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Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 196 and 198
Pipeline Safety: Pipeline Damage Prevention Programs; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 196 and 198

[Docket No. PHMSA–2009–0192]

RIN 2137–AE43

Pipeline Safety: Pipeline Damage Prevention Programs

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) seeks to revise the Pipeline Safety Regulations to: Establish criteria and procedures for determining the adequacy of state pipeline excavation damage prevention law enforcement programs; establish an administrative process for making adequacy determinations; establish the Federal requirements PHMSA will enforce in states with inadequate excavation damage prevention law enforcement programs; and establish the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised. Pursuant to the Pipeline Inspection, Protection, Enforcement, and Safety (PIPES) Act of 2006, establishment of review criteria for state excavation damage prevention law enforcement programs is a prerequisite should PHMSA find it necessary to conduct an enforcement proceeding against an excavator in the absence of an adequate enforcement program in the state where the violation occurs. The development of these criteria and the subsequent determination of the adequacy of state excavation damage prevention law enforcement programs is intended to encourage states to develop effective excavation damage prevention law enforcement programs to protect the public from the risk of pipeline ruptures caused by excavation damage, and allow for Federal administrative enforcement action in states with inadequate enforcement programs.

DATES: Persons interested in submitting written comments on this NPRM must do so by June 1, 2012.

ADDRESSES: Comments should reference Docket Number PHMSA–2009–0192 and may be submitted in the following ways:

- *Web Site:* Comments should be filed at the Federal eRulemaking Portal, *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations Facility (M–30), U.S. Department of Transportation, West Building, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Docket Operations Facility, U.S. Department of Transportation, West Building, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify the docket number, PHMSA–2009–0192, at the beginning of your comments. If you mail your comments, we request that you send two copies. To receive confirmation that PHMSA received your comments, include a self-addressed stamped postcard.

Note: Comments are posted without changes or edits to *http://www.regulations.gov,* including any personal information provided. There is a privacy statement published on *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Sam Hall, Program Manager, PHMSA by email at *sam.hall@dot.gov* or by telephone at (804) 556–4678 or Larry White, Attorney Advisor, PHMSA by email at *lawrence.white@dot.gov* or by telephone at (202) 366–9093.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This NPRM proposes to amend the Federal Pipeline Safety Regulations to: (1) Establish criteria and procedures PHMSA will use to determine the adequacy of state pipeline excavation damage prevention law enforcement programs. Such determination is a prerequisite should PHMSA find it necessary to conduct an administrative enforcement proceeding against an excavator for violation of the Federal requirements proposed in this NPRM in the absence of adequate state enforcement of state excavation damage prevention laws; (2) establish an administrative process for states to contest notices of inadequacy from PHMSA should they elect to do so; (3) establish the Federal requirements PHMSA will enforce in states with inadequate excavation damage prevention law enforcement programs; and (4) establish the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised. In the absence of regulations specifying the criteria that PHMSA will use to evaluate a state's excavation damage prevention law enforcement program, PHMSA would take no enforcement action.

Executive Orders 12866 and 13563 require agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' The expected benefit of this rulemaking action is an increased deterrent to violations of one-call requirements (though requirements vary by state, a one-call system allows excavators to call one number in a given state in order to ascertain the presence of underground utilities) requirements and the attendant reduction in pipeline incidents and accidents caused by excavation damage. Based on incident reports submitted to PHMSA, failure to use an available one-call system is a known cause of pipeline accidents. PHMSA analyzed the costs and benefits of the proposed rule. To determine the benefits, PHMSA was able to obtain data for three states over the course of the establishment of their excavation damage prevention programs (additional information about these states can be found in the regulatory analysis that is in the public docket). Each of the three states had a decrease of at least 63 percent in the number of excavation damage incidents occurring after they initiated their enforcement programs. While many factors can contribute to the decrease in state excavation damage incidents, PHMSA found these states to be a helpful starting point on which to estimate the benefits of this rulemaking. PHMSA utilized three separate effectiveness rates to conservatively evaluate the benefits of this rulemaking. The rates are based on the reduction of incidents of the three states studied and more conservative effective rates because state pipeline programs vary widely, which may lead to a lower effective rate than the three states analyzed. In addition, we compared the overall costs of this rule to the average costs associated with a single excavation damage incident. PHMSA expects the total cost of this rule to be $1.2 million while the benefits are $23 million.[1]

This rulemaking has three separate potential cost impacts. The costs to excavators to comply with the Federal excavation standard, the cost to states to have their enforcement programs reviewed, to appeal a determination of ineffectiveness and to ask for reconsideration, and the cost impact on the Federal government to enforce the Federal excavation standard. With

[1] These numbers are discounted over 10 years at 7%.

regard to the potential cost impacts on excavators, PHMSA believes that excavators will not incur any additional costs because the Federal excavation standard, which is also a self-executing standard, mirrors the excavation standard in each state and does not impose any additional costs on excavators. The cost impacts on states are those costs associated with having their enforcement programs reviewed (estimated to be $20,000 per year), to appeal a determination of ineffectiveness (estimated to be a one time cost of $125,000) and to ask for reconsideration (estimated to be a one-time cost of $350,000). Therefore, the total estimated first year cost impacts on states are (($20,000 (annually) + (14 × $25,000) + (5 × $25,000)) = $495,000. The annual cost impacts on states in subsequent years are estimated to be $20,000. The annual cost impacts on the Federal government are estimated to be approximately $80,000. Therefore, the total first year cost of this rulemaking is estimated to be $547,688 ($470,000 + $77,688). The following years the costs are estimated to be approximately $100,000 per year. The total cost over ten years, with a 3% discount rate is $1,331,876 and at a 7% discount rate is $1,182,602. PHMSA is specifically asking for comments on whether it has adequately captured the scope and size of the costs of this rulemaking. The average annual benefits range from $10,939,602 to $3,445,975. Evaluating just the lower range of benefits over ten years results in a total benefit of over $29,000,000, with a 3% discount rate, and over $23,000,000, with a 7% discount rate. In addition, over the past 22 years, the average reportable incident caused $272,200 in property damage alone. Therefore, if this proposed regulatory action prevents just one average reportable incident per year, this rulemaking would be cost beneficial. Interested readers should refer to the Regulatory Evaluation that is posted in the docket for additional information.

