



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

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

MAY 07 2018

OVERNIGHT EXPRESS MAIL

Mr. Brad Johnson
Chairman
Montana Public Service Commission
1701 Prospect Avenue
PO Box 202601
Helena, MT 59620-2601

Dear Chairman Johnson:

On November 17, 2017, a representative of the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) conducted an adequacy evaluation of Montana'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 Montana's excavation damage prevention law is **ADEQUATE**. No further action is required at this time. PHMSA will schedule a follow-up evaluation next year to determine if Montana is continuing to adequately enforce the excavation damage prevention law.

The State score of 186 is just above the 70 percent threshold of 181 needed to be considered adequate. While PHMSA congratulates the State for achieving an adequate determination, PHMSA also strongly encourage the State to continue strengthening enforcement of its excavation damage prevention law. PHMSA has identified several areas of concern that are presented on page two of this letter.

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. Our representatives spoke with Joel Tierney of the Montana Public Service Commission, Tim Lloyd and Carrie Baker of the Department of Labor and Industry, Clint Kalfell of Montana 811, and Dale Schultz and Michelle Slyder of Northwestern. During the evaluation, PHMSA asked a series of standard questions regarding actions Montana has executed to enforce the State's excavation damage prevention law.

In accordance with 49 CFR 198.55, every State must be able to demonstrate annually that it adequately meets the seven Federal criteria used to assess the effectiveness of a State's damage prevention enforcement program. These criteria determine whether the State's pertinent operating/enforcement agency has the authority (i.e., is properly enabled) to enforce the State's excavation damage prevention law, whether the State utilizes its authority to issue civil penalties

and other appropriate sanctions for violations of the law, and whether the State is able to provide documented procedures, processes, and data to demonstrate an effective overall damage prevention enforcement program. The evaluation criteria are enclosed.

While the overall program was deemed adequate, during the evaluation, PHMSA noted several areas of concern that impact our evaluation of the adequacy of damage prevention enforcement. Areas of concern from Montana's evaluation include the responses to the following questions.

3.b.6. How does the enforcement organization assess the effectiveness of enforcement actions over time? PHMSA believes it is important for the State to understand how its enforcement actions are reducing the risk of excavation damage to pipelines over time. Collecting and analyzing excavation damage information to include details on who damaged the pipeline, what violations of the excavation damage prevention law may have contributed to the excavation damage, what is the history of enforcement actions against the violator, where the damage occurred, and other relevant information, will help determine the best use of training and civil penalties to drive compliance with the law and reduce the risk of damage to pipelines.

3.b.7. What are the results of the enforcement program? PHMSA is looking for the State to demonstrate how they evaluate their enforcement program, and then use those findings to make adjustments to training, the State laws, regulations, or programs to continuously reduce the risk of excavation damage.

3.c.1. Does the enforcement organization make information about enforcement actions and outcomes publicly available? PHMSA believes transparency into the State enforcement process is important. The State may make high-level summary or more detailed information about its excavation enforcement process and outcomes available online.

6.c. Does the State require that excavators may not engage in excavation activity in disregard of the marked location of a pipeline facility as established by a pipeline operator? PHMSA urges all States to review the definitions for excavator and excavation in their excavation damage prevention law to ensure the law does not exempt anyone from the reporting requirements of 49 USC § 60114 and 49 CFR Part 198.55. An excavator who causes damage to a pipeline facility must report the damage to the operator of the facility at the earliest practical moment following discovery of the damage.

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.

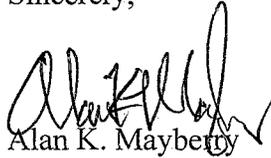
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PHMSA strongly believes that effective damage prevention programs, including enforcement, are best addressed at the State level. Nationwide statistics show that effective enforcement of State excavation damage prevention laws reduces excavation damage and pipeline incidents resulting in increased safety. PHMSA recognizes that Montana damage prevention stakeholders took significant steps towards strengthening its damage prevention law when the Governor signed House Bill 365 on May 4, 2017. Identifying a State agency responsible for enforcing the State excavation damage prevention law is a positive step in improving safety in the State.

PHMSA stands ready to continue working with the State of Montana 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 (469) 779-2283.

Finally, PHMSA encourages 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 Steve Bullock, Office of the Governor, State of Montana
G. Joel Tierney, Pipeline Safety Program Manager, Montana Public Service Commission
Tim Lloyd, Bureau Chief, Department of Labor and Industry
Clint Kalfell, Montana 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.