196 regulations.

Output: Completed draft documentation of the excavation activity preliminary investigation and accompanying evidence.

Responsibility: Community Liaisons, supported by Region and/or Accident Investigation Division staff.

Description: Community Liaisons document any potential violations that have been discovered and collect the evidence required to support these allegations. Primary documentation occurs on the Excavation Activity Investigation form(s) (Parts 1-5), completed in accordance with the instructions which accompany them. If criminal activity is suspected, refer to Section 2, *Criminal Enforcement and OIG Coordination*, of the Pipeline Safety Enforcement Procedures.

While gathering evidence, it's important to determine if any potential violations occurred that were causal factors and/or increased the severity of the accident/incident. There may be multiple potential violations that were causal factors or that increased the severity of the accident/incident. It's important to identify these potential violations since these could be among the most serious violations.

Note separately any potential violations of 49 C.F.R. Parts 191, 192, 193, 194, 195, or 199 by the pipeline operator which may be identified during the course of the preliminary investigation of excavation activity. When identified, these will be considered independently by the Region for potential enforcement in accordance with Sections 3 and 4.

7.2.1.2 Review for Referral to DAA's

Input: Completed draft documentation of the excavation activity preliminary investigation and accompanying evidence.

Output: A determination whether the excavation activity preliminary investigation is referred to the Deputy Associate Administrator for Policy & Programs and Deputy Associate Administrator for Field Operations (DAAs) for consideration for potential enforcement by PHMSA under 49 C.F.R. Part 196.

Responsibility: Excavation Activity Review Team.

Description: The Excavation Activity Review Team reviews the results of the excavation activity preliminary investigation, along with the associated evidence, and determines if the activity should be considered by the Office of Pipeline Safety DAAs for potential enforcement against the third party excavator by PHMSA under 49 C.F.R. Part 196.

This review may include, but not be limited to, all or some of the following considerations:

- The scope and nature of the State's excavation damage prevention program, laws, and regulations.
- The strength and extent of the State's enforcement efforts regarding its excavation damage prevention program, laws, and regulations.
- Past enforcement actions taken by the State regarding excavation damage prevention.
- Past enforcement actions regarding excavation damage prevention taken by PHMSA within the State.
- The nature and extent of excavation activity within the State.
- The nature and extent of pipeline incidents or accidents due to third party excavation damage within the State.
- Improvement efforts completed, planned, or in progress regarding excavation damage prevention by the State.
- The scope and nature of any casualties, evacuations, property damage, or environmental damage resulting from the excavation activity.

- The size and nature of any product release resulting from the excavation activity, including whether a fire or an explosion occurred.
- The scope and nature of public awareness, concern, or inquiry regarding the excavation activity.
- Whether any alternative means exist to obtain the objectives of PHMSA's excavation damage prevention program, including the pros and cons of these alternatives.

If the preliminary results are to be referred, the Excavation Activity Review Team schedules a meeting with the DAAs to discuss the results. If the Excavation Activity Review Team determines not to refer results from the excavation activity preliminary investigation, the investigation will be closed and documented in accordance with Section 7.2.1.4 below.

7.2.1.3 Consider for Potential Enforcement

Input: Excavation Activity Review Team recommendation, alternative actions considered, and supporting rationale.

Output: Determine whether to advance the excavation activity to the Region Director for further review.

Responsibility: Deputy Associate Administrator for Policy & Programs and Deputy Associate Administrator for Field Operations.

Description: The Office of Pipeline Safety's DAAs review the Excavation Activity Review Team's recommendations and determine whether to advance the excavation activity for the Region Director's further review and investigation, and possible enforcement by PHMSA against the third party excavator for violations of 49 C.F.R. Part 196. If the DAAs determine not to refer results from a preliminary investigation of excavation activity, the investigation will be closed and documented in accordance with Section 7.2.1.4 below.

7.2.1.4 Document Excavation Activity Preliminary Investigation Results

Input: Input for documenting the results of the excavation activity preliminary investigation may include, but not be limited to:

- The Excavation Activity Investigation forms – Parts 1-5.
- All materials collected under Section 7.2.1.1.
- Any other additional material generated or obtained by the Accident Investigation Division, the Community Liaison, and/or Region staff that is relevant to the determination of compliance or non-compliance with 49 C.F.R. Part 196 regulations, and other factors pertinent to whether or not to proceed with enforcement via PHMSA.
- A summary of any alternative actions to be pursued, if any, that are not related to PHMSA enforcement.

Output: Completed documentation of the results of the excavation activity preliminary investigation and accompanying evidence.

Responsibility: Community Liaisons, supported by Region staff.

Description: Community Liaisons document the final disposition of any potential violations that were discussed in the course of the reviews of Sections 7.2.1.2, 7.2.1.3, and 7.2.1.5, along with the rationale associated with such disposition. Additionally, the Community Liaisons document any alternative actions pursued that are not related to enforcement by PHMSA. If the excavation activity is not referred for possible enforcement, the Community Liaisons will prepare and issue an investigation closure letter to the excavator.

7.2.1.5 *Probable Violations Identified?*

Input: Approved excavation activity documentation and associated evidence.

Output: Which (if any) issues/observations will be prosecuted as an enforcement case.

Responsibility: Region Director.

Description: When all available information has been obtained, the Region Director decides which, if any, issue(s), including observation(s), identified during the preliminary investigation of excavation activity warrant enforcement action under 49 C.F.R. Part 196, *Protection of Underground Pipelines from Excavation Activity*. The Region Director follows the criteria in Section 7.1 to select the type of enforcement tool to use for each issue. The Excavation Violation Report is used to document identified probable violations as described in Section 7.2.2.

Note: Pipeline operators and their contractors are NOT subject to enforcement by PHMSA as “excavators” in accordance with these Section 7 requirements. Pipeline operators and their contractors are subject to enforcement by PHMSA, including when functioning as excavators, in accordance with Sections 3 and 4.

If the time between the date that the probable violation occurred and the date of the anticipated notice letter exceeds five years, the Region Director consults with the Region Attorney⁶ to ensure that the statute of limitations will not be an issue.

If no enforcement action is needed, or if the Region Director decides there is not enough information/evidence to successfully prosecute a case, Region staff complete the data entry in SMART Inspection, update the status of the investigation as complete with no enforcement action taken, and prepare and issue an investigation closure letter to the excavator. If enforcement action is taken to

⁶ In this document, “Region Attorney” means an attorney in PHMSA’s Office of Chief Counsel who advises PHMSA on legal matters related to probable violations of 49 C.F.R. Part 196, *Protection of Underground Pipelines from Excavation Activity*.

address probable violations, a notice letter is prepared per Section 7.2.2, *Prepare Notice Letter to Excavator*.

Sometimes, the Region Director may not have enough information/evidence to: 1) successfully prosecute a case; 2) determine which enforcement tool should be used; or, 3) determine if enforcement action is appropriate. In these circumstances, the Region Director or Region staff may work with the third party excavator, the operator, the One-Call Center, or others to obtain additional documentation, evidence, or information needed to proceed with effective enforcement.

7.2.2 Prepare Notice Letter to Excavator

The notice letter process for a probable violation is initiated when the Region Director, based on the criteria within Section 7.1, determines there is a probable or potential violation. The notice letter and Excavation Violation Report preparation are very important in the development and prosecution of enforcement cases and in meeting OPS's oversight program objectives. Figure 7.2, Sheet 2, *Prepare Notice Letter to Excavator*, illustrates the overall process steps and individual responsibilities. The following discussion provides further explanation of the key steps in this process identified by bold borders in the cross-functional diagram.

7.2.2.1 Prepare Draft Notice Letter and Excavation Violation Report

Input: Input needed:

- Excavation Activity Investigation documents,
- Evidence files,
- Investigator notes,
- One-Call Center documentation retained by Region staff,
- Third party excavator documentation retained by Region staff,
- Operator documentation retained by Region staff,
- First Responder documentation retained by Region staff,
- Telephone records from involved One-Call Center(s), emergency response authority(ies), third party excavator, operator(s), and/or others,
- Photographs,
- Root cause analysis of pipeline failure or excavation-related damage, and
- Region Director decisions on the enforcement action for each issue.

Output: Draft notice letter and accompanying Excavation Violation Report.

Responsibility: Region staff.