II. Objective

Based on incident data PHMSA has received from pipeline operators, excavation damage is a leading cause of natural gas and hazardous liquid pipeline failure incidents.[2] Better, more effective enforcement of state excavation damage prevention laws is a key to reducing pipeline excavation damage incidents. Though all states have a damage prevention program, not all states adequately enforce their state damage prevention laws. Pursuant to the Pipeline Inspection, Protection, Enforcement and Safety Act of 2006 (PIPES Act), PHMSA is proposing criteria and procedures for determining whether a state's enforcement of its excavation damage prevention laws is adequate. As mandated by the PIPES Act, such determination is a prerequisite should PHMSA find it necessary to conduct an administrative enforcement proceeding against an excavator for violating Federal excavation standards. This NPRM also proposes to establish the administrative process for states to contest notices of inadequacy PHMSA issues, the Federal requirements PHMSA will enforce in states with inadequate enforcement programs, and the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised.

III. Background

A. Pipeline Incidents Caused by Excavation Damage

Excavation damage is a leading cause of natural gas and hazardous liquid pipeline failure incidents. For the period from 1988 to 2010, 1,613 incidents, 185 fatalities, 697 injuries, and $438,785,552 in estimated property damages were reported as being caused by excavation damage on all PHMSA regulated pipeline systems in the United States, including onshore and offshore hazardous liquid, gas transmission, and gas distribution lines, except gathering lines.[3]

While excavation damage is the cause in a significant portion of all pipeline failure incidents, it is cited as the cause in a relatively higher portion of natural gas distribution incidents. To look at this issue, PHMSA initiated and sponsored in 2005 an investigation of the risks and threats to gas distribution systems. This investigation was conducted through the efforts of four joint work/study groups, each of which included representatives of the stakeholder public, the gas distribution pipeline industry, state pipeline safety representatives, and PHMSA. The areas of their investigations included excavation damage prevention. The Integrity Management for Gas Distribution, Report of Phase I Investigations (DIMP Report) was issued in December 2005.[4] As noted in the DIMP Report, the Excavation Damage Prevention work/study group reached four key conclusions.

- Excavation damage poses by far the single greatest threat to distribution system safety, reliability and integrity; therefore, excavation damage prevention presents the most significant opportunity for distribution pipeline safety improvements.
- States with comprehensive damage prevention programs that include effective enforcement have a substantially lower probability of excavation damage to pipeline facilities than states that do not. The lower probability of excavation damage translates to a substantially lower risk of serious incidents and consequences resulting from excavation damage to pipelines.
- A comprehensive damage prevention program requires nine important elements be present and functional for the program to be effective. All stakeholders must participate in the excavation damage prevention process. The elements are:

1. Enhanced communication between operators and excavators.
2. Fostering support and partnership of all stakeholders in all phases (enforcement, system improvement, etc.) of the program.
3. Operator's use of performance measures for persons performing locating of pipelines and pipeline construction.
4. Partnership in employee training.
5. Partnership in public education.
6. Enforcement agencies' role as partner and facilitator to help resolve issues.
7. Fair and consistent enforcement of the law.
8. Use of technology to improve all parts of the process.
9. Analysis of data to continually evaluate/improve program effectiveness.

- Federal legislation is needed to support the development and implementation of damage prevention programs that include effective enforcement as a part of the state's pipeline safety program. This is consistent with the objectives of the state pipeline safety programs, which are to ensure the safety of the public by addressing threats to the distribution

[2] Data from the U.S. Department of Transportation, PHMSA Office of Pipeline Safety, Incident and Accident Reports of Gas Distribution, Gas Transmission & Gathering and Hazardous Liquid Pipeline Systems. Pipeline incident and accident summaries are available on PHMSA Stakeholders Communication Web site at: *http://primis.phmsa.dot.gov/comm/Index.htm?nocache=3320.*

[3] Data from the U.S. Department of Transportation, PHMSA Office of Pipeline Safety, Incident and Accident Reports of Gas Distribution, Gas Transmission & Gathering and Hazardous Liquid Pipeline Systems. Pipeline incident and accident summaries are available on PHMSA Stakeholders Communication Web site at: *http://primis.phmsa.dot.gov/comm/Index.htm?nocache=3320.*

[4] This report is available in the rulemaking docket.

infrastructure. The legislation will not be effective unless it includes provisions for ongoing funding such as federal grants to support these efforts. This funding is intended to be in addition to, and independent of, existing federal funding of state pipeline safety programs.

Another recent report (Mechanical Damage Report) prepared on behalf of PHMSA [5] concluded that excavation damage continues to be a leading cause of serious pipeline failures and that better one-call enforcement is a key gap in damage prevention. In that regard, the Mechanical Damage Report noted that most jurisdictions have established laws to enforce one-call notification compliance; however, the report noted that many pipeline operators consider lack of enforcement to be degrading the effectiveness of one-call programs. The report cited that in Massachusetts, 3,000 violation notices were issued from 1986 to the mid-1990s, contributing to a decrease of third-party damage incidents on all types of facilities from 1,138 in 1986 to 421 in 1993. The report also cited findings from another study that enforcement of the one-call notification requirement was the most influential factor in reducing the probability of pipeline strikes and that the number of pipeline strikes is proportionate to the degree of enforcement.

With respect to the effectiveness of current regulations, the Mechanical Damage Report stated that an estimated two-thirds of pipeline excavation damage is caused by third parties and found that the problem is compounded if the pipeline damage is not promptly reported to the pipeline operator so that corrective action can be taken. It also noted ''when the oil pipeline industry developed the survey for its voluntary spill reporting system—known as the Pipeline Performance Tracking System (PPTS)—it recognized that damage to pipelines, including that resulting from excavation, digging, and other impacts, is also precipitated by operators (''first parties'') and their contractors (''second parties'')''.

