

PHMSA Seeks Comments on the Enforcement of State Pipeline Damage Prevention Laws and Existing Regulatory Requirements Regarding Pipeline Operators' Damage Prevention Programs

On October 29, 2009, the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued an Advanced Notice of Proposed Rulemaking (ANOPR) seeking feedback and comments regarding (1) the criteria and procedures PHMSA should use in determining if a state's enforcement of its pipeline damage prevention laws is adequate; (2) the standards and process that should apply to excavators in a state found to have an inadequate enforcement program; and (3) the adequacy of the existing regulatory requirement that pipeline operators participate in one-call organizations, respond to dig tickets, and perform locating and marking responsibilities. The ANOPR responds to the Pipeline Inspection, Protection, Safety, and Enforcement (PIPES) Act of 2006, which requires that PHMSA establish criteria and procedures before it can exercise authority to conduct a civil enforcement proceeding against an excavator for violating one-call damage prevention laws, when the violation occurs in a state that does not undertake enforcement action. Comments on the ANOPR are due December 14, 2009.

OVERVIEW OF PHMSA'S ADVANCED NOTICE OF PROPOSED RULEMAKING

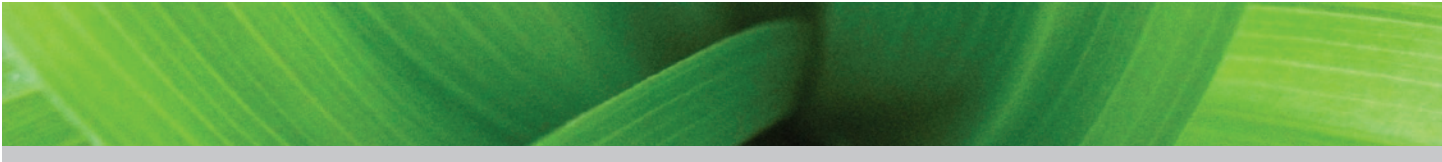
Excavation damage to gas and hazardous liquid pipelines is the single leading cause of pipeline incidents. Although numerous programs and initiatives designed to prevent excavation damage have resulted in a downward trend in serious pipeline incidents caused by excavation damage, recent reports demonstrate that better and more effective enforcement of state damage prevention laws is key to further reducing such incidents.

The PIPES Act gives PHMSA limited authority to conduct civil enforcement proceedings against excavators who damage pipelines if the violation occurs in a state that has not adequately enforced its damage prevention laws. PHMSA may not, however, conduct such enforcement proceedings in such a state unless PHMSA first determines that the state's enforcement is inadequate to protect safety, and until PHMSA issues, through a rulemaking proceeding, criteria and procedures for determining inadequate state enforcement of penalties. The ANOPR initiates the rulemaking process to establish procedures for making these determinations, and to articulate a proposed process for federal enforcement. PHMSA invites pipeline operators, excavators, states, and the public to submit data and information on the following five topics:

1. Considerations for Determining the Adequacy of State Damage Prevention Enforcement Programs

PHMSA states that a threshold criterion for determining the adequacy of a state's damage prevention enforcement program will be whether the state has established and exercised its authority to assess civil penalties for violations of its one-call laws. PHMSA likely will consider the following issues in evaluating the enforcement component of state damage prevention programs, and invites comments on additional considerations and suggestions:

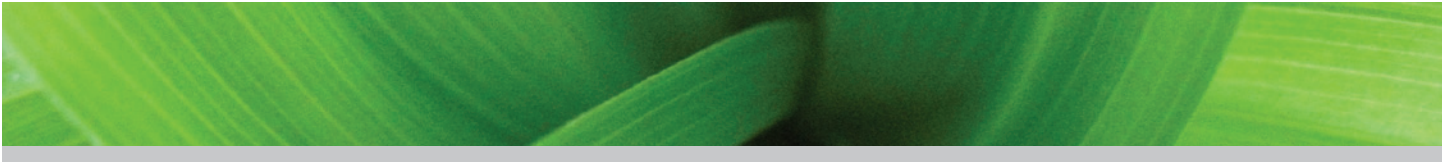
- Whether state law is consistent with the federal requirement that operators be members of, and participate in, the state's one-call system;

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- Does the state law require excavators to use the state’s one-call system and request that underground utilities in the area of the planned excavation be located and marked before digging;
 - Does the state avoid giving exemptions to one-call damage prevention laws to state agencies, municipalities, agricultural entities, railroads and other groups of excavators;
 - Is the state’s program detailed enough to adequately inform excavators of their responsibilities before and during excavating near a pipeline;
 - Are excavators required to report pipeline damage incidents to the pipeline operator;
 - Whether excavators are required to call 911 if a pipeline damage incident causes a release of hazardous products;
 - Has the responsible state agency established a reliable mechanism to ensure that it receives timely reports of pipeline damage incidents;
 - Whether the responsible state agency conducts investigations of all excavation damage to pipeline incidents to determine whether the excavator and pipeline operator took appropriate actions;
 - Whether the state’s damage prevention law includes enforcement authority, including civil penalty authority, and are the maximum penalties similar to those contained in the federal Pipeline Safety Act;
 - Whether the state official responsible for determining whether to proceed with enforcement action is required to document the reasons for the decision in a transparent and accountable manner, and whether records of investigations and enforcement decisions are made available to PHMSA;
 - Whether the state exercises its civil penalty authority when taking an enforcement action, whether the amount of the civil penalty reflects the seriousness of the incident, and whether remedial orders are legally enforceable;
 - Whether the state provides the public and PHMSA with annual statistics on the number of excavation damage incidents, investigations, enforcement actions, and penalties proposed and collected.