Description: If the Region Director determines, based on the criteria in Section 7.1, that a probable violation occurred, an Excavation Violation Report is required. The Excavation Violation Report documents the technical justification and evidence that supports the decision to proceed with a Notice of Probable Violation letter. Because OPS has the burden of proof in excavation enforcement cases, it is essential that cases be fully developed and well documented from the beginning. All records,

photographs, maps, documents, interview notes, and other evidence deemed by the Region Director to be required to support the statements in the Excavation Violation Report must be attached to the report. A template for the Excavation Violation Report is available, along with “Excavation Violation Report User instructions.” These instructions include detailed guidance for providing information to support the determination of proposed Civil Penalties. The Excavation Violation Report must include information and evidence on each probable violation to be included in the Notice of Probable Violation letter. The case must be assigned to one third party excavator and one EXID (Excavator Identification number). When repeat violations are identified, they are included in the Excavation Violation Report. See the Excavation Violation Report template for the definition of a repeat violation.

If the probable violation(s) relates to a pipeline accident/incident, and OPS conducts a pipeline failure investigation, appropriate accident/incident documentation is attached to the Excavation Violation Report. If available, a copy of OPS’s Pipeline Failure Investigation Report is attached. The operator’s “30-day” accident/incident report required for gas (§ 191.9) or hazardous liquid pipelines (§ 195.54) is also attached to the Excavation Violation Report.

Because there are limitations on the maximum penalty amounts for a series of days of violation, it is important to indicate the date on which the non-compliance was found to begin and the date on which it ceased (if it ceased), and note the number of days for the non-compliance, for each item in the Excavation Violation Report.

If the Excavation Violation Report contains multiple evidentiary documents for a probable violation, insert a single numbered cover page or tab between each document when multiple documents are combined together into one exhibit. List each document within an exhibit in the index of exhibits and indicate to which probable violation it relates.

The draft notice letter is prepared using the appropriate template on the PHP-60 SharePoint site. The chart in Table 7-A identifies the appropriate template for each circumstance. Specific instructions in each notice letter template provide direction for completing each portion of the letter. Notice letters should be brief and concise while still communicating the issue(s) clearly. A description of the evidence used to substantiate each probable violation must also be included in the notice letter.

For letters that identify multiple probable violations, each probable violation must be uniquely numbered. In the portions of the notice letter where Civil Penalties are proposed and in any proposed Compliance Order, these probable violations must be referenced by these unique item numbers so it is clear to which items Civil Penalties are proposed and the amount for each item; and to which items Compliance Order requirements are proposed.

To improve enforcement case quality and expedite case processing, the following recommendations are provided to assist in preparing notice letters.

- Make sure that the name of the third party excavator is correct. If in doubt, contact the company or the Region Attorney to obtain the specific legal name of the third party excavator.

- SMART is set up to assign a case to only one third party excavator and one EXID. If there is a need to address the letter to multiple entities, consult with the Region Attorney and the Enforcement Division.
- Notice of Probable Violation letters must be addressed to the most senior official of the third party excavator company such as the President or Chief Executive Officer; not the Vice President or a compliance manager. (The letter should not be addressed to the larger holding company that is not the third party excavator company.) Use whatever method of research necessary to determine who is the most senior company official of the third party excavator company. Call the third party excavator company to verify the identity of the most senior company official before sending the Notice of Probable Violation letter.
- For each probable violation, keep the structure simple and use the following logical order and sequence:
 - Cite and quote the regulation violated in bold at the beginning of each allegation. Use only the specific citations listed in Section 7.2.1.2.
 - These regulations either require something to be done or prohibit something from being done. The first sentence following the bolded regulatory citation should describe the probable violation by stating what the third party excavator did that failed to comply with the regulation cited using the same language and terminology as the regulation. The allegation should be phrased in terms of the third party excavator's alleged failure to take a required action, or in terms of the third party excavator doing something that was prohibited. When describing the third party excavator's conduct, use the past tense to relate actions that occurred prior to the notice letter being issued.
 - State the specific evidence and facts upon which the probable violation is based and that demonstrated why the conduct constitutes a violation. It is very important to explain *why* the third party excavator's action or inaction constituted a violation.

- The Notice of Probable Violation template letter is illustrated below.

As a result of the inspection, it is alleged that you have committed
[insert: a probable violation or probable violations] in Part 196 of the Pipeline Safety Regulations, Title
49, Code of Federal Regulations (C.F.R.). The items inspected and the probable violation(s) are:

1. [cite the regulation and title]

[quote the regulation]

[describe the probable violation]

The first sentence in this section should describe the allegation by using the same language and terminology from the regulation. Phrase the allegation in terms of the excavator's failure to take a required action, or in terms of the excavator doing something that was prohibited. When describing the excavator's conduct, use the past tense to relate actions that occurred prior to the Notice Letter being issued. For example, a probable violation of 196.103(a) would be stated "Bob's Backhoe & Excavating failed to use the Montana State One-Call before excavating." Then, describe the specific facts and circumstances that you intend to rely upon as proof of the alleged violation. Finally, briefly describe how these facts become a violation of the regulation.

[state the specific evidence upon which the probable violation is based]

Or, a description of the evidence may be included in the paragraph(s) above.

2. [cite the regulation and title]

[quote the regulation]

[describe the probable violation]

The first sentence in this section should describe the allegation by using the same language and terminology from the regulation. Phrase the allegation in terms of the excavator's failure to take a required action, or in terms of the excavator doing something that was prohibited. When describing the excavator's conduct, use the past tense to relate actions that occurred prior to the Notice Letter being issued. For example, a probable violation of 196.103(a) would be stated "Bob's Backhoe & Excavating failed to use the Montana State One-Call before excavating." Then, describe the specific facts and circumstances that you intend to rely upon as proof of the alleged violation. Finally, briefly describe how these facts become a violation of the regulation.

[state the specific evidence upon which the probable violation is based]

Or, a description of the evidence may be included in the paragraph(s) above.

- See Section 7.1.1.3 for proposed Compliance Order considerations. Each Compliance Order item must be tailored to one of the probable violation items and must reference that item. This reference should include the number of the probable violation item in the notice letter.

The following applies to the number of alleged violation items:

- Each allegation of violation should normally be cited as a single regulation, cited in bold at the top of each allegation. (SMART Enforcement considers this as the “Cited Regulation.”)
- No regulations will be included in SMART Enforcement or SMART Inspection that are not included in the notice letter (or Final Order).
- As noted in the Excavation Violation Report template, identify the regulation from Section 7.2.1.2 violated with the part, section, and specific paragraph of Title 49. For example, cite § 196.103(b) instead of just § 196.103 for issues associated with a failure by the third party excavator to wait.
- Use caution before citing the same code section or subsection for more than one Item in a Notice of Probable Violation letter because if the Items are based on the same evidence, it may result in a single violation being inappropriately alleged as multiple violations:
 - If the alleged violation involves a failure of third party excavator personnel to perform a given task at a particular location or on multiple occasions, and a failure to perform that same task at a different location or on multiple occasions, these generally should be grouped together into one violation item. For example, a failure to wait before excavating at 4 different excavation locations along a pipeline right-of-way should be 4 instances of one violation item. In the Excavation Violation Report under “Gravity”, enter 4 instances.

Region staff may seek input or assistance from the Region Attorney in drafting the notice letter and in preparing the Excavation Violation Report. The Region Attorney will be useful in identifying the best regulatory citation, formulating the legal and evidentiary arguments into a strong case, and in presenting the evidence in complicated enforcement cases. The Enforcement Division may also be useful in addressing these enforcement issues.

Region staff submit the final draft notice letter to the Region Director for approval.

7.2.2.2 *Approve Draft Notice Letter and Excavation Violation Report*

Input: Final draft notice letter, final draft Excavation Violation Report.

Output: Approved notice letter and Excavation Violation Report.

Responsibility: Region Director.

Description: The Region Director reviews the final draft notice letter and draft Excavation Violation Report and discusses any comments, changes, or corrections with Region staff. If required, Region staff revise the final draft documents. When the notice letter and Excavation Violation Report are satisfactory, the Region Director approves them. The Excavation Violation Report must be signed by the Region Director and Region staff preparing the report.

If no Civil Penalty is proposed, the Region Director issues the Notice of Probable Violation to the third party excavator as described in Section 7.2.3, *Issue Notice Letter to Excavator*.