Finally, the report found that for some pipeline excavation damage data that was evaluated, ''in more than 50 percent of the incidents, one-call associations were not contacted first'' and that ''failure to take responsible care, to respect the instructions of the pipeline personnel, and to wait the proper time accounted for another 50 percent of the incidents.''

[5] Mechanical Damage Final Report, Michael Baker Jr., Inc., April 2009.

B. State Damage Prevention Programs

There is considerable variability among the states in terms of physical geography, population density, underground infrastructure, excavation activity, and economic activity. For example, South Dakota is a rural, agricultural state with a relatively low population density. In contrast, New Jersey is more densely populated and is host to a greater variety of land uses, denser underground infrastructure, and different patterns of excavation activity. These differences between states equate to differences in the risk of excavation damage to underground infrastructure, including pipelines. Denser population often means denser underground infrastructure; more rural and agricultural states will have different underground infrastructure densities and excavation patterns than more urbanized states.

There is no single, comprehensive national damage prevention law. On the contrary, all 50 states in the United States have a law designed to prevent excavation damage to underground utilities. However, these state laws vary considerably and no two state laws are identical. Therefore, excavation damage prevention stakeholders in each state are subject to different legal and regulatory requirements. Variances in state laws include excavation notice requirements, damage reporting requirements, exemptions from the requirements of the laws for excavators and/or utility operators, provisions for enforcement of the laws, and many others. PHMSA has developed a reference for understanding the variability in these state laws at *http://primis.phmsa.dot.gov/comm/DamagePreventionSummary.htm.*

C. PHMSA Damage Prevention Efforts

PHMSA has made extensive efforts over many years to improve excavation damage prevention as it relates to pipeline safety. These efforts have included outreach, grants, and funding of cooperative agreements with a wide spectrum of excavation damage prevention stakeholders including:

- Public and community organizations.
- Excavators and property developers.
- Emergency responders.
- Local, state and Federal government agencies.
- Pipeline and other underground facility operators.
- Industry trade associations.
- Consensus standards organizations.
- Environmental organizations.

These initiatives are described in detail in the ANPRM on this subject that PHMSA published in the **Federal Register** on October 29, 2009 (74 FR 55797). The ANPRM can be viewed at *http://www.regulations.gov,* Docket ID PHMSA–2009–0192. These initiatives appear to have contributed to an overall decline in the rate of excavation damages to pipelines and other underground utilities, but PHMSA is unaware of any studies of the direct effect of these initiatives on the national excavation damage rate to pipelines. PHMSA invites comments regarding any studies that might have evaluated the effectiveness of these initiatives.

D. The Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006

On December 29, 2006, the PHMSA's pipeline safety program was reauthorized by enactment of the PIPES Act. The PIPES Act provides for enhanced safety and environmental protection in pipeline transportation, enhanced reliability in the transportation of the Nation's energy products by pipeline, and other purposes. Major portions of the PIPES Act were focused on damage prevention including additional resources and clear program guidelines as well as additional enforcement authorities to encourage states in developing effective excavation damage prevention programs. The PIPES Act identifies nine elements that effective damage prevention programs should include. These are, essentially, identical to those nine elements noted in the DIMP Report discussed in the previous subsection.

The PIPES Act also provided PHMSA with limited authority to conduct administrative civil enforcement proceedings against excavators who damage pipelines in a state that has failed to adequately enforce its excavation damage prevention laws. Specifically, Section 2 of the PIPES Act provides that the Secretary of Transportation may take civil enforcement action against excavators who:

1. Fail to use the one-call notification system in a state that has adopted a one-call notification system before engaging in demolition, excavation, tunneling, or construction activity to establish the location of underground facilities in the demolition, excavation, tunneling, or construction area;

2. Disregard location information or markings established by a pipeline facility operator while engaging in demolition, excavation, tunneling, or construction activity; and

3. Fail to report excavation damage to a pipeline facility to the owner or operator of the facility promptly, and report to other appropriate authorities

by calling the 911 emergency telephone number if the damage results in the escape of any flammable, toxic, or corrosive gas or liquid that may endanger life or cause serious bodily harm or damage to property.

The PIPES Act limited the Secretary's ability to take civil enforcement action against these excavators, unless the Secretary has determined that the state's enforcement of its damage prevention laws is inadequate to protect safety.

The following is the applicable citation from the PIPES Act:

SEC. 2. PIPELINE SAFETY AND DAMAGE PREVENTION.

(a) ONE CALL CIVIL ENFORCEMENT.—

(1) PROHIBITIONS.—Section 60114 is amended by adding at the end the following:

(d) PROHIBITION APPLICABLE TO EXCAVATORS.—A person who engages in demolition, excavation, tunneling, or construction—

(1) May not engage in a demolition, excavation, tunneling, or construction activity in a state that has adopted a one-call notification system without first using that system to establish the location of underground facilities in the demolition, excavation, tunneling, or construction area;

(2) May not engage in such demolition, excavation, tunneling, or construction activity in disregard of location information or markings established by a pipeline facility operator pursuant to subsection (b); and

(3) Who causes damage to a pipeline facility that may endanger life or cause serious bodily harm or damage to property—

(A) May not fail to promptly report the damage to the owner or operator of the facility; and

(B) If the damage results in the escape of any flammable, toxic, or corrosive gas or liquid, may not fail to promptly report to other appropriate authorities by calling the 911 emergency telephone number.

(e) PROHIBITION APPLICABLE TO UNDERGROUND PIPELINE FACILITY OWNERS AND OPERATORS.—Any owner or operator of a pipeline facility who fails to respond to a location request in order to prevent damage to the pipeline facility or who fails to take reasonable steps, in response to such a request, to ensure accurate marking of the location of the pipeline facility in order to prevent damage to the pipeline facility shall be subject to a civil action under section 60120 or assessment of a civil penalty under section 60122.

