



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

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

May 18, 2018

OVERNIGHT EXPRESS MAIL

Mr. Michael A. Albert
Chairman
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25301

Dear Chairman Albert:

On November 29, 2017, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) conducted an adequacy evaluation of West Virginia's enforcement of its excavation damage prevention law, commonly known as the State One-Call law. This letter serves as your official notice of our findings and determination. Based on the evaluation, PHMSA has determined that enforcement of West Virginia's excavation damage prevention law is inadequate due to the State responding "no" to the following evaluation criteria:

- 1) Does the State have the authority to enforce its State excavation damage prevention law using civil penalties and other appropriate sanctions for violations?
- 2) In the previous calendar year, did the State enforcement authority assess civil penalties and/or other sanctions for violations of the excavation damage prevention law involving regulated pipelines?

PHMSA conducted the evaluation pursuant to 49 United States Code (USC) § 60114 and 49 Code of Federal Regulations (CFR) Part 198, Subpart D -- State Damage Prevention Enforcement Programs. PHMSA spoke with Mary Friend of the West Virginia Public Service Commission, and Tom Taylor, Courtland Smith, and Trina Bell of the West Virginia 811. During the evaluation, PHMSA asked a series of standard questions regarding actions that the State has executed to enforce the West Virginia excavation damage prevention law.

In accordance with 49 CFR § 198.55, there are seven federal criteria that PHMSA uses to assess the effectiveness of the State's damage prevention enforcement programs. These criteria specify if the State has the authority to enforce its excavation damage prevention law; that the State utilizes its authority to issue civil penalties and other appropriate sanctions for violations of the law; and, that the State can provide documented procedures, processes, and data that demonstrates an effective overall damage prevention enforcement program. The evaluation criteria are included in the enclosed brief.

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West Virginia was found to have inadequate enforcement during the PHMSA evaluation conducted in 2016. Based on PHMSA's 2017 determination, PHMSA continues to maintain enforcement authority in West Virginia as defined in 49 CFR Part 196 against an excavator who damages a regulated hazardous liquid or natural gas pipeline in the State. It is important to note this does not mean that West Virginia is unable to continue its enforcement efforts, only that PHMSA has the authority to enforce its own Federal minimum excavation damage standards alongside your current efforts. PHMSA continues to recognize the critical role West Virginia officials play in the safety of their pipeline network and will continue to work together with West Virginia officials going forward.

Please be advised States that fail to establish an adequate excavation damage prevention law enforcement program within five years from the date of a final PHMSA determination, may be subject to a four percent reduction in PHMSA State Base Grant funding. This grant currently funds up to 80 percent of the cost of the pipeline safety program within the Public Service Commission of West Virginia.

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

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

PHMSA evaluation of State damage prevention law enforcement will occur annually; however, if West Virginia acts to establish an adequate enforcement program prior to the annual evaluation, West Virginia may request that PHMSA review and reconsider this designation.

Excavation damage continues to be a leading cause of hazardous liquid and natural gas pipeline incidents resulting in fatalities, serious injury, and environmental damage. Damaging a pipeline during excavation poses a serious safety risk to excavators, the public living or working in proximity to the excavation site, and the environment.

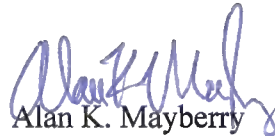
PHMSA strongly believes that effective damage prevention programs, including enforcement, are best addressed at the State level. Nationwide statistics show that effective enforcement of State excavation damage prevention laws reduces excavation damage and pipeline incidents, resulting in increased safety. PHMSA commends West Virginia's ongoing efforts to improve its one-call legislation. PHMSA looks forward to seeing the results of these important efforts.

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PHMSA stands ready to assist West Virginia stakeholders in improving enforcement of your excavation damage prevention law. If you have any questions or need additional information, please contact our Damage Prevention Team by email at excavation.enforcement@dot.gov or by phone at (804) 556-4678.

Finally, we encourage you and your colleagues to support several safety education initiatives throughout the year. These efforts include National Safe Digging Month in April, National Safety Month in June, and National 811 Day in August. More information is available at www.call811.com and www.nsc.org/work-safety/get-involved/national-safety-month.

Sincerely,



Alan K. Mayberry
Associate Administrator for Pipeline Safety

Enclosure

cc: The Honorable Jim Justice, Office of the Governor, State of West Virginia
Mary Friend, Director, Pipeline Safety, Public Service Commission of West Virginia
Tom Taylor, Executive Director, West Virginia 811

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

BACKGROUND

49 USC § 60114 provides the United States Department of Transportation with back stop authority to conduct administrative civil enforcement proceedings against excavators who damage hazardous liquid and natural gas pipelines in a state that has failed to adequately enforce its excavation damage prevention or one-call laws. **Federal civil penalty levels are as high as \$209,002 for each day the violation continues, with a maximum penalty of \$2,090,022 for a related series of violations.**

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

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

CRITERIA TO BE USED TO EVALUATE STATE DAMAGE PREVENTION PROGRAMS

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

ADMINISTRATIVE PROCESS FOR STATES TO CONTEST NOTICES OF INADEQUACY

1. PHMSA will issue a notice of inadequacy to the state in accordance with 49 CFR 190.5.
2. States have 30 days to submit written response by mail to:
Alan Mayberry
Associate Administrator for Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE, Suite E22-321
Washington, DC 20590
3. PHMSA will issue a final decision to states that contested a notice of inadequacy.
4. State may petition PHMSA to reconsider at any time following a finding of inadequacy; PHMSA will respond not later than the date of the next annual review.
5. States that fail to establish an adequate enforcement program within five years of effective date of the damage prevention final rule (January 1, 2016) may be subject to a 4 percent reduction in base grant funding.

FEDERAL STANDARDS FOR EXCAVATORS

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

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

FOR MORE INFORMATION

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

CONTACT OUR DAMAGE PREVENTION TEAM

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