If a Civil Penalty is proposed, the Region Director sends the final draft notice letter, and final completed Excavation Violation Report to the Compliance Officer for determination of the Civil Penalty amount.

7.2.2.3 Prepare Civil Penalty Recommendation

Input: Notice letter and Excavation Violation Report approved by Region Director.

Output: Amount of proposed Civil Penalty.

Responsibility: Compliance Officer and Enforcement Director.

Description: The Compliance Officer reviews the information provided in the Excavation Violation Report for each item where a proposed Civil Penalty is the recommended enforcement action. The Compliance Officer prepares a Civil Penalty recommendation for each item where a proposed Civil Penalty is recommended, and submits to the Enforcement Director for approval. The Enforcement Director reviews and approves the Civil Penalty recommendations.

If the proposed Civil Penalty for the case totals less than \$200,000, the Enforcement Director/Compliance Officer informs the Region Director of the proposed penalty amounts for each probable violation. The Region Director completes the notice letter as described in Section 7.2.2.5. If the proposed Civil Penalty is \$200,000 or greater, an additional level of review is performed per Section 7.2.2.4.

7.2.2.4 Review Case with Region Attorney and Region Director

Input: Notice letter, Excavation Violation Report, and proposed Civil Penalty \$200,000 or greater.

Output: Notice letter and Excavation Violation Report with any changes recommended by the attorney.

Responsibility: Enforcement Director, Region Attorney, and Region Director.

Description: If the proposed Civil Penalty amount totals \$200,000 or greater, the Enforcement Director or Compliance Officer ensures that the Region Attorney has reviewed the case. The purpose of this review is to ensure that all aspects of the case are legally sound (e.g. that the evidence is sufficiently developed to support each of the alleged violations), and to provide the Office of Chief Counsel an opportunity to consider if the case may be appropriate for civil judicial enforcement in accordance with the referral procedure (see Fig. 7.2, Sheet 10 and Section 7.2.10).

For cases with a total proposed Civil Penalty greater than \$2,000,000, the Region Attorney additionally determines if the proposed civil penalties are affected by the \$2,000,000 limit for a “related series of violations” (§ 190.223). This provides another opportunity for the Office of Chief Counsel to consider if the case may be appropriate for civil judicial enforcement in accordance with the referral procedure (see Fig. 7.2, Sheet 10 and Section 7.2.10).

After receiving any comments from the Region Attorney, including, if applicable, the determination of the “related series of violations” penalty limit issue, the Enforcement Director or Compliance Officer provides the Region Director with written notification of the proposed Civil Penalty amount for each probable violation in the notice letter. If the Region Attorney, Enforcement Director, or Compliance Officer recommend changes to the notice letter or Excavation Violation Report to strengthen the case, the parties work with the Region Director to address these issues (see Section 7.2.2.5).

7.2.2.5 *Complete Notice Letter*

Input: Proposed Civil Penalty from Enforcement Division and any recommended changes to the notice letter or Excavation Violation Report from case reviews.

Output: Completed notice letter.

Responsibility: Region Director.

Description: Upon notification of the proposed Civil Penalty, the Region Director completes the notice letter by:

- Including the proposed Civil Penalty for each item,
- Making modifications resulting from the case review process and resolving any additional substantive changes with the Region Attorney and Enforcement Director, and
- Assigning a Compliance Progress File (CPF) number according to the nomenclature provided in Section 5.2.

For any case involving a proposed Civil Penalty equal to or more than \$100,000 for a single violation item or for a sum of violation items, the Region Director will prepare a one page summary. This summary will be forwarded by e-mail to the Associate Administrator (AA), Deputy Associate Administrator for Field Operations (DAAFO), and the Deputy Associate Administrator for Policy and Programs (DAAPP). In the e-mail, the Region Director will include a short paragraph covering key aspects of the enforcement action. The AA, DAAFO, or DAAPP will forward the e-mail notification to PHMSA senior leadership, along with any requested clarification and background information about the case. The Region Director will not send the Notice Letter to the third party excavator until the Region Director is given clearance by the AA, DAAFO, or DAAPP.

The Region Director then issues the notice letter to the third party excavator, as described in Section 7.2.3, *Issue Notice Letter to Excavator*.

7.2.3 *Issue Notice Letter to Excavator*

When approved, the notice letter is officially sent to the third party excavator. Figure 7.2, Sheet 3, *Issue Notice Letter to Excavator*, illustrates the overall process steps and individual responsibilities. The following discussion provides further explanation of the key steps in this process identified by bold borders in the cross-functional diagram.

The issuance of the notice letter constitutes a critical legal step in the enforcement process: It triggers certain “due process” rights that a respondent enjoys and which OPS must protect. Due process includes:

- Fair notice of the allegations against a respondent,
- The right to an impartial and unbiased decision-maker,
- The right to be represented by counsel, and
- Final agency action that is rationally based and not arbitrary or capricious.

These due process rights are legal in nature and must be safeguarded throughout the enforcement process. In informal adjudications, agencies must pay particular attention to separating the roles played by agency officials who prosecute enforcement cases from those who decide them. A party to an enforcement proceeding, including the third party excavator, its representative, or OPS employees having served in an investigative or prosecutorial capacity in the proceeding, may not communicate privately with the Associate Administrator, Presiding Official⁷, or attorney drafting the recommended decision concerning information that is relevant to the questions to be decided in the proceeding. A party may communicate with the Presiding Official regarding administrative or procedural issues, such as for scheduling a hearing. For more guidance on due process, consult the Region Attorney.

7.2.3.1 Send Notice Letter to Excavator (and Send Copy to FAA if Civil Penalty Case)

Input: Final notice letter ready for sending to third party excavator.

Output: Signed notice letter, case information entered into SMART Inspection, and Region/enforcement case files created.

Responsibility: Region Director.

Description: The Region Director signs the notice letter, and assures that it is sent to the third party excavator using the method described in Section 5.1.

Upon issuance, the Region Director assures that Region staff:

- Create a Region case file;
- Enter case information into SMART Inspection, which documents the investigation results and proposed enforcement actions. Ensure the SMART Inspection accurately reflects the notice letter with the Letter Sent (LS) item in SMART Activities. For more information or detail relating to this topic see the SMART Inspection Policy; and

⁷ A “Presiding Official” means an attorney from that office who is assigned to preside over an informal hearing, and who prepares and recommends a final order or other document to be issued by the Associate Administrator.

- Send the case data to the Compliance Registry.

This step is crucial to the prompt and accurate creation of an enforcement case record in the Compliance Registry. Region personnel send the case data from SMART Inspection to the Compliance Registry (see illustration below) to create the case in SMART Enforcement. The Compliance Progress File number and date of the notice letter are needed before this action can be completed.

The screenshot shows the 'Activity Detail' window in the SMART Enforcement system. The window has a top navigation bar with buttons: 'New Search', 'Modify Search', 'First', 'Previous', 'Activity List', 'Next', 'Last', 'Help', and 'Print'. Below this is a sub-navigation bar with buttons: 'Activity', 'Assignments(1)', 'LS Items(2)', 'Comments', 'Portion Insp.', and 'Summary'. The main content area displays the following information:

- Activity Type :** 101
- Operator :** 26041 KINDER MORGAN LIQUID TERMINALS, LLC
- Unit :** 70443 MIDWAY PIPELINE
- Activity ID :** 120445
- Status :** Complete
- From Date :** 05/27/2008
- To Date :** 05/30/2008
- AFO Total Days :** 4.0
- Activity Total Days :** 4.0
- Lead Person :** ARCHULETTA, PHILLIP N
- Person Region :** 3 - CENTRAL
- Added By :** ARCHULETTA, PHIL
- Date Added :** 01/09/2008
- Updated By :** ARCHULETTA, PHIL
- Date Updated :** 12/03/2008

A callout bubble with the text 'click to open the "Send to CR" window' points to the 'Compliance Registry' button. The bottom of the window has a navigation bar with buttons: 'First', 'Previous', 'Next', and 'Last'.