(f) LIMITATION.—The Secretary may not conduct an enforcement proceeding under subsection (d) for a violation within the boundaries of a state that has the authority to impose penalties described in section 60134(b)(7) against persons who violate that state's damage prevention laws, unless the Secretary has determined that the state's enforcement is inadequate to protect safety, consistent with this chapter, and until the Secretary issues, through a rulemaking proceeding, the procedures for determining inadequate state enforcement of penalties.

E. Advance Notice of Proposed Rulemaking

On October 29, 2009, PHMSA published an Advance Notice of Proposed Rulemaking (ANPRM) to seek feedback and comments regarding the development of criteria and procedures for determining whether states are adequately enforcing their excavation damage prevention laws, and for conducting Federal administrative enforcement, if necessary. The ANPRM also outlined PHMSA's excavation damage prevention initiatives and described the requirements of the PIPES Act, which authorizes PHMSA to conduct this rulemaking action. The ANPRM may be viewed at *http://www.regulations.gov* by searching for Docket ID PHMSA–2009–0192. Specifically, the ANPRM sought comments on the following subjects:

1. Criteria for determining the adequacy of state excavation damage prevention law enforcement programs;

2. The administrative procedures available to a state for contesting a notice of inadequacy should it receive one;

3. The Federal requirements for excavators that PHMSA would be enforcing in a state that PHMSA has determined to have an inadequate enforcement program;

4. The adjudication process that PHMSA would use if PHMSA cited an excavator for failure to comply with the Federal requirements for excavators PHMSA establishes through this rulemaking; and

5. The adequacy of PHMSA's existing requirements for pipeline operators to participate in one-call organizations, respond to dig tickets, and perform their locating and marking responsibilities.

A summary of comments and our response to those comments are provided later in the document.

F. Notice of Proposed Rulemaking

This NPRM proposes to respond to the Congressional mandate specified in Section 2 of the PIPES Act to:

1. Establish criteria and procedures PHMSA will use to determine the adequacy of state pipeline excavation damage prevention law enforcement programs. Such determination is a prerequisite should PHMSA find it necessary to conduct an administrative enforcement proceeding against an excavator for violation of the Federal requirements proposed in this NPRM in the absence of adequate state enforcement of state excavation damage prevention laws.

2. Establish an administrative process for states to contest notices of inadequacy from PHMSA should they elect to do so.

3. Establish the Federal requirements PHMSA will enforce in states with inadequate excavation damage prevention law enforcement programs.

4. Establish the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised.

G. Summary of the Proposed Rulemaking

A. Standards for Effective State Damage Prevention Enforcement Programs

This NPRM proposes to establish the criteria by which PHMSA will evaluate state excavation damage prevention law enforcement programs for minimum adequacy to protect public safety. PHMSA is seeking comments on using the following criteria to evaluate the effectiveness of a state's damage prevention enforcement program:

1. Does the state have the authority to enforce its state excavation damage prevention law through civil penalties?

2. Has the state designated a state agency or other body as the authority responsible for enforcement of the state excavation damage prevention law?

3. Is the state assessing civil penalties for violations at levels sufficient to ensure compliance and is the state making publicly available information that demonstrates the effectiveness of the state's enforcement program?

4. Does the enforcement authority (if one exists) have a reliable mechanism (e.g., mandatory reporting, complaint-driven reporting, etc.) for learning about excavation damage to underground facilities?

5. Does the state employ excavation damage investigation practices that are adequate to determine the at-fault party when excavation damage to underground facilities occurs?

6. At a minimum, does the state's excavation damage prevention law require the following?

a. Excavators may not engage in excavation activity without first using an available one-call notification system to establish the location of underground facilities in the excavation area.

b. Excavators may not engage in excavation activity in disregard of the marked location of a pipeline facility as established by a pipeline operator.

c. An excavator who causes damage to a pipeline facility:

i. Must report the damage to the owner or operator of the facility at the earliest practical moment following discovery of the damage; and,

ii. If the damage results in the escape of any flammable, toxic, or corrosive gas

or liquid that may endanger life or cause serious bodily harm or damage to property, must promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.

7. Does the state limit exemptions for excavators from its excavation damage prevention law? A state must provide to PHMSA a written justification for any exemptions for excavators from state damage prevention requirements. PHMSA will make the written justifications available to the public.

PHMSA may also consider individual enforcement actions taken by a state in evaluating the effectiveness of a state's damage prevention enforcement program. PHMSA requests comments on this issue.

PHMSA invites comments on the proposed criteria. In particular, are these criteria sufficient to assess the adequacy of state excavation damage prevention law enforcement programs? Do these criteria strike the right balance between establishing standards for minimum adequacy of state enforcement programs without being overly prescriptive?

B. Administrative Process for States

This NPRM proposes the administrative procedures that would be available to a state that elects to contest a notice of inadequacy. The proposed procedures involve a paper hearing where PHMSA finds the state's excavation damage prevention law enforcement inadequate and documents the basis for that finding (i.e., following its annual review of the state's pipeline safety program). Then, the state would have an opportunity to submit written materials and explanations. PHMSA would then make a final written determination including the reasons for the decision. PHMSA proposes to make publicly available all notices, findings and determinations. The proposed administrative procedures also provide for an opportunity for the state to petition for reconsideration of the decision. If the state's enforcement program is ultimately deemed inadequate, direct Federal administrative enforcement against an excavator who damaged a pipeline in that state could proceed. The procedures also give a state the opportunity to demonstrate at a later time that it has improved its excavation damage prevention law enforcement program to an adequate level and upon such showing, request that PHMSA discontinue Federal administrative enforcement in that state. PHMSA will respond to such requests and perform an adequacy review in a timely manner and no later than the next annual review.

