



ADMINISTRATIVE AND MANAGEMENT POLICY

**PHMSA Communications
Policy for Inspections and Investigations on Tribal Lands**

POLICY NUMBER: PHMSA 5301.1A

U.S. DEPARTMENT OF TRANSPORTATION

**PIPELINE AND HAZARDOUS MATERIALS
SAFETY ADMINISTRATION**

ORIGINATING OFFICE: Office of Chief Counsel

EFFECTIVE DATE: July 12, 2018

Howard R. Elliott
Administrator, PHMSA

NOTICE:

This policy is supported by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000). This document is available digitally on the PHMSANet SharePoint site under Policies.

OVERVIEW: This document establishes the policy, authority, criteria, and responsibilities for communicating with Tribes before inspections or accident investigations for the U.S. Department of Transportation (DOT), Pipeline and Hazardous Materials Safety Administration. PHMSA will follow the guidelines herein to ensure implementation of communication standards, program effectiveness, and internal control.

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1 INTRODUCTION

1.1 PURPOSE

This Pipeline and Hazardous Materials Safety Administration (PHMSA) Tribal Lands Pre-Inspection Communication Policy provides a framework for PHMSA inspectors and investigators who plan to enter Tribal lands to conduct safety inspections, compliance inspections, and accident investigations.

The DOT has a government-to-government relationship with Federally recognized American Indian and Native Alaskan Tribes. This relationship is established through and confirmed by the Constitution, treaties, statutes, Executive Orders, and Presidential Memorandum. PHMSA recognizes the importance of clear and respectful government-to-government communications with Tribes through proactive means. PHMSA recognizes the right of each Tribe to self-governance and supports Tribal sovereignty and self-determination. At the same time, PHMSA must act in accordance with its authorizing statutes and regulations which, in certain circumstances, may confer an exclusive Federal jurisdiction for PHMSA including, for example, safety of interstate pipelines.

This Policy is the official guidance for all PHMSA Headquarters, Regional and Field offices, and will provide consistency among the various PHMSA inspections and investigations on Tribal lands. It will also encourage custom-tailored approaches to consultation and coordination that reflect the circumstances of each situation and the preference of each Tribal government.

1.2 SCOPE

PHMSA is not legally required to execute the actions outline in this guidance before entering onto Tribal lands to carry out its mission. However, PHMSA intends to move forward, to the extent possible, with notification to tribal entities before entering tribal lands.

PHMSA developed this Policy for guidance purposes only, consistent with all applicable laws and regulations. It does not preempt or modify PHMSA's statutory mission and authorities, position in litigation, applicable privilege, or any professional responsibility of agency employees.

Nothing in this Policy may be construed as affecting the authority or responsibilities of States to manage or regulate under State law or regulations. Similarly, nothing in this Policy may be construed to alter, amend, repeal, interpret, or modify Tribal sovereignty, any treaty rights, or other rights of any Indian Tribes, or to preempt, modify, or limit the exercise of such rights.

This Policy is intended only to improve the internal management of PHMSA. It is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, entities, its officers or employees, or any other person.

1.3 AUTHORITIES

Federal Hazardous Materials Transportation Laws, 49 U.S.C. § 5101 et seq.

Federal Pipeline Safety Statutes, 49 U.S.C. § 60101 et seq.

Hazardous Materials Regulations, 49 CFR Parts 171-180.

Pipeline Safety Regulations, 49 CFR Parts 190-199.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000).

Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, (November 5, 2009). 74 Fed. Reg. 57881.

U.S. Department of Transportation (USDOT) Order 5301.1, “Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes” (November 16, 1999).

USDOT Tribal Consultation Plan (2010).

PHMSA Tribal Assistance Protocol (2014).

1.4 DEFINITIONS

“Inspection” means an examination by PHMSA to determine regulatory authority or ensure compliance with the Federal Hazardous Materials Statutes, 49 U.S.C. § 5101 et seq., Federal Pipeline Safety Statutes, 49 U.S.C. § 60101 et seq., and any regulations and Orders issued thereunder.

“Tribe” means an Indian, or Alaska Native tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in the Alaska Native Claims Settlement Act (43 U.S.C. § 1602), which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians. (25 U.S.C. § 5131).

“Tribal lands” mean any lands reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe, including Off-reservation trust land; for purposes of this Policy, “Tribal lands” also includes Allotted lands and State reservations, as defined by the U.S. Department of the Interior, Bureau of Indian Affairs (<https://www.bia.gov/frequently-asked-questions>).

“Tribal leader” means an elected or duly appointed official of a Tribe.

2 POLICY

2.1 AGENCY POLICY

PHMSA's mission is to protect people and the environment by advancing the safe transportation of energy and other hazardous materials that are essential to our daily lives. One way the agency accomplishes this mission is through its authority to conduct inspections and investigations.

When PHMSA determines that a pipeline, hazardous materials facility, or hazardous materials container requiring inspection is on or crosses Tribal lands, the Regional Director (RD), or their designee, of the PHMSA Regional or Field office that encompasses the Tribal lands where the inspection will take place should notify the Tribe(s) of PHMSA's intention to potentially conduct an inspection or investigation.

The U.S. Department of the Interior, Indian Affairs provides a website link to a "Tribal Leaders Directory" at <https://www.bia.gov/tribal-leaders-directory>. Additionally, many Tribes provide contact information on their websites.

3 RESPONSIBILITIES

3.1 Regional Office Inspections

The RD, or their designee, should first call the appropriate Tribal Leader or designated representative. During the telephone conversation, the RD should provide an overview of the inspection activities, clearly explain the project and scope (e.g. the companies being inspected, where they can expect to see PHMSA inspectors, etc.), provide a timeline and PHMSA Community Liaison contact information, and answer any questions the Tribe might have. The RD, or their designee, should also ask to identify any additional leaders or practitioners that should be notified.