- Send the notice letter to the OPS Compliance Registry email distribution list that includes those identified in Table 7-B. Refer to Section 5 for formatting requirements.
- If the notice letter contains a proposed Civil Penalty, a copy is provided to the Federal Aviation Agency in the same e-mail used to transmit the notice letter to the Compliance Registry.
- Send one electronic copy of the Excavation Violation Report and the evidence files in PDF format to the Compliance Registry, Region Attorney, and Compliance Officer.
- The Compliance Registry is the official record for all case files. Anything that the Region believes is needed to be documented in the case file should be sent to the Compliance Registry throughout the enforcement process.

When a new case transfers into SMART Enforcement and the case files are received from the Region, the Compliance Registry Coordinator:

- Uploads case files into SMART, and
- Performs SMART case data quality checks.

7.2.4 Process Excavator Response to Notice Letter

Third party excavators have 30 days from receipt of a Notice of Probable Violation to respond to OPS. The document "Response Options for Third Party Excavators in Enforcement Proceedings" describes the different response options for third party excavators.

Failure of the third party excavator to respond to the notice within 30 days of receipt constitutes a waiver of the right to contest the allegations in the notice. It also authorizes the Associate Administrator for Pipeline Safety to find facts as alleged in the notice without further notice to the respondent and to issue a Final Order.

Figure 7.2, Sheet 4, *Process Excavator Response to Notice Letter*, illustrates the overall process steps and individual responsibilities involved in processing third party excavator responses to notices of probable violation. The following discussion provides further explanation of the key steps in this process identified by bold borders in the cross-functional diagram.

7.2.4.1 *Review Excavator Response*

Input: Third party excavator response to Notice of Probable Violation.

Output: Draft notification to schedule hearing, draft Recommendation for a Final Order (if appropriate), or draft letter withdrawing case.

Responsibility: Region staff.

Description: Region staff review the third party excavator response letter and any associated information. The Region Attorney may be brought into the process here to help ensure that all of the third party excavator's responses receive the attention they should. If the third party excavator requests the Excavation Violation Report or case file, the Region Director provides this information within five business days. The Excavation Violation Report is sent by email or by mail, with an electronic or printed copy, respectively. The third party excavator's request, as well as a record of the Region's formal transmittal, is sent to the Compliance Registry so the case file in SMART can be updated.

If the Region staff's review of the additional information establishes that the third party excavator had been in compliance with all the cited regulatory requirement(s) for the entire case, Region staff draft a letter withdrawing the entire case. (See Section 7.2.4.2, *Send Letter Withdrawing Case to Excavator*.)

If the Region staff's review of the information provided by the third party excavator concludes that a portion or all of the case is still valid, and the third party excavator has requested a hearing, notify the Region Director and prepare a draft notification that a hearing be scheduled. (Some third party excavators may tentatively request a hearing or "reserve" their right to request a hearing in the future. All such statements should be treated as requests for hearings.) These steps are described in Section 7.2.6, *Conduct Hearing*.

If Region staff believe the case is still valid and the third party excavator did not request a hearing, Region staff prepare a draft Recommendation for Final Order using the template provided. (See Section 7.2.5.1, *Prepare and Approve Recommendation for Final Order*.) Instructions for the content of the draft Recommendation are contained in the template.

For cases with only a proposed Civil Penalty, the third party excavator's response to the notice letter may be to pay the penalty amount in full and notify the Region Director of this action. Once the Federal

Aviation Agency receives and processes the payment, they notify the Compliance Registry Coordinator, who enters the proof of payment in SMART. Using this payment confirmation, the Region recommendation for the case is to prepare the Final Order and close the case upon issuance of the order.

If the third party excavator does not provide electronic copies of its response, the documents are scanned to create these files.⁸ The electronic files of the complete and redacted⁹ response from the third party excavator (including attachments) are e-mailed to the Compliance Registry.

7.2.4.2 *Send Letter Withdrawing Case to Excavator*

Input: Draft letter to third party excavator withdrawing case.

Output: Signed letter to third party excavator withdrawing case.

Responsibility: Region Director.

Description: Normally cases are not withdrawn in their entirety, rather notice items are withdrawn individually if appropriate. However, in the unusual circumstance where an entire case is being withdrawn, the Region Director reviews the final draft letter to withdraw the entire case and discusses any comments, changes, or corrections with Region staff. If required, Region staff revise the final draft withdrawal letter. When the letter is satisfactory, and after obtaining concurrence from the Region Attorney, the Region Director approves and signs the letter.

The Region Director assures that the letter is sent to the third party excavator (return receipt requested), the Federal Aviation Administration (if a Civil Penalty was proposed), and the Compliance Registry so the SMART case file can be updated. Copies of the letter are also sent to the individuals identified in Table 7-B.

7.2.5 **Prepare and Approve Recommendation for Final Order**

7.2.5.1 *Prepare Recommendation for Final Order*

Input: Information in case file, and information provided by the third party excavator during or after the hearing (if applicable).

Output: Draft Recommendation for Final Order or Draft No Recommendation.

Responsibility: Region staff.

⁸ In situations where excavators provide voluminous responses such as manuals and procedures, these documents may be sent to the Compliance Registry for scanning. Difficult-to-scan items like large maps and drawings should be retained in the Region case files.

⁹ In the notice letter, excavators are advised that their response may be made available to the public. As such, they can provide a redacted copy of their response if it qualifies as sensitive or privacy protected material. See Section 5 for assigning file names to sensitive or privacy protected excavator response documents.

Description: A Recommendation for Final Order is issued when:

- All responsive materials have been received and the time period for the third party excavator to respond has ended (and a hearing was not requested),
- The third party excavator does not respond to the Notice of Probable Violation,
- The third party excavator's reply is non-responsive to the Notice of Probable Violation, or insufficient to resolve the deficiency, or
- After the conclusion of a hearing (if the third party excavator requested a hearing).

Region staff assigned to the case review the information provided by the third party excavator, including additional information provided at the hearing, and in any post-hearing submissions (if applicable). This information is evaluated along with the facts and evidence of the case previously documented in the Notice of Probable Violation and the Excavation Violation Report. If there are substantial factual issues involving credibility, or significant legal issues, Region staff work with the Region Attorney to address them in the Recommendation. Region staff determine whether the non-compliance issue(s) that originally motivated the Notice of Probable Violation is still valid and still merits OPS enforcement action. The Region staff prepares a draft Recommendation for a Final Order using the Recommendation template. The Recommendation should detail whether the evidence as presented in the Notice of Probable Violation and/or the Excavation Violation Report should be presented differently or revised. The original Excavation Violation Report should not be changed, but if modifications were deemed appropriate, a second, updated version of the Excavation Violation Report should be created.

If the Notice of Probable Violation included a proposed Civil Penalty for one or more of the probable violations, Region staff confirm that the allegations are still valid. If the third party excavator provided new information that may warrant reduction of the Civil Penalty amount, this evidence is documented in the Recommendation. If Region staff determine that a Civil Penalty reduction may be warranted, this determination is thoroughly explained in the Recommendation, along with any supporting evidence. This information is documented for each item for which a Civil Penalty reduction is recommended.

If the Notice of Probable Violation included a proposed Compliance Order for any of the probable violations, Region staff confirm that the allegations are still valid.

- If a Compliance Order is still required, the Recommendation clearly documents these corrective measures and recommends that a Final Order be issued to require the third party excavator to complete the corrective actions.
- When the third party excavator proposed modification of the corrective actions in the proposed Compliance Order, explain whether such changes are warranted or not.
- For the determination of any changes of the corrective actions, there should be a thorough explanation for why it is necessary to achieve compliance with referenced supporting evidence in the Recommendation.

The Region may consult with the Region Attorney to finalize the Recommendation.

Whether there is a hearing or not, if the third party excavator does not contest the case and if the Region has no additional information beyond that presented in the Notice of Probable Violation Letter and the Excavation Violation Report, Region staff can alternatively draft a simple email (same distribution as a Recommendation) that says the Region has no recommendation.

7.2.5.2 *Approve Recommendation and Send to Office of Chief Counsel and Compliance Registry*

Input: Draft Recommendation for Final Order or Draft No Recommendation.

Output: Approved Recommendation for Final Order or No Recommendation.

Responsibility: Region Director.

Description: The Region Director reviews the draft Recommendation and discusses any comments, changes, or corrections with Region staff. If the third party excavator has provided information that supports mitigation of any proposed Civil Penalties, the Region Director reviews this material to determine if there is good cause to consider reducing or eliminating a proposed Civil Penalty for any of the alleged non-compliance items. Likewise, if the third party excavator has provided information that might change the terms of the Proposed Compliance Order, this information is also reviewed to see if changes are warranted.