PHMSA invites further comments on these proposed administrative procedures. In particular, does this process strike the right balance between Congress' direction to undertake Federal administrative enforcement, where necessary, while providing a state with a fair and efficient means of showing that the state's enforcement program is adequate? PHMSA is proposing to evaluate state excavation damage prevention law enforcement programs consistent with the criteria proposed in Section 198.55 below. For states that have been deemed to have inadequate enforcement programs in their most recent annual reviews and in accordance with the established process, PHMSA could conduct Federal administrative enforcement against excavators without further state process. A state with an inadequate program will have five years from the date of the finding to make program improvements that meet PHMSA's criteria for minimum adequacy. A state that fails to establish an adequate enforcement program in accordance with 49 CFR 198.55 within five years of the finding of inadequacy may be subject to reduced grant funding established under 49 U.S.C. 60107. The amount of the reduction will be determined using the same process PHMSA currently uses to distribute the grant funding; PHMSA will factor the findings from the annual review of the excavation damage prevention enforcement program into the 49 U.S.C. 60107 grant funding distribution to state pipeline safety programs. The amount of the reduction in 49 U.S.C. 60107 grant funding shall not exceed 10% of prior year funding. If a state fails to implement an adequate enforcement program within five years of a finding of inadequacy, the Governor of that state may petition the Administrator of PHMSA, in writing, for a temporary waiver of the penalty, provided the petition includes a clear plan of action and timeline for achieving program adequacy.

Even though the proposed rule does not require states to take any actions, the states have several incentives for enforcing their own excavation damage prevention laws. First, states with effective enforcement programs have lower rates of excavation damages to underground utilities, including pipelines. Lower damage rates translate to increased public and worker safety and decreased repair and outage costs for pipeline operators.

This proposed rule provides several additional incentives for states to enforce their own excavation damage prevention laws. First, in the comments to the ANPRM on this subject, stakeholders expressed their desire for states to maintain control over their own excavation damage prevention programs, including the enforcement of damage prevention laws. Stakeholders agree that damage prevention is a local and state issue and would prefer to avoid Federal involvement in enforcement. Second, this NPRM proposes to reduce PHMSA base grant funding for state pipeline safety programs if states do not implement effective enforcement programs within five years of findings of inadequacy (see proposed section 198.53). The potential reduction in grant funding will provide incentive to the state to address enforcement gaps in the excavation damage prevention laws and programs. PHMSA specifically requests comments on the adequacy of these incentives and the need for additional incentives for states to enforce their own excavation damage prevention laws.

Currently, states are reevaluating their pipeline safety laws. Several states, including Washington and Maryland, made significant changes to their damage prevention laws subsequent to the ANPRM on this subject. In addition, the following states are in various stages of legislative efforts to incorporate effective enforcement into their laws (these efforts range from stakeholder meetings, to building support for drafting legislation, to actually having a bill before the state legislatures): California, Ohio, Michigan, Alabama, Mississippi, Montana, Florida, Kentucky, and Delaware.

C. Federal Excavation Standard

This NPRM proposes to add a new Part 196 to Title 49, Code of Federal Regulations that prescribes standards for excavators to follow in conducting excavation activities in areas where underground gas or hazardous liquid pipelines may be located and the administrative enforcement process to address violations of the standards. The Federal requirements PHMSA is proposing to be contained in this Part are the standards that PHMSA would enforce against excavators in states determined to have inadequate damage prevention law enforcement programs pursuant to the procedures proposed in this rulemaking. The standard that PHMSA is proposing are effectively equivalent to the standard in 49 U.S.C. 60114(d) which states:

(d) Prohibition applicable to excavators.—A person who engages in demolition, excavation, tunneling, or construction—

(1) May not engage in a demolition, excavation, tunneling, or construction

activity in a state that has adopted a one-call notification system without first using that system to establish the location of underground facilities in the demolition, excavation, tunneling, or construction area;

(2) May not engage in such demolition, excavation, tunneling, or construction activity in disregard of location information or markings established by a pipeline facility operator pursuant to subsection (b); and

(3) Who causes damage to a pipeline facility that may endanger life or cause serious bodily harm or damage to property—

(A) May not fail to promptly report the damage to the owner or operator of the facility; and

(B) If the damage results in the escape of any flammable, toxic, or corrosive gas or liquid, may not fail to promptly report to other appropriate authorities by calling the 911 emergency telephone number.

The NPRM proposes to add new excavation standards that include requirements to use an available one-call system before digging, to excavate with proper regard for location information or markings established by a pipeline operator, to promptly report any damage to the pipeline operator, and to report any emergency release of hazardous products to appropriate authorities by calling 911 immediately. PHMSA is seeking comment in this NPRM on whether or not it should establish an upper limit on the time frame to report any damage to pipeline operators, such as two hours following discovery.

D. Adjudication Process for Excavators

PHMSA is proposing to use the same adjudication process established for pipeline safety violations set forth in 49 CFR Part 190. Under this process, excavators would have the same right as pipeline operators to: Receive written notice of the allegations including a description of the factual evidence the allegations are based on, file a written response to the allegations, request a hearing, be represented by counsel if the excavator so chooses, examine the evidence, submit relevant information and call witnesses on the excavator's behalf, and otherwise contest the allegations of violation. PHMSA proposes that hearings would be held as they are now for pipeline operators at one of PHMSA's regional offices or via teleconference. An excavator would also have the same opportunity as pipeline operators to petition for reconsideration of the agency's administrative decision. Judicial review of the final agency action would be available to the same extent it is available to a pipeline operator.

PHMSA invites further comments on the adjudication process for excavators. In particular, is the process too formal in the sense that excavators contesting a citation would have to prepare a written response for the record and potentially appear before an administrative hearing officer? Is the process not formal enough in the sense that it does not provide for formal rules of evidence, transcriptions, or discovery? Or does this process strike the right balance by being informal enough to be efficient and at the same time providing enough formality that excavators feel the process is fair and their ''due process are maintained''?

E. State Base Grant

PHMSA already conducts annual program evaluations and certification reviews of state pipeline safety programs. PHMSA would also conduct annual reviews of state excavation damage prevention law enforcement programs. A state that fails to establish an adequate enforcement program in accordance with 49 CFR 198.55 within five years of the finding of inadequacy may be subject to reduced grant funding established under 49 U.S.C. 60107. PHMSA would factor the findings from the annual review of the excavation damage prevention enforcement program into the 49 U.S.C. 60107 grant funding distribution to state pipeline safety programs. The amount of the reduction in 49 U.S.C. 60107 grant funding would not exceed 10 percent of prior year funding. If a state fails to implement an adequate enforcement program within five years of a finding of inadequacy, the Governor of that state may petition the Administrator of PHMSA, in writing, for a temporary waiver of the penalty, provided the petition includes a clear plan of action and timeline for achieving program adequacy. PHMSA would use the proposed 49 CFR 198.55 criteria to evaluate the effectiveness of a state's excavation damage prevention enforcement program.

