



U.S. Department  
of Transportation

Pipeline and Hazardous  
Materials Safety  
Administration

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

June 28, 2019

**OVERNIGHT EXPRESS MAIL**

Ms. Rebecca Cameron Valcq  
Chairperson  
Public Service Commission of Wisconsin  
Hill Farms State Office Building  
North Tower, 6<sup>th</sup> Floor  
4822 Madison Yards Way  
Madison, WI 53705

Dear Chairperson Valcq:

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

On December 18, 2018, a representative of the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) conducted an evaluation of Wisconsin's enforcement of its excavation damage prevention law. PHMSA conducted this evaluation pursuant to 49 United States Code § 60114 and 49 Code of Federal Regulations (CFR) Part 198, Subpart D—State Damage Prevention Enforcement Programs. Based on this evaluation, PHMSA determined that enforcement of Wisconsin's excavation damage prevention law is inadequate at this time. PHMSA has identified several areas that, if addressed, would help to make the state's enforcement program adequate.

In accordance with 49 CFR Part 198.55, there are several criteria that PHMSA uses to assess the effectiveness of a state's damage prevention enforcement program. The evaluation criteria are attached for reference.

The areas that impacted the overall rating of the state's program are:

1. Although Wisconsin's excavation damage prevention law includes provisions for enforcement, Wisconsin did not take any enforcement actions in 2017 or 2018 for violations of its excavation damage prevention law. Please refer to Criterion 3 on the PHMSA evaluation checklist for additional guidance. PHMSA understands that Wisconsin passed legislation that became effective in July 2018, including significant changes to improve enforcement of the law. The new law will be factored into

PHMSA's future evaluations and could result in a determination of adequacy.

2. Because there has been no enforcement of the excavation damage prevention law, Wisconsin has not assessed the effectiveness of its enforcement program and has not used the assessment to make appropriate programmatic changes. Please refer to Criterion 3 on the PHMSA evaluation checklist for additional guidance. In addition, Wisconsin does not have a reliable mechanism for learning about excavation damages and potential violations of Wisconsin's excavation damage prevention law. Please refer to Criterion 4 on the PHMSA evaluation checklist for additional guidance. Finally, Wisconsin has not developed procedures and policies for conducting investigations and enforcement of the law. Please refer to Criterion 5 on the PHMSA evaluation checklist for additional guidance.

Please be advised that if Wisconsin fails to establish an adequate excavation damage prevention enforcement program by December 28, 2021, the state may be subject to a four percent reduction in PHMSA's State Base Grant funding. This grant currently provides funding for up to 80 percent of the qualified costs of the pipeline safety program incurred by the Wisconsin Public Service Commission.

Wisconsin may, under 49 CFR Part 198.59, submit to PHMSA a written response providing any additional information relative to the inadequacy determination herein. Upon receipt of such notification, PHMSA will review all relevant information and will issue a final determination. The notification can be sent to:

Massoud Tahamtani  
Deputy Associate Administrator, Policy and Programs  
Office of Pipeline Safety  
Pipeline and Hazardous Materials Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Suite E23-312  
Washington, DC 20590

PHMSA's evaluation of state's enforcement of its damage prevention law will occur annually; however, if Wisconsin acts to establish an adequate enforcement program prior to the annual evaluation, Wisconsin may request that PHMSA review and reconsider this designation. PHMSA stands ready to continue working with your state on improving the enforcement of your excavation damage prevention law.

In closing, PHMSA appreciates your dedication to safety and encourages the Public Service Commission of Wisconsin and the Wisconsin damage prevention stakeholder community to continue to support safety outreach initiatives throughout the year. These efforts include the National Safe Digging Month in April, the National Safety Month in June, and the National 811 Day in August.

Should you have any questions regarding this letter, please contact Dr. Christie Murray, our Director of Outreach and Engagement, at (202) 366-4996 or by email at [Christie.Murray@dot.gov](mailto:Christie.Murray@dot.gov).

Sincerely,



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

Enclosure

cc: Mr. Bennet G. Zweifel, President/CEO, Diggers Hotline, Inc.

**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 \$213,268 for each day the violation continues, with a maximum penalty of \$2,132,679 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:



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3. PHMSA will issue a final decision to states that contested a notice of inadequacy.
4. States 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 in accordance with §198.55 within five years of the finding of inadequacy may be subject to a 4 percent reduction in base grant funding.

#### **FEDERAL STANDARDS FOR EXCAVATORS**

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

There are no exemptions in the damage prevention regulation for calling 811 prior to excavation. 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](http://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](mailto:excavation.enforcement@dot.gov).