

ONE-CALL ENFORCEMENT RULEMAKING

Key Message: PHMSA is considering rulemaking to establish administrative procedures needed to implement its damage prevention enforcement oversight authorized in 49 U.S.C. 60114 and section 2 of the Pipeline Inspection, Protection, Enforcement, and Safety (PIPES) Act of 2006.

Background: PHMSA has never undertaken administrative enforcement actions against parties violating state one-call laws and we are interested in the states remaining the primary entities to conduct enforcement against these violators. We will continue working with states to strengthen their enforcement programs by awarding State Damage Prevention grants, working to affect change through our Damage Prevention Assistance Program, and working with the national trade associations interested in legislative enforcement changes at the state level.

The PIPES Act did give PHMSA limited “backstop” authority to conduct civil enforcement against one-call violators in a state that has failed to do so effectively if certain conditions are met. PHMSA must undertake rulemaking to establish procedures for declaring a state’s enforcement inadequate which is a prerequisite to Federal civil enforcement against a one-call law violator (who is not a pipeline operator) in that state. The PIPES Act did not provide new Federal resources for PHMSA to take over enforcement on a nationwide basis.

Rulemaking Proceeding Regarding the Adequacy of State Programs

The rulemaking to establish the procedures for determining inadequate state enforcement of penalties should be a full notice and comment rulemaking that takes into account the views of the states and other interested parties. The procedures established by the rulemaking would likely involve a “paper hearing” process where PHMSA would notify a state that it considers its enforcement inadequate and the state would then have an opportunity to submit written materials and explanations. PHMSA would then make a final written determination including the reasons for the decision. The procedures would also likely provide for an appeal or opportunity for the state to petition for reconsideration. If the state is deemed inadequate, Federal enforcement against an excavator in that state could proceed. The procedures would also likely give states the right to make a showing at a later time that it has improved its enforcement program to an adequate level and upon such a showing, PHMSA would discontinue Federal enforcement.

In connection with this rulemaking proceeding, PHMSA will need to establish criteria for considering a state enforcement program to be adequate/inadequate. A major threshold criterion will presumably be whether the state has authority under state law to assess civil penalties for violations of its one call laws.

Proposed Criteria for State Adequacy

PHMSA’s approach to selecting the criteria for state adequacy should be to use criteria that all stakeholders will support. Section 7.0 “Compliance” of the Common Ground Alliance Best Practices Version 4.0 (March, 2007) is consensus based among stakeholders and could play a part in criteria development. An effective state damage prevention program will address all 9 of the elements set forth in 49 U.S.C. 60134(b). Element 7 involving the enforcement program is critical and deserves extra weight in developing the adequacy criteria. PHMSA recognizes that in some cases action by a

state legislature may be needed to give civil penalty authority to the state pipeline safety agency or other appropriate state office.

Civil Penalty Enforcement Program

The enforcement program should be based on a damage prevention law that designates a specific state agency as the primary authority for enforcement. It should focus on consistent enforcement (not just the high-profile accidents) that sends strong message regarding compliance and should be fair, transparent and accountable. The program executed by the primary authority should include:

- The adoption of standards and practices for the entire damage prevention process including one call use, locating, and marking.
- A requirement that all significant damage incidents be reported;
- A process for assigning trained personnel to investigate incident reports;
- Identification of official(s) responsible for decisions about issuing a notice of probable violation and documented reasons why action was or was not taken;
- Impartial authority adjudicating violations;
- An informal means for the operator or excavator to respond to a notice of violation;
- An adequate operating budget source such as a line item in the state budget or a fee-based system for providing adequate funding for the enforcement program; and
- Stakeholder involvement in periodic review and modification of enforcement processes.

The enforcement program should include civil penalties for violations of one call laws that are substantially similar to Federal civil penalties. Characteristics of the penalty assessment system should include:

- The adoption of penalty assessment criteria;
- A penalty structure assessing higher penalties on severe violations and repeat offenses;
- Consideration of mitigating and aggravating factors for determining the penalty for a violation by statute or regulation; and
- Public and stakeholder access to key metrics about the penalties collected.