IV. Analysis of Public Comments on the ANPRM

PHMSA received comments from 39 organizations and 152 individuals, including:

- Associations representing pipeline operators (trade associations)
  - The American Gas Association (AGA)
  - The American Petroleum Institute (API)
  - The American Public Gas Association (APGA)
  - The Association of Oil Pipelines (AOPL)
  - The Interstate Natural Gas Association of America (INGAA)
  - The Texas Pipeline Association (TPA)
  - The Texas Pipeline Safety Coalition (TPSC)
  - The Texas Oil and Gas Association (TxOGA)
- Transmission and distribution pipeline companies
  - Atlanta Gas Light Resources (AGL)
  - Baltimore Gas and Electric Company (BGE)
  - CenterPoint Energy
  - El Paso Pipeline Group (EPPG)
  - LDH Energy Pipeline, L.P.
  - Marathon Pipeline
  - Michigan Consolidated Gas Company
  - MidAmerican Energy Company
  - Nicor Gas
  - Northern Natural Gas Company
  - Paiute Pipeline
  - Panhandle Energy
  - San Diego Gas & Electric
  - Southern California Gas Company
  - Spectra Energy Transmission
- The National Association of Pipeline Safety Representatives (NAPSR)
- Individual state pipeline regulatory authorities
  - The Florida Public Service Commission
  - The Minnesota Office of Pipeline Safety
  - The Missouri Public Service Commission (PSC)
  - The Public Utilities Commission of Ohio (PUCO)
  - The Tennessee Regulatory Authority (TRA) excavator contractor associations
  - The Associated General Contractors of America (AGC)
  - The Associated General Contractors of Texas (AGC of Texas)
  - The National Utility Contractor Association (NUCA)
  - The Wisconsin Underground Contractors Association (WUCA)
- One-call organizations
  - Joint Utility Locating Information for Excavators, Inc. (JULIE)
  - GulfSafe
- A utilities locating service
  - The United States Infrastructure Corporation (USIC)
- A local/regional damage prevention council
  - The Greater Chicago Damage Prevention Council
- A citizens' interest group
  - The Pipeline Safety Trust (PST)
- The Association of American Railroads
- An excavation equipment manufacturer
- 154 individuals, 145 of whom submitted substantially similar to comments submitted by excavation contractors.

To a substantial extent, the comments supported the need for this rulemaking. When a pipeline is struck during an excavation project, not only is the public put at risk and energy supplies potentially disrupted, but the excavator personnel are also at risk of serious injury or even death. In the ANPRM, PHMSA posed some specific questions related to state excavation damage prevention programs. Many comments received were general to the entire ANPRM and others addressed specific sections and content of the ANPRM. The general comments and comments related to specific sections of the ANPRM are addressed individually below.

Many commenters addressed the concept of the questions, as was intended. Others addressed the questions as they were deemed to apply currently to specific state damage prevention (SDP) programs. Additionally, many comments received are outside the scope of the proposed regulatory changes. Many of the comments were to the effect that PHMSA enforcement should be applied to all underground utilities. For example, NAPSR, the Missouri Public Service Commission, AGA, and several pipeline operators commented that any rulemaking language should clearly specify the scope to which it applies and that if PHMSA seeks to expand its enforcement authority outside of pipeline matters, its legal authority to do so should be explained. While commenters believe that many states will benefit from broadening their damage prevention programs beyond pipelines to include other underground utilities, PHMSA's authority does not extend beyond pipeline facilities and, as defined in the PIPES Act, excavators under certain specified conditions.

Federal pipeline safety regulations require gas and hazardous liquid pipeline operators to have excavation damage prevention programs in place to protect their pipelines. These regulations require pipeline operators to participate in state one-call systems and enable PHMSA enforcement against regulated pipeline operators who fail to comply with applicable locating and marking requirements, including situations where their pipelines are damaged by improper excavation activities of the pipeline operator or its contractors (either excavating or locating contractors).

General Comments

Involve All Stakeholders in This Rulemaking Process

A number of comments supported PHMSA's approach of involving all stakeholders in this rulemaking process. Several commenters, including NAPSR, Missouri Public Service Commission, INGAA, and EPPG commented that beyond reviewing the written comments, PHMSA should conduct public meetings on this topic, and should lead open and on-going discussions of the issues as they arise, through the most appropriate venues. They noted that public meetings would allow all stakeholder groups to present their viewpoints and hear similar presentations from others, thus providing an effective means of gathering additional information that would assist PHMSA in developing standards for auditing the adequacy of states' excavation damage prevention enforcement programs and in issuing an effective and practicable rulemaking. NAPSR especially wants to be involved in the rulemaking process.

Response

PHMSA recognizes the value of open and ongoing discussions related to this rulemaking, and, therefore, took the optional step of publishing an ANPRM in October 2009 to provide information to and solicit feedback from stakeholders. PHMSA also conducted a meeting with NAPSR to discuss NAPSR's position and concerns on the issues identified in the ANPRM. The minutes from the meeting are available on the ANPRM docket (*http://www.regulations.gov,* Docket ID PHMSA–2009–0192). PHMSA does not intend to hold public meetings related to this rulemaking after the NPRM is published. As an alternative, PHMSA will post a recorded presentation pertaining to the NPRM on the PHMSA Web site. The recorded presentation will provide an overview of the proposed rule and encourage viewers to read and comment on the NPRM.