If required, Region staff revise the draft Recommendation. The Region may consult with the Region Attorney to finalize the Recommendation. When the Recommendation is satisfactory, the Region Director sends it to the Office of Chief Counsel,¹⁰ Compliance Registry, and other individuals as identified in Table 7-B. The Region Director also sends to the Compliance Registry a record of the Recommendation being sent to the third party excavator.

If the third party excavator has not contested the case and if the Region has no additional information beyond that presented in the Notice of Probable Violation Letter and the Excavation Violation Report, the Region Director can alternatively send a simple email saying the Region has no Recommendation. In this event, the Region Director sends it to the same distribution as for a Recommendation.

If a third party excavator submits a rebuttal to the Region Recommendation, the Region will normally not provide anything further.

When the Region determines a need to issue a Revised Region Recommendation for Final Order, it must be reviewed by the Region Attorney. Once the Revised Region Recommendation for Final Order is approved and signed, the Region Director will issue in accordance with Table 4-B.

¹⁰ In cases where a hearing is held, the Recommendation is sent to the Presiding Official. For other cases, the Recommendation is sent to the Region Attorney.

7.2.5.3 *Send Recommendation to Excavator*

Input: Third party excavator request for Region Recommendation for Final Order.

Output: Recommendation for Final Order sent to third party excavator.

Responsibility: Region Director or Office of Chief Counsel Attorney.

Description: If the third party excavator requests a copy of the Region's recommendation, the recipient of this request – either the Region Director or the Office of Chief Counsel Attorney – sends the Recommendation to the third party excavator. This individual also sends a copy of the third party excavator's request for the Recommendation as well as a record of the Recommendation being sent to the third party excavator to the Compliance Registry so these documents can be added to the case file.

If a third party excavator submits a rebuttal to the Region Recommendation, the Region will normally not provide any further response. In the event an OPS response is deemed appropriate, the Region Director will consult with the Office of Chief Counsel Attorney and the Enforcement Director to craft a response.

7.2.6 **Conduct Hearing**

If a third party excavator seeks to contest allegations of violations, the third party excavator may request an administrative hearing to present its case. The Office of Chief Counsel's Presiding Official conducts the hearing as described in §§ 190.211 and 190.212. Figure 7.2, Sheet 6, *Conduct Hearing*, illustrates the overall process steps and individual responsibilities. The following discussion provides further explanation of the key steps in this process identified by bold borders in the cross-functional diagram.

7.2.6.1 *Send Notification to Schedule Hearing to Presiding Official*

Input: Letter from third party excavator requesting a hearing.

Output: Notification to schedule a hearing.

Responsibility: Region Director.

Description: Upon receipt of a response to a Notice of Probable Violation in which the third party excavator requests a hearing, the Region Director prepares and sends the notification to the Presiding Official and the Compliance Registry so the SMART case file can be updated. Additional recipients of the notification to schedule a hearing are identified in Table 7-B.

Hearing scheduling notifications are created for SMART record-keeping purposes and to notify the Presiding Official of a hearing request. If a third party excavator requests a hearing, one must be held, unless the case is withdrawn for other reasons.

7.2.6.2 *Schedule Hearing*

Input: Notification to schedule a hearing.

Output: Hearing scheduled.

Responsibility: Presiding Official.

Description: After receiving a notification to schedule a hearing from the Region, the Presiding Official works with the Region and the third party excavator to select a hearing date and location. These arrangements are documented in a letter and sent to the third party excavator and the Region Director. The hearing is typically conducted by teleconference if the Civil Penalty or cost of the proposed corrective action is less than \$25,000, unless the third party excavator requests otherwise. Where Civil Penalties or corrective action costs exceed \$25,000, the hearing is held in-person or by teleconference or video conferencing at the discretion of the Presiding Official.

When the hearing has been scheduled, the Presiding Official sends a copy of the letter scheduling the hearing to the Compliance Registry so the SMART case file can be updated. Additional recipients of the letters scheduling a hearing are listed in Table 7-B.

If the third party excavator withdraws its request for a hearing, the Presiding Official sends the withdrawal to the Region Director and to the Compliance Registry so the SMART case file can be updated. Region staff then prepare a draft Recommendation for Final Order in accordance with Section 7.2.5.1, *Prepare Recommendation for Final Order*.

7.2.6.3 *Prepare for Hearing*

Input: Third party excavator response to the Notice of Probable Violation.

Output: Depending on the specifics of the case, additional materials, information, analysis, and evidence to successfully prosecute the case.

Responsibility: Region Director, Region staff, Community Liaisons, and Region Attorney.

Description: A third party excavator's request for a hearing must be accompanied by a statement of the issues it intends to raise at the hearing. The issues may relate to the allegations in the notice, the proposed corrective action, or the proposed Civil Penalty amount. A third party excavator's failure to specify an issue may result in forfeiture of the third party excavator's right to raise that issue at the hearing.

Upon receipt of the third party excavator's letter requesting a hearing, the Region Director and staff evaluate the basis for the third party excavator's position in contesting the alleged violation, the proposed Civil Penalty amount (if any), and/or the terms of the any Proposed Compliance Order. Region Director and staff put together evidence from the case file, as appropriate. If the Region intends to introduce new material that is not currently in the case file during the hearing, the Region provides this information to the third party excavator and the Presiding Official at least 10 days prior to the hearing date. This gives the third party excavator the opportunity to review and respond to the new materials. Examples of such material include any presentations, maps, or other information that the Region may want to use in rebutting a third party excavator's arguments or explaining issues to the Presiding Official.

Likewise, if the third party excavator intends to introduce materials at the hearing that are not already in the case file, the third party excavator must provide this material to the Region Director and the Presiding Official at least 10 days prior to the hearing date. This provides the Region Director and Region staff an opportunity to review and prepare responses to this new material before the hearing.

If the third party excavator or the Region is unable to provide its pre-hearing submissions 10 or more days before the hearing, the party must send a request for a time extension to the Presiding Official and the other party. This request must explain the reason for requesting the time extension.

Should the third party excavator or the Region provide pre-hearing submissions or request time extensions for the 10 day submission deadline, the Presiding Official sends the pre-hearing submissions and/or associated correspondence to the Compliance Registry so the SMART case file can be updated.

The Region Attorney may be consulted by the Region Director or Region staff to provide guidance and assistance in preparing to present the case at the hearing. By working together consistently before the hearing, it can be assured that the Region Director, Region staff, and the Region Attorney are all fully briefed and aware of the case issues, the basis for the enforcement, and evidence.

Pursuant to § 190.210(b)'s prohibition on ex parte communications, the Region Director and Region staff assigned to the case cannot discuss the case with the Presiding Official outside of the hearing. This assures that the Presiding Official is not influenced by information that is not presented at the hearing. Only procedural and scheduling questions can be addressed to the Presiding Official. The Region Attorney should be consulted if there are any questions about communication with the Presiding Official prior to the hearing.

7.2.6.4 Conduct Hearing

Input: Materials developed or collected in preparation for the hearing.

Output: A fair hearing in which both sides have had the opportunity to present their positions. Any documents and other evidence presented at the hearing become part of the case file. A written notification that the hearing was held is provided to the Compliance Registry.

Responsibility: Presiding Official.

Description: During the hearing, the third party excavator is typically represented by staff members knowledgeable with the alleged violations, and perhaps its regulatory compliance personnel and/or company management. Third party excavators may also rely on outside consultants for technical support, and in-house or outside counsel for legal support. The Region is represented by the Region Director, Region staff assigned to the case, and the Region Attorney.

All OPS hearings are considered "informal adjudications," meaning that they do not adhere to the formal procedures used by courts or strict rules of evidence. However, they must still meet all statutory, regulatory, and constitutional requirements for informal hearings. Conformance with these obligations is ensured through these procedures. Both the third party excavator and Region are provided an opportunity to present evidence supporting their respective positions. The third party excavator may present facts, statements, explanations, documents, testimony, or other items relevant to the issues under consideration. Each side is allowed to respond to information the other party presents.

After the hearing is finished, the Presiding Official provides written notification that the hearing has been held to the Compliance Registry so the SMART case file can be updated. An e-mail message indicating the hearing date and a list of the participants or a copy of the sign-up sheet is satisfactory documentation of the event. If the third party excavator has provided additional evidence at the hearing, these documents are also provided to the Compliance Registry to update the SMART case file. Additional recipients of this material are listed in Table 7-B.

