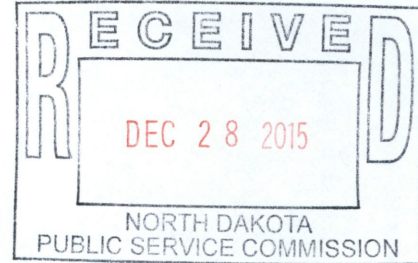




U.S. Department  
of Transportation  
**Pipeline and Hazardous  
Materials Safety  
Administration**

1200 New Jersey Ave., S.E.  
Washington, DC 20590

DEC 22 2015



**OVERNIGHT EXPRESS MAIL**

Brian P. Kalk, Ph.D  
Chairman  
North Dakota Public Service Commission  
600 E. Boulevard Avenue, Department 408  
Bismarck, ND 58505-0480

Dear Dr. Kalk:

On July 23, 2015, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) published its Pipeline Damage Prevention Program Final Rule (49 FR 43835-43869) that may likely impact your State. The rule includes new criteria and procedures to determine the adequacy of State damage prevention enforcement programs, administrative procedures for States to contest a notice of inadequacy, the Federal requirements PHMSA will enforce against excavators for violations in States with inadequate damage prevention laws and programs, and the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised. These new rules become effective on January 1, 2016. Please refer to the included guidance brief for background on this new regulation.

Excavation damage continues to be a leading cause of hazardous liquid and natural gas pipeline incidents resulting in death, serious injury, and environmental damage. Damaging a pipeline during an excavation poses a serious safety risk to excavators, the general public living and working in proximity to the excavation site, and the environment. Nationwide statistics show that effective enforcement of a State's one-call law reduces excavation damage and pipeline incidents, and results in increased safety.

In early 2016, PHMSA will initiate State evaluations to determine if State damage prevention one-call laws allow for adequate enforcement. PHMSA will evaluate your State's damage prevention enforcement program and will issue a formal determination in your State, as to whether or not the one-call law enforcement is inadequate in your State. An inadequate determination means that PHMSA may use Federal excavation standards to take enforcement action against an excavator who damages a hazardous liquid or natural gas pipeline in your State. Federal civil penalty levels are \$200,000 for each violation for each day the violation continues with a maximum civil penalty of \$2,000,000 for any related series of violations. Additionally, States that fail to establish an adequate one-call law enforcement program, within five years from

**4** **GS-15-678** Filed: 12/28/2015 Pages: 4  
**PHMSA pipeline damage prevention program final  
Rule – Notice of State Evaluations**

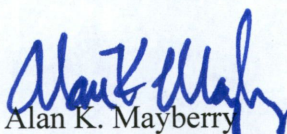
U S Dept of Transportation, Office of Pipeline Safety

Alan Mayberry, Deputy Associate Admin.

the date of the final PHMSA determination notice, may be subject to a 4 percent reduction in PHMSA State Base Grant funding.

PHMSA strongly believes that effective damage prevention programs, including enforcement, are best addressed at the State level. We stand ready to assist you in whatever way best to help support a strong damage prevention program in your State. If we can be of any further assistance, please contact our Damage Prevention Team by email at [excavation.enforcement@dot.gov](mailto:excavation.enforcement@dot.gov) or by phone at (804) 556-4678.

Sincerely,



Alan K. Mayberry  
Deputy Associate Administrator  
for Policy and Programs

cc: The Honorable Jack Dalrymple, Office of the Governor, State of North Dakota  
Aaron Morman, Gas Pipeline Safety, North Dakota Public Service Commission

**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.

PHMSA published a Final Rule on July 23, 2015, that establishes:

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
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:
  - 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 DP law limited? Written justification of exemptions is required.

## **Administrative Process for States to Contest Notices of Inadequacy**

1. PHMSA issues a notice of inadequacy to the State in accordance with 49 CFR 190.5
2. State will have 30 days to submit written response
3. PHMSA issues final decision
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 final rule may be subject to 4 percent reduction in base grant funding

## **Federal Standard 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, 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 earliest practical moment
6. If there is a release, excavator must call 911

There are no exemptions in the new 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**

<http://phmsa.dot.gov/pipeline/safety-awareness-and-outreach/excavator-enforcement/>

## **Contact Our Damage Prevention Team**

Our team of damage prevention professionals, Sam Hall, Annmarie Robertson, and Steve Fischer, 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).