Federal Administrative Enforcement

USIC Locating Services, API, AOPL, INGAA, and several pipeline operators commented that PHMSA should develop the necessary processes and procedures and should not hesitate to use the Federal administrative enforcement authority granted by Congress to enforce excavation damage prevention laws where state enforcement programs are determined to be inadequate. They consider it to be in the public's best interest and that a key element of an effective excavation damage prevention program is enforcement action against excavators that do not follow the one-call laws, and that without enforcement, there is little incentive for excavators to comply with one-call laws. However, AGC, API and AOPL commented that Federal administrative enforcement should not be permanent. It should only last as long as necessary to ensure the state achieves a successful enforcement program. They noted that PHMSA should reserve enforcement to only those specific circumstances permitted by law when a state fails to meet the test for adequate enforcement of its excavation damage prevention laws. They contended that where strong and effective state excavation damage prevention laws and enforcement programs exist, PHMSA need not and should not exert its Federal authority lest a costly, potentially inefficient layer of Federal oversight result.

Conversely, WUCA commented that all enforcement of state excavation damage prevention laws should be at a state or local level and that the Federal Government should not be involved at all in enforcement. WUCA commented that excavators who damage underground facilities already pay for ''at fault'' damages and can be removed from bid lists for specific utilities. They consider free enterprise to the best ''enforcement'' available and want no Federal Government involvement, and prefer, at most, state enforcement.

JULIE, commented that it would seem contradictory that a particular state's excavation damage prevention enforcement program could be ''taken over'' by an agency (i.e., PHMSA) whose jurisdiction is limited solely to pipelines. JULIE suggested that PHMSA limit itself to providing assistance to state excavation damage prevention systems to help them improve enforcement of state excavation damage prevention laws.

Response

Congress provided that PHMSA undertake this rulemaking action in Section 2 of the PIPES Act. The PIPES Act requires that PHMSA must determine that a state's excavation damage prevention law enforcement program is inadequate before PHMSA may take enforcement action for a violation by an excavator occurring in that state. Thus, PHMSA cannot take enforcement actions against excavators in states determined by PHMSA to have adequate enforcement programs. PHMSA's goal is to encourage states to implement adequate enforcement programs. Federal administrative enforcement is not intended to be the

primary means of pipeline damage prevention enforcement and is instead intended to provide incentives for states to develop and implement adequate programs and serve as a backstop in states with inadequate programs.

State Program Evaluation Should Include an Appeals Process

Several commenters noted that the process for determining whether a state's enforcement of its excavation damage prevention law is ''inadequate'' should contain an appeals process and timeframe by which PHMSA needs to respond to appeals. Northern Natural Gas commented that the rulemaking should provide for an arbitration element when there is a dispute over a state's enforcement program, and that the state should be allowed an opportunity to improve its excavation damage prevention program if PHMSA determines that the program does not meet the minimum Federal requirements.

Response

This NPRM proposes the administrative process by which a state may contest a notice of inadequacy from PHMSA. Additionally, states deemed to have inadequate excavation damage prevention law enforcement programs will have the opportunity to enhance their programs and to demonstrate their adequacy through periodic reviews. Programs PHMSA previously determined to be inadequate may later be found adequate if a state takes steps to implement an effective enforcement program (see proposed Subpart D of Part 198).

Minimum Damage Prevention Program Requirements

API, INGAA, several pipeline operators, and three Texas pipeline associations commented that PHMSA should establish clear, well-defined, and consistent minimum criteria for determining the adequacy of acceptable state excavation damage prevention laws and programs. API, AOPL and Nicor commented that the fundamental minimum requirements that should apply in evaluating state programs are that all excavators, including state agencies and municipalities: (1) Use state one-call systems prior to excavation, (2) follow location information or markings established by pipeline operators, (3) report all excavation damage to pipeline operators, and (4) immediately notify emergency responders by calling 911 when excavation damage results in a release of pipeline products.

AGA and several pipeline operators commented that PHMSA should keep the overall review process and the criteria for determining the adequacy of state programs as simple as possible. They noted that PHMSA's evaluation of the adequacy of states' excavation damage prevention programs should be based upon a relatively short list of elements. They also noted that PHMSA will likely discover that few states have an excavation damage prevention program that would clearly meet all or even most of the criteria listed in the ANPRM.

Response

PHMSA agrees that the criteria for evaluating the adequacy of state excavation damage prevention law enforcement programs should be clear, well-defined, consistent, and as simple as possible. These criteria helped guide development of the criteria proposed in this NPRM. PHMSA seeks comments on these criteria.

PHMSA Should Encourage States To Implement and Enforce Effective Damage Prevention Laws

Many commenters, including the AGC, API, AOPL, INGAA, state regulatory agencies and many individual pipeline operators, agree with PHMSA's goal of encouraging states to implement, maintain and enforce effective excavation damage prevention laws. They encouraged PHMSA to move forward promptly to issue a final rule to accomplish the objective set forth in the ANPRM of promoting better, more effective enforcement of state excavation damage prevention laws. The NUCA and several pipeline trade associations recognized that PHMSA's jurisdiction is limited to gas and hazardous liquid pipelines. They commented, however, that this regulation's influence on how state authorities adjust their programs and enforcement practices to protect all underground facilities will be significant, and that addressing enforcement in a balanced and comprehensive manner in the proposed rule will facilitate the entire process.

Three Texas pipeline associations suggested that standards consistent with key aspects of the Common Ground Alliance Best Practices should be adopted by states to ensure the scope of their enforcement programs are adequate. They noted those key provisions include tolerance zone, positive response, due care in excavating, and reporting damages.

Response

As noted, PHMSA supports effective state excavation damage prevention law enforcement to protect pipelines. PHMSA strongly believes that individual states should retain the primary responsibility to enforce their excavation damage prevention laws effectively. The proposed regulations do not conflict with the best practices established by the Common Ground Alliance.

Apply Enforcement to All Excavators—No Exemptions

Several respondents, including NUCA and EPPG, commented that state excavation damage prevention laws and enforcement processes should apply to pipeline operator ''in-house'' and contractor excavators. They noted that ''first-party'' (facility operators) and ''second-party'' (operator contractor) damages, although often unreported, carry the same consequences as pipeline damages caused by landscapers, home owners, and other ''third-party'' excavators.