There are no transcripts or official minutes of the hearing, unless a third party excavator elects to transcribe a hearing. In these situations, the third party excavator must notify the Presiding Official in advance of its intent, and it must arrange for a court reporter to transcribe the session at its own cost. The third party excavator must provide copies of the transcript to OPS for the case file.

7.2.6.5 *Review Post-Hearing Submission*

Input: Additional evidence submitted by the third party excavator after the hearing.

Output: Updated case file with additional information and evidence.

Responsibility: Presiding Official.

Description: If requested, the Presiding Official allows the third party excavator to submit additional evidence supporting its case following the conclusion of the hearing. The third party excavator sends this post-hearing submission to the Presiding Official and the Region for review. Unless otherwise noted by the Presiding Official, the third party excavator sends its post-hearing submission within 30 days of the conclusion of the hearing.

If the third party excavator only sends its post-hearing submission to either the Presiding Official or the Region, the recipient sends a copy of this material to the other so that everyone has the same information. The Presiding Official sends the post-hearing submission to the Compliance Registry so the SMART case file can be updated. If the contents of the post-hearing submission are not in electronic format, the Presiding Official may send the documents to the Compliance Registry for scanning. Oversize drawings and documents are sent to the Region for retention in its case files.

7.2.7 **Process Final Order**

Figure 7.2, Sheet 7, *Process Final Order*, illustrates the overall process steps and individual responsibilities. The following discussion provides further explanation of the key steps in this process identified by bold borders in the cross-functional diagram.

7.2.7.1 *Prepare Final Order*

Input: Evidence in Case File, including third party excavator submissions and Region Recommendation.

Output: Draft Final Order, in a fully edited proof-read and signature-ready format.

Responsibility: Presiding Official or other Office of Chief Counsel Attorney

Description: Based on all the evidence in the record, an Office of Chief Counsel Attorney who was not involved in any way in the development of the previous stages of the case independently drafts a Final Order that contains findings of fact and law on all material issues. The attorney may consult the Region's Recommendation but is not bound by it. The attorney may also consult with impartial technical personnel and resources at headquarters or in the Regions who were not involved in any way in the development of the case.

If a third party excavator is issued a Notice of Probable Violation that contains only a proposed Civil Penalty (no Compliance Order), and the third party excavator has paid (or will pay) the Civil Penalty without asking for a hearing, the attorney will still prepare a Final Order so that there is a record of a finding of violation. If the penalty has been paid at the time the Final Order is written, the order will also declare that the case is closed. If the penalty has not been paid at the time the Final Order is written, it will state that the case will be closed upon receipt of payment.

If the attorney determines that the evidence may support an assessed penalty reduced from the proposed, the attorney will obtain the proposed Civil Penalty worksheet from the Enforcement Division. The attorney will use the same consistent methodology that was previously applied to determine the proposed penalty, to calculate and provide a revised recommended Civil Penalty.

Similarly, if the third party excavator is issued a Notice of Probable Violation that contains no Civil Penalty or no Compliance Order without asking for a hearing, the attorney will still prepare a Final Order so that there is a record of a finding of violation. This Final Order will declare that the case is closed.

If a violation: is a repeat violation; is a causal factor in an accident/incident; increased the severity of consequences of an accident/incident; or is egregious or willful (see the Culpability section in the Excavation Violation Report), this should be stated in the Final Order.

Before the order is sent to the Enforcement Division, the attorney confirms that the company name and address are correct and current. The attorney also confirms the name and title of the company official to whom the Final Order is addressed.

The Office of Chief Counsel may implement its own internal draft review procedures, provided the reviewers were not involved in any way in the development of the previous stages of the case.

7.2.7.2 Review Final Order

Input: Draft Final Order.

Output: Draft Final Order ready for Associate Administrator review.

Responsibility: Enforcement Division Staff, and Management and Program Analyst.

Description: An Enforcement Division staff person – one not involved in any way in the development of the previous stages of the case – reviews the draft Final Order prepared by Office of Chief Counsel only

for differences with the Region Recommendation. If found, the staff person highlights the Item(s) having differences to facilitate the Associate Administrator's review.

The draft Final Order is then provided to the Management and Program Analyst for one last editorial check. Any suggested changes during this process are resolved with the Office of Chief Counsel. When this review is complete, the Management and Program Analyst sends the Final Order to the Associate Administrator or Deputy Associate Administrator.

7.2.7.3 Review and Approve Final Order

Input: Draft Final Order.

Output: Approved and signed Final Order.

Responsibility: Associate Administrator (or Deputy Associate Administrator when so delegated by the Associate Administrator).

Description: The Associate Administrator reviews the draft Final Order. When the Associate Administrator determines the Final Order to be satisfactory, the Associate Administrator approves and signs the order.

7.2.7.4 Send Final Order to Excavator

Input: Approved Final Order signed by the Associate Administrator.

Output: Order sent to third party excavator and updated case file.

Responsibility: Office of Chief Counsel.

Description: The Office of Chief Counsel sends the approved and signed order to the third party excavator. The order is sent by certified mail, overnight courier, or electronic transmission by facsimile or other electronic means that includes reliable acknowledgement of actual receipt. The Office of Chief Counsel retains a copy of the acknowledgement of receipt of the order by the third party excavator (e.g., the U.S. Postal Service return receipt signed by the third party excavator).

The Office of Chief Counsel sends a copy of the order to the Compliance Registry to update the SMART case file. If the case involved a proposed Civil Penalty, the Office of Chief Counsel also sends a copy of the Final Order to the Federal Aviation Agency in the same e-mail that transmits the order to the Compliance Registry. Additional recipients of the Final Order are listed in Table 7-B.

7.2.8 Petition for Reconsideration

After receipt of a Final Order, third party excavators have the right to petition the Associate Administrator to reconsider the ruling. A Petition for Reconsideration must be received by OPS no later than 20 days after the third party excavator's receipt of the Final Order, unless an extension is requested and granted. The petition must contain a brief explanation of the third party excavator's objection and an explanation why the Final Order should be modified. Figure 7.2, Sheet 8, *Petition for Reconsideration*, illustrates the

overall process steps and individual responsibilities. The following discussion provides further explanation of the key steps in this process identified by bold borders in the cross-functional diagram.

7.2.8.1 Assign Attorney and Review Petition

Input: Petition for Reconsideration submitted by the third party excavator.

Output: Updated case file and stay of Civil Penalty.

Responsibility: Office of Chief Counsel Attorney.

Description: Third party excavators may petition the Associate Administrator for reconsideration of a Final Order. Upon receipt of a Petition for Reconsideration, the Office of Chief Counsel assigns an attorney to the case to review the petition. The attorney reviews the third party excavator's petition and determines the appropriate initial course of action on the petition.

The Office of Chief Counsel Attorney also sends a copy of the petition to the Compliance Registry to update the SMART case file.

If the case involves a Civil Penalty, the Office of Chief Counsel also sends a copy of the petition to the Federal Aviation Administration in the same e-mail that transmits the petition to the Compliance Registry. The Federal Aviation Agency places the collection of the Civil Penalty on hold until a decision on the petition is rendered. Additional copies of the petition are sent to the individuals listed in Table 7-B.

7.2.8.2 Prepare Decision on Petition

Input: Petition for Reconsideration.

Output: Draft Decision on Petition for Reconsideration in a fully edited proof-read and signature-ready format.

Responsibility: Office of Chief Counsel Attorney.

Description: The Office of Chief Counsel Attorney assigned to the case prepares a draft Decision on Petition for Reconsideration. If a review of the evidence suggests a revised Civil Penalty for one or more alleged violations is warranted, the attorney obtains the proposed Civil Penalty worksheet from the Enforcement Division. The attorney uses the same consistent methodology that was previously applied to determine the proposed penalty to calculate and provide a revised recommended Civil Penalty.

The attorney may also consult with impartial technical resources at headquarters or in the Regions, as long as these individuals have had no previous involvement with this case.

7.2.8.3 Review Decision on Petition

Input: Draft Decision on Petition for Reconsideration.

Output: Approved Decision on Petition for Reconsideration.

