

PHMSA Releases Excavation Enforcement Final Rule

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On July 13, 2015, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) announced the issuance of a final rule to establish the process for evaluating state excavation damage prevention programs and enforcing federal standards in states where such requirements are inadequate or do not exist. PHMSA is the federal safety authority with oversight of the transmission or distribution pipelines used to transport any refined petroleum product or hazardous/highly volatile liquid. The final rule was published in the *Federal Register* on July 23, 2015. The effective date of the Rule is January 1, 2016.

The Pipeline Inspection, Protection, Enforcement, and Safety (PIPES) Act of 2006 directed PHMSA to develop criteria for evaluating the adequacy of state damage prevention laws, and authorized PHMSA to take civil enforcement action against excavators who violate safety requirements. PHMSA published an Advanced Notice of Proposed Rulemaking on the excavation damage rule in 2009 and a Notice of Proposed Rulemaking in 2012.

On the surface, this may not seem onerous to members of **NUCA of Florida**. However, a closer look at the Rule suggests that it goes beyond determining the adequacy of a state's pipeline excavation damage prevention laws or one-call laws. The rule would strengthen PHMSA's ability to take enforcement action against anyone who violates pipeline damage prevention requirements.

Under the new Rule, PHMSA will have enforcement authority against excavators for violations in states with inadequate excavation damage prevention law enforcement programs; and the adjudication process for administrative enforcement proceedings against excavators where federal authority is exercised.

Highlights of the new Rule:

- PHMSA can assess civil and criminal penalties for violations of 49 CFR Part 196.
- PHMSA will evaluate state enforcement programs annually. If deemed inadequate the state has five years after notification to meet PHMSA's criteria.
- PHMSA wants the states to enforce and MAY take immediate action against excavators in states with ineffective enforcement.
- PHMSA recognizes some exemptions are needed and will allow limited exemptions. Exemptions for certain categories of excavators are discouraged, (i.e., pest control).
- PHMSA currently has 200 team members...in the process of hiring 109 more.

In addition, PHMSA will take the next steps:

- Develop a checklist/guidance that expands on policy document.

- Develop FAQ's.
- Develop a timeline.
- Develop training.

So how effective is Florida's One-Call? Let's take a look at the *Underground Facility Damage Prevention and Safety Act*, Chapter 556, Florida Statutes. Originally passed in 1993, the law created the notification system Sunshine State One-Call of Florida aka, Sunshine 811. Though Chapter 556 F.S. has enforcement provisions, most agree that they fall short of the criteria that PHMSA will use in evaluating the effectiveness of states enforcement

program. If a state's program does not measure up to the federal criteria PHMSA will notify the state. The state will have 30 days to respond.



The Sunshine 811 board has been struggling for several years on how to enforce Florida's damage prevention laws. Currently the board is taking a measured approach on the development of legislation that would address PHMSA's enforcement criteria as well as the twenty two exemptions in the current law. Exemptions are also on PHMSA's radar. They recognize some exemptions are needed and will allow limited exemptions. However, the states will more than likely have to provide written justification.

Currently, Sunshine 811 is working on legislation with the intent of developing consensus and support for mandatory damage reporting for member operators during the 2017 Florida Legislative Session. A damage report will be required whenever there is an incident that results in damage to any pipe, cable or its protective coating. The report will go to Sunshine 811 and will include, if known, the cause, nature and location of the damage. It is the hope of the Sunshine 811 Board that this information will provide them with the tools necessary to develop a more focused enforcement program, one that goes after the bad actors.

I will continue to monitor this issue and will be reporting on any updates to the PHMSA Rule or proposed legislation by Sunshine 811. Please feel free to contact me if you have any questions on this issue.