AGA and several pipeline operators noted that the term ''excavator'' is used throughout the ANPRM but that it was not clear what constitutes an excavator or excavation, thus clarification is needed.

NUCA, API, AOPL, and several pipeline operators commented that the scope of enforcement for all programs, Federal and state, should encompass all excavators, including state agencies, municipalities, counties, parishes, agricultural entities, and railroads. They believe that state law should require all excavators to call the one-call center and request facilities to be located and marked before digging, and that the exclusion of a category of excavator should be considered a basis for PHMSA regulation and direct enforcement.

Response

PHMSA agrees that state excavation damage prevention laws and enforcement should apply to all excavators, including pipeline operators and their contract excavators and locators. Current Federal pipeline safety regulations at 49 CFR 192.614 and 195.442, require gas and hazardous liquid pipeline operators, respectively, to comply with specific excavation damage prevention requirements. PHMSA and its state partners have authority to enforce these regulations against pipeline operators and can pursue enforcement action against pipeline operators when an operator's employees or its contractors, including

excavators and locators, violate the regulations.

PHMSA also agrees that, in general, exemptions of categories of excavators from state excavation damage prevention laws can be problematic because exempt excavators can damage underground utilities. However, some exemptions may be justifiable in some states, especially where substantiated by data (e.g., Virginia's exemptions for VDOT). States are ultimately responsible for establishing their own excavation damage prevention laws.

Under this proposed rule, only homeowners using hand tools, as opposed to than mechanized excavating equipment, on their own property are exempt from Federal administrative enforcement action. All other excavators would be subject to Federal enforcement in a state PHMSA deems to have an inadequate enforcement program, regardless of an excavator's exemption status under that state's law.

Fines and Penalties

Many commenters acknowledged that the use and application of civil penalties is necessary as an effective tool to deter violations of state excavation damage prevention laws that could lead to pipeline damage. Comments also indicated that civil penalties should be applied at an appropriate level to achieve such deterrence, including the escalation of fines and penalties for repeat offenders. Northern Natural Gas and others agreed that a responsible state agency should have the ability to levy fines and civil penalties similar to the Federal maximums. However, several commenters, including PUCO, noted that PHMSA could clarify the maximum civil penalties PHMSA will require for a state program to be determined ''adequate.'' Additionally, some commented that education and training should be considered in lieu of fines and penalties for minor violations.

Response

PHMSA is not proposing a specific penalty amount or schedule as a criterion in determining the adequacy of state excavation damage prevention law enforcement programs. However, state penalty levels should be sufficient to deter violations. PHMSA will review state enforcement records on a state-by-state basis.

Clarification of Terminology and Parties Subject to PHMSA Enforcement Action

Several comments asked for clarification of some terminology used in the ANPRM or, in some cases, clarification of the scope of the rulemaking. For example, WUCA asked for clarification of where enforcement would start—with gas mains or service lines or both. PUCO and some gas pipeline operators asked that the term ''incident'' be clarified. Is it as defined in 49 CFR § 191.3? Does it mean only incidents reportable under the applicable Federal or state law? Or, does it mean every event wherein damage occurs, regardless of the magnitude or consequences? PUCO also commented that the definition and implications of a state program designation of ''nominally adequate'' need to be clarified.

NAPSR asked what ''available'' means, regarding the question in the ANPRM ''Are records of investigations and enforcement available to PHMSA?'' Additionally, NAPSR asked for clarification on the terms ''reasonable care'' and ''timely.'' Other terms noted for clarification include: all excavation damage, damage, incident, excavation, and excavator.

Response

This rulemaking applies to all excavators and excavation activities that affect any gas or hazardous liquid pipelines subject to the pipeline safety laws in 49 U.S.C. 60101 *et seq.,* including gathering, transmission, and distribution pipelines (including gas mains and service lines). Those terms are defined in existing laws and regulations. PHMSA will retain the discretion to determine if enforcement action is necessary on a case-by-case basis. In response to commenters' concerns, PHMSA has taken care to clearly define terms in this regulation.

Complaint-Based Enforcement Process

Centerpoint Energy suggested a ''complaint-based'' process in which a pipeline operator or an excavator can file a complaint to petition for enforcement actions by the state, or to petition PHMSA to review the adequacy of the state's enforcement process. Centerpoint expressed the view that PHMSA should only initiate enforcement actions upon receipt of filed complaints and that one allegation in each complaint would have to be that the state's enforcement process is not adequate to prevent repeated violations. Centerpoint would prefer that the state could intervene as an interested party and dispute the claim and PHMSA would have to conduct a hearing and require specific findings concerning what aspects of the state's enforcement efforts were inadequate. Centerpoint considers that findings of inadequacy would relieve the complaining parties from the duty to resolve disputes at the state level until the state resolved those issues of inadequacy. Centerpoint commented that costs for PHMSA could be assessed to the losing party or split between the two.

Centerpoint commented that a complaint-based process would allow the operator, excavator, the state agency and PHMSA to direct time and resources where they are most needed. Centerpoint believes that a pipeline operator is in the best position to determine when an excavator is willfully ignoring the excavation damage prevention program and will likely continue to do so in spite of any actions the operator takes. They also consider that an operator can collect evidence to show it was unable to change excavator behavior and that punitive enforcement is needed, and to show that Federal administrative enforcement is necessary because a state's enforcement efforts were not adequate to affect the behavior of the excavators. Similarly, Centerpoint comments that excavators should be able to file complaints against operators that will not respond to locate requests or that consistently do a poor job of locating their facilities.

Response

PHMSA proposes to use the criteria and procedures proposed in this NPRM to assess the adequacy of state excavation damage prevention law enforcement programs. Once those evaluations are complete, PHMSA will determine, on a state-by-state basis, if Federal administrative enforcement action is necessary in states deemed by PHMSA to have inadequate enforcement programs. Under § 198.55, PHMSA would evaluate the state enforcement program in its entirety, but may also consider individual enforcement actions taken by a