Responsibility: Enforcement Director

Description: The Enforcement Director reviews the draft Decision on Petition for Reconsideration. When the Enforcement Director finds the draft Decision on Petition for Reconsideration to be acceptable, the Enforcement Director approves the decision for final approval and signing by the Associate Administrator.

7.2.8.4 Review and Approve Decision on Petition

Input: Approved Decision on Petition for Reconsideration.

Output: Approved and signed Decision on Petition for Reconsideration.

Responsibility: Associate Administrator (or Deputy Associate Administrator when so delegated by the Associate Administrator).

Description: The Associate Administrator reviews the draft Decision on Petition for Reconsideration. When the Associate Administrator finds the draft Decision on Petition for Reconsideration to be acceptable, the Associate Administrator approves and signs the decision.

7.2.8.5 Send Decision on Petition to Excavator and FAA (if Civil Penalty Case)

Input: Approved and signed Decision on Petition for Reconsideration.

Output: Decision on Petition for Reconsideration sent to third party excavator.

Responsibility: Office of Chief Counsel.

Description: The Office of Chief Counsel sends the approved and signed Decision on Petition for Reconsideration to the third party excavator. The decision is sent by certified mail, overnight courier, or electronic transmission by facsimile or other electronic means that includes reliable acknowledgement of actual receipt. The Office of Chief Counsel retains a copy of the acknowledgement of receipt of the decision by the third party excavator (e.g., the U.S. Postal Service return receipt signed by the third party excavator).

The Office of Chief Counsel provides a copy of the decision to the Compliance Registry to update the SMART case file. If the case involves a Civil Penalty, the Office of Chief Counsel also provides a copy of the Decision on Petition for Reconsideration to the Federal Aviation Administration in the same e-mail that transmits the decision to the Compliance Registry. The Federal Aviation Agency either resumes collection of the Civil Penalty or cancels/modifies it as described in the final decision. Additional copies of the decision are sent to individuals identified in Table 7-B.

7.2.9 Close Case

A case is closed upon confirmation that the third party excavator complied with all the terms of the Final Order and, if applicable, the Decision on Petition for Reconsideration. Figure 7.2, Sheet 9, *Close Case*, illustrates the overall process steps and individual responsibilities. The following discussion provides further explanation of the key steps in this process identified by bold borders in the cross-functional diagram.

7.2.9.1 Send Confirmation of Payment to Compliance Registry

Input: Receipt of funds from third party excavator in payment of Civil Penalty.

Output: Confirmation of payment of Civil Penalty.

Responsibility: Federal Aviation Administration.

Description: Upon receipt of the full Civil Penalty payment, the Federal Aviation Agency representative responsible for processing OPS Civil Penalties sends written confirmation of payment to the Compliance Registry so the SMART case file can be updated. The payment amount includes any applicable penalties and interest that have accrued since the Civil Penalty was ordered.

If a case has not received a confirmation for payment of Civil Penalty within 90 days, the Compliance Registry Coordinator will send a notification to the Region Director and Region Attorney.

7.2.9.2 Confirm Excavator Payment and Compliance

Input: Third party excavator payment of Civil Penalty and performance of Compliance Order.

Output: Draft letter to close case.

Responsibility: Region staff.

Description: Region staff verify that the third party excavator completed the terms of the Compliance Order, and if a Civil Penalty was assessed, paid the penalty.

Payment of a Civil Penalty assessed in a Final Order or affirmed in a Decision on Petition for Reconsideration must be made within 20 days after receipt of the Final Order or Decision. If the third party excavator fails to pay the Civil Penalty, the Federal Aviation Agency refers the case to the Treasury Department for collection.¹¹ Upon receipt of the confirmation of payment from the Federal Aviation Agency, the Compliance Registry Coordinator will update this payment information in SMART Enforcement, as noted in Section 7.2.9.1, and advise the designated Region contact by e-mail that payment was made. The list of designated Region contacts will be updated as desired by the Region Directors and maintained in the Compliance Registry Coordinator Instructions. Of course, the Region can also verify if the payment was made by checking SMART Enforcement. Claims by third party excavators, whether written or verbal, that payment of Civil Penalty has been made are not accepted for proof of payment. For example, a letter from the third party excavator or copies of checks or money orders, are not accepted for case closure.

¹¹ Failure to make payment results in the initiation of collection action by the Federal Aviation Agency, including the accrual of interest and penalties, in accordance with 31 U.S.C. 3717 and 49 C.F.R. Part 89 (§ 190.227). In addition, OPS may request that the Department of Justice bring a civil action for collection, in accordance with 49 U.S.C. 60122(c).

Region staff verify that the terms of the Compliance Order have been met and the third party excavator provides evidence or documentation that establishes the basis for closure. This could take the form of additional evidence gathered on subsequent follow-up to the investigation. In the case of verification by direct observation on the part of Region staff, compliance can be documented in an Excavation Activity Investigation form(s). If the third party excavator fails to comply with the Compliance Order or the final Decision on Petition for Reconsideration in a timely manner, Region staff inform the Region Director for consideration of additional administrative enforcement action. Options for addressing non-compliance with the terms of a Compliance Order may be discussed with the Region Attorney.

Region staff prepare a letter to the third party excavator closing the case using the appropriate template. Instructions for the content of the case closure letter are contained in the template. Region staff submit the draft closure letter to the Region Director for approval.

The Region will not prepare a closure letter for a case that includes only a Civil Penalty or for a case that contains neither a Civil Penalty nor a Compliance Order. In these situations, the Final Order already stated that the case closes automatically, or automatically upon payment in cases with Civil Penalties. (The Enforcement Division directly closes those cases without involvement from the Region.)

If the Region receives a notification of a bankruptcy claim from the Compliance Registry Coordinator, the Region Attorney will send a letter to the assigned bankruptcy attorney from the Office of Chief Counsel requesting a bankruptcy review. The bankruptcy attorney will then follow the PHC's process to evaluate the case.

7.2.9.3 *Send Closure Letter to Excavator*

Input: Draft closure letter.

Output: Signed closure letter sent to third party excavator.

Responsibility: Region Director.

Description: The Region Director reviews the draft closure letter and discusses any comments, changes, or corrections with Region staff. If required, Region staff revise the final draft letter. When the letter is satisfactory, the Region Director approves and signs the letter and sends it to the third party excavator. The closure letter along with evidence (or documentation) of compliance is sent to the Compliance Registry Coordinator who updates SMART, uploads the evidence, and closes the case. If the case includes a Civil Penalty, an electronic copy of the closure letter is also sent to the Federal Aviation Agency in the same e-mail that transmits the Closure Letter to the Compliance Registry. Additional recipients of Closure Letters are listed in Table 7-B.

7.2.10 **Refer Case to the Department of Justice (DOJ) or Other Agency**

If the nature of probable violations warrants, the case may be referred to DOJ for civil judicial enforcement. If DOJ is already pursuing a case against the third party excavator on behalf of another federal agency (e.g., EPA or USCG), the cases may be pursued jointly. Figure 7.2, Sheet 10, *Refer Case to DOJ or Other Agency*, illustrates the overall process steps and individual responsibilities associated with

referring cases outside OPS. This section does not apply to criminal enforcement. For criminal enforcement, see Section 7.1.1 and Section 2, *Criminal Enforcement and OIG Coordination*.

A decision to refer a case can be made at any time, but would most commonly occur before a notice letter is sent. When deciding whether a case should be referred to DOJ, one or more of the following should be considered:

- Does the statutory limit on administrative penalties unduly restrict the penalty OPS believes is appropriate?
- Is there a chance the case may be referred criminally?
- Did the violation result in an accident or incident involving a fatality, injuries, significant environmental harm, or significant property damage?
- Does the third party excavator have a poor history of compliance?
- Can corrective action be facilitated better with a referral than using OPS's administrative tools, such as a Notice of Probable Violation?
- Are there other appropriate considerations that might weigh in favor or against DOJ referral?

If the Enforcement Director, Region Attorney, or Region Director believes the probable violations would warrant referral of the case to DOJ, or should be pursued jointly with another federal agency (e.g., EPA or USCG), he/she will notify their management up their chain of command to the Chief Counsel or one of the Deputy Associate Administrators.