As soon as practicable after the telephone call, but no later than five (5) business days, the RD, or their designee, should send a follow-up letter, via certified mail or email, confirming the discussion and planned inspection. (*see* Appendix A). The letter should be sent to the Tribal Leader with a copy to the Tribal Pipeline Director, Tribal Director of Natural Resources, or Tribal Chief of Police, as appropriate.

The PHMSA inspector or investigator should contact the appropriate tribal official at least two business days before the inspection or investigation to confirm plans. If a meeting is not planned, ask if the Tribe wants to request one with PHMSA before the inspection begins. The PHMSA inspectors or investigators should also remind the pipeline operator or hazardous materials carrier to contact its appropriate contacts within the applicable Tribal lands. The PHMSA inspectors or investigators should advise the pipeline operator or hazardous materials carrier of the tribal official the agency has contacted. The PHMSA inspectors or investigators should have a copy of the confirmation letter with them during the inspection.

3.2 Accident Investigations

If a pipeline release occurs on Tribal lands, the PHMSA Pipeline Accident Investigation Division (AID) Director, or their designee, should call the appropriate Tribal Leader as soon as practicable.¹ During the telephone conversation, the Director of the AID should explain anything known about the release and potential impacts (e.g. location, quantity, description of the released hazardous material, evacuation or emergency safety information, the operator of the pipeline or hazmat facility or carrier, the extent of the release and where they can expect to see PHMSA investigators, etc.), provide a timeline for PHMSA's AID response, provide PHMSA Community Liaison contact information, and PHMSA Office of Governmental, International and Public Affairs contact information, and answer any questions the Tribe might have.

If a hazardous material transportation accident, which is to be investigated by PHMSA, occurs on Tribal lands, the Hazardous Materials RD, or their designee, should first call the appropriate Tribal Leader. During the telephone conversation, the RD should explain anything known about the accident and potential impacts (e.g. severity of accident, impact to transportation infrastructure, evacuation(s), environmental impacts and when they can expect to see PHMSA investigators, etc.), provide a timeline for PHMSA's response and PHMSA Office of Governmental, International and Public Affairs contact information, and answer any questions the Tribe might have.

After the initial verbal conversation and upon verifying the appropriate contact, if practicable, the Director or RD should send a follow-up letter confirming the conversation and specific informational topics disseminated. The letter should be sent to the Tribal Chairman with a copy to the Tribal Pipeline Director, Tribal Director of Natural Resources, or Tribal Chief of Police, as appropriate.

¹ If a liquid pipeline spill occurs on Tribal lands, the Tribe will likely be notified through the Incident Command in accordance with their planning and participation with the emergency response agencies, such as EPA and the USCG.

APPENDIX

February xx, 2018

Mr. Mike Wiggins, Chairman
Bad River Band of Lake Superior Tribe of Chippewa Indians
P.O. Box 39
72682 Maple Street
Odanah, WI 54861

Dear Chairman Wiggins:

The mission of the Pipeline and Hazardous Materials Safety Administration (PHMSA) is to protect people and the environment by advancing the safe transportation of energy and other hazardous materials essential to our daily lives. PHMSA does this by administering a National regulatory safety program for the Nation's 2.7 million miles of interstate and intrastate pipelines, as well as by requiring that pipeline operators design, construct, operate, and maintain their pipeline facilities in compliance with Federal pipeline safety regulations. PHMSA establishes National policy, sets and enforces standards, educates stakeholders, conducts research and development activities, and is supported by both Federal and State employees who work to further our mission and improve pipeline safety.

In an effort to ensure the United States government and the federally-recognized Indian tribal governments work together in a government-to-government relationship and out of respect for tribal sovereignty, self-determination, and tribal lands, we are notifying you of the upcoming scheduled pipeline inspections before we enter the reservation.

In accordance with 49 CFR 190.203(b)(1), in the coming months, PHMSA Central Region inspectors will conduct inspections of the following pipeline operators that have facilities that cross your reservation boundaries:

- Great Lakes Gas Transmission Company
- Enbridge Energy, Limited Partnership

As part of these inspections, we may stop along the pipeline route to briefly inspect right-of-way conditions and other pipeline safety related items. There may be a light impact to the Tribal community with vehicular and foot traffic; and pictures may be taken for documentation purposes.

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Effective Date: July 12, 2018

PHMSA takes pipeline safety very seriously. To ensure that operators comply with the Federal pipeline safety regulations, PHMSA conducts inspections on federally-regulated pipeline facilities. We maintain regulatory oversight of jurisdictional pipeline facilities for as long as the pipelines are in service and if any violations of the regulations are identified, PHMSA will take enforcement action, as appropriate.

PHMSA values stakeholder engagement in pipeline safety. The websites listed below provide information on PHMSA, our enforcement program, and additional information pertaining to pipeline operators.

<https://primis.phmsa.dot.gov/comm/Index.htm?nocache=2317>

<https://www.phmsa.dot.gov/pipeline/enforcement>

<https://primis.phmsa.dot.gov/comm/reports/operator/OperatorEnfGlossary.html>

PHMSA is committed to ensuring that pipelines throughout the Nation are operated and maintained in accordance with the pipeline safety regulations. If I can provide further information or assistance, please feel free to call me at 816-329-3800 or have your staff contact Angela Pickett, Community Liaison by phone at 816-329-3823 or by e-mail at angela.pickett@dot.gov or Sean Quinlan, Community Liaison by phone at 816-329-3886 or by email at sean.quinlan@dot.gov.

Sincerely,

Allan C. Beshore
Director, Central Region, OPS