2. *Administrative Process*

PHMSA seeks input regarding the administrative procedures that should be available to a state that elects to contest a notice that its enforcement of its damage prevention enforcement is inadequate. PHMSA states that these procedures likely would involve a “paper hearing” process under which a state would be able to respond in writing to the notice and to file a petition for reconsideration of PHMSA’s final written determination stating reasons for its decision. If the state’s enforcement program is ultimately deemed inadequate, direct federal enforcement against an excavator who violated the state’s damage prevention law and damaged a pipeline in that state could proceed. PHMSA explains that, at a later time, a state also would likely have the right to demonstrate improvements to its enforcement of its damage prevention program and request that PHMSA discontinue federal enforcement.

PHMSA requests comments on this process and any suggested alternative approaches. For example, PHMSA seeks input on whether the process properly balances Congress’s directive to PHMSA and the need to provide a



state with a fair and efficient means of demonstrating the adequacy of its enforcement program. PHMSA explains that it will likely conduct annual reviews of state programs, and requests comment on whether, for a state that is deemed to be “nominally adequate,” PHMSA should be able to evaluate a state enforcement decision concerning an individual incident during the course of a year, and potentially conduct federal enforcement if a state has decided not to undertake enforcement action.

3. Federal Standards for Excavators

PHMSA invites comments on the federal standards that should apply to excavators in a state found to have an inadequate enforcement program, and on the standards set forth in the PIPES Act and any suggested alternatives. In particular, PHMSA inquires whether the federal standards should be more detailed than those in the PIPES Act, and whether requiring an excavator to report any release of hazardous products by calling 911 will have unintended consequences.

4. Adjudication Process

PHMSA requests comments from excavators on the adjudication process that would apply if PHMSA were to cite an excavator for failing to comply with the federal standards in a state where the enforcement has been deemed inadequate. PHMSA states that, at a minimum, an excavator would have the right to receive written notice of the allegations (including a description of supporting factual evidence), file a written response, request an informal hearing, be represented by counsel, examine the evidence, submit relevant information, call witnesses, and otherwise contest the allegations. PHMSA would likely convene a hearing at a regional office, with an attorney from PHMSA’s Office of Chief Counsel presiding as hearing officer. The excavator also would likely have the right to petition for reconsideration of the agency’s administrative decision and to seek judicial review.

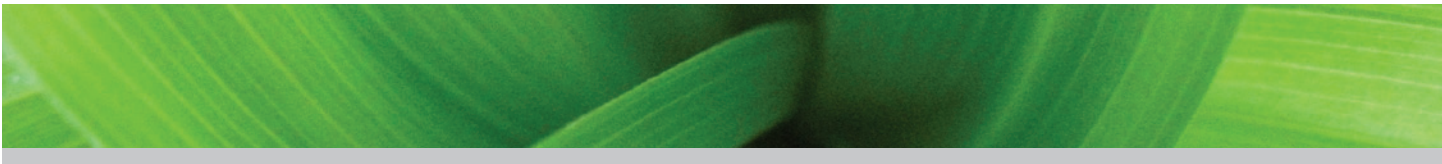
PHMSA requests comments on whether such a process is too formal or not formal enough, and whether it appropriately balances the goal of efficiency and the need to provide a fair process that ensures due process for an excavator. PHMSA also inquires whether existing civil penalty provisions of the Pipeline Safety Act should apply to an excavator.

5. Existing Requirements Applicable to Owners and Operators of Pipeline Facilities

PHMSA invites comments on the adequacy of its existing requirements that pipeline operators participate in one-call organizations, respond to dig tickets, and perform locating and marking responsibilities. For example, PHMSA notes that existing regulations require that operators have written damage prevention programs that, in part, require an operator to provide for marking its pipelines in the area of an excavation for which a locate request has been submitted. PHMSA requests whether the requirement should be more detailed and explicit with respect to the amount of time for responding to locate requests, the accuracy of facility locating and marking, or making operator personnel available to consult with excavators after receiving an excavation notification.

IMPLICATIONS

PHMSA’s ANOPR is the first step in a rulemaking process that could lead to the implementation of new civil penalty enforcement authority against excavators who may cause damage to pipelines. All pipeline industry stakeholders, in particular, pipeline operators, excavators, states, and the public have an opportunity to express



their views on state enforcement of existing pipeline damage prevention laws and the requirements that should apply before PHMSA can step in and exercise civil penalty authority where it believes the state is not effectively doing so. By establishing criteria and procedures for determining whether states are adequately enforcing their state pipeline damage prevention laws, PHMSA seeks to encourage states to strengthen these laws and to adequately enforce them. PHMSA also seeks input on the standards and enforcement procedures that should apply to excavators that may cause pipeline damage in a state that does not effectively enforce pipeline damage prevention laws.

Finally, in requesting input on the adequacy of existing requirements applicable to pipeline operators, PHMSA could be suggesting that it is considering revisions to those requirements.

FOR ADDITIONAL INFORMATION

Van Ness Feldman regularly counsels clients on issues related to pipeline construction, permitting, safety, and operation. Specifically, the firm has in-depth experience counseling clients on compliance with pipeline safety statutes and regulations. If you are interested in additional information regarding PHMSA's ANOPR, or any other energy-related federal activity, please contact Susan Olenchuk at (202) 298-1896, Jonathan Simon at (202) 298-1932, Mona Tandon at (202) 298-1836, or any member of the firm's Natural Gas practice group.

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