If the Chief Counsel or a Deputy Associate Administrator believes the probable violations would warrant referral of the case to DOJ, or should be pursued jointly with another federal agency (e.g., EPA or USCG), he/she will notify the Associate Administrator. The Associate Administrator will discuss this option with the PHMSA Administrator, including the Chief Counsel, before any commitments are made or OPS opinions/positions are relayed to those agencies.

If the PHMSA Administrator then decides the case would warrant referral to DOJ, the Office of Chief Counsel will handle the referral.

Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 47 of 51

Table 7-A Selection of Enforcement Documents

Selected Action	Proposed Probable Violation (PV)?	Proposed Compliance Order (CO)?	Proposed Civil Penalty (CP)?	Example Letter/Form ^A	Attachment ^A	Excavation Violation Report required? ^A
Probable Violation (PV)	Yes	Yes	Yes	NOPV (Civil Penalty/ Compliance Order)	<ul style="list-style-type: none"> • Compliance Order • Response Options for Third Party Excavators in Enforcement Proceedings 	Yes
				NOPV (Civil Penalty/ Compliance Order)	<ul style="list-style-type: none"> • Compliance Order • Response Options for Third Party Excavators in Enforcement Proceedings 	
			No	NOPV (Compliance Order)	<ul style="list-style-type: none"> • Compliance Order • Response Options for Third Party Excavators in Enforcement Proceedings 	
				NOPV (Compliance Order)	<ul style="list-style-type: none"> • Compliance Order • Response Options for Third Party Excavators in Enforcement Proceedings 	
	Yes	No	Yes	NOPV (Civil Penalty)	<ul style="list-style-type: none"> • Response Options for Third Party Excavators in Enforcement Proceedings 	
				NOPV (Civil Penalty)	<ul style="list-style-type: none"> • Response Options for Third Party Excavators in Enforcement Proceedings 	
			No	NOPV (no Civil Penalty/no Compliance Order)	<ul style="list-style-type: none"> • Response Options for Third Party Excavators in Enforcement Proceedings 	Yes

Notes

A - The example letters/forms reside on the OPS/PHP-60 Share Point site.

THIS DOCUMENT FOR INTERNAL USE IN OPS ONLY

Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 48 of 51

Table 7-B Distribution of Enforcement Documents

Notes:

- An “O” designates the originator (and who is responsible for ensuring proper distribution) of the document, an “••” indicates responsibility for distributing a document originating from the third party excavator, and “•” indicates the minimum parties to whom the document must be sent.
- Documents distributed within PHMSA should be electronic files.
- The originator/distributor is responsible for assigning a document file name and for following the special requirements for those documents that will be sent to the enforcement transparency web site. See Section 5.

Document		Management			Headquarters Enforcement		Third Party Excavator	FAA	Office of Chief Counsel			Region		
		Associate Administrator	Deputy Associate Administrator for Field Operations (DAAFO)	Deputy Associate Administrator for Policy & Programs (DAAPP)	Enforcement Director	OPS Compliance Registry	Third Party Excavator	Federal Aviation Agency	Presiding Official or Adjudicating Attorney	Region Attorney	Region Attorney – other Regions	Director	Directors – other Regions	Assigned Region Staff
Notice Letters	Notice of Probable Violation letter with only a probable violation					•	•			•		O	•	•
	Notice of Probable Violation letter with a proposed Compliance Order					•	•			•		O	•	•
	Notice of Probable Violation letter with a proposed Civil Penalty					•	•	•		•		O	•	•
	Notice of Probable Violation letter with a proposed Civil Penalty and Compliance Order					•	•	•		•		O	•	•
	Excavation Violation Report (including all evidence documents such as maps, drawings, records, forms, etc.)					•				•		O		•

THIS DOCUMENT FOR INTERNAL USE IN OPS ONLY

Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 49 of 51

Document		Management			Headquarters Enforcement		Third Party Excavator	FAA	Office of Chief Counsel			Region		
		Associate Administrator	Deputy Associate Administrator for Field Operations (DAAFO)	Deputy Associate Administrator for Policy & Programs (DAAPP)	Enforcement Director	OPS Compliance Registry	Third Party Excavator	Federal Aviation Agency	Presiding Official or Adjudicating Attorney	Region Attorney	Region Attorney – other Regions	Director	Directors – other Regions	Assigned Region Staff
Region	Region Request for Specific Information letter associated with an enforcement case					•	•					0		•
	Region Response to request for time extension					•	•					0		•
	Region Notification to schedule a hearing					•			•	•		0		•
	Region Recommendation for a case with no hearing					•	•		•	•		0		•
	Region Recommendation after a hearing has been held					•	•		•	•		0		•
	Bankruptcy letter					•	•			•		0	•	•
	Vandalism letter					•	•			•		0	•	•
	Withdrawal of Notice of Probable Violation letter with only a probable violation					•	•			•		0	•	•
	Withdrawal of Notice of Probable Violation letter with a proposed Compliance Order					•	•			•		0	•	•
	Withdrawal of Notice of Probable Violation letter with a proposed Civil Penalty					•	•	•		•		0	•	•
	Withdrawal of Notice of Probable Violation letter with a proposed Civil Penalty and Compliance Order					•	•	•		•		0	•	•

THIS DOCUMENT FOR INTERNAL USE IN OPS ONLY

Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 50 of 51

Document		Management			Headquarters Enforcement		Third Party Excavator	FAA	Office of Chief Counsel			Region		
		Associate Administrator	Deputy Associate Administrator for Field Operations (DAAFO)	Deputy Associate Administrator for Policy & Programs (DAAPP)	Enforcement Director	OPS Compliance Registry	Third Party Excavator	Federal Aviation Agency	Presiding Official or Adjudicating Attorney	Region Attorney	Region Attorney – other Regions	Director	Directors – other Regions	Assigned Region Staff
Third Party Excavator Responses	Excavator Response to a Notice of Probable Violation letter					•	O			•		••		•
	Excavator Response to a Request for Specific Information					•	O			•		••		•
	Excavator's Request for Time Extension					•	O					••		•
	Excavator Request for Hearing					•	O		•	•		••		•
	Excavator Pre-Hearing Submission					•	O		••	•		•		•
	Excavator Post-Hearing Submission					•	O		••	•		•		•
	Excavator Response to a Consent Agreement					•	O		•	•		••		•
	Excavator Response to Region Recommendation					•	O			•		••		•
	Excavator Response to a Final Order					•	O		•	•		••		•
	Excavator Petition for Reconsideration for a case without a Civil Penalty	•	•	•		•	O		••	•		•		•
	Excavator Petition for Reconsideration for a case with a Civil Penalty	•	•	•		•	O	•	••	•		•		•
	Excavator Petition for Reconsideration for a case without a Civil Penalty	•	•	•		•	O		••	•		•		•

THIS DOCUMENT FOR INTERNAL USE IN OPS ONLY

Pipeline Safety Enforcement Procedures

Section 7
February 20, 2018
Page 51 of 51

Document		Management			Headquarters Enforcement		Third Party Excavator	FAA	Office of Chief Counsel			Region		
		Associate Administrator	Deputy Associate Administrator for Field Operations (DAAFO)	Deputy Associate Administrator for Policy & Programs (DAAPP)	Enforcement Director	OPS Compliance Registry	Third Party Excavator	Federal Aviation Agency	Presiding Official or Adjudicating Attorney	Region Attorney	Region Attorney – other Regions	Director	Directors – other Regions	Assigned Region Staff
Final Orders	Final Order (and Amendments) without a Civil Penalty	•	•	•	•	•	•		O	O		•	•	•
	Final Order (and Amendments) with a Civil Penalty	•	•	•	•	•	•	•	O	O		•	•	•
	Consent Order without a Civil Penalty	•	•	•	•	•	•	•	O	O		•	•	•
	Consent Order with a Civil Penalty	•	•	•	•	•	•	•	O	O	•	•	•	•
	Decision on Petition for Reconsideration for a case without Civil Penalty	•	•	•	•	•	•	•	O	•	•	•	•	•
	Decision on Petition for Reconsideration for a case with Civil Penalty	•	•	•	•	•	•		O	•	•	•	•	•
	Proof-of-Payment of Civil Penalty					•	•	O		•		O		•
	Closure letter for a case without a Civil Penalty					•	•			•		O		•
	Closure letter for a case with a Civil Penalty					•	•	•		•		O		•

THIS DOCUMENT FOR INTERNAL USE IN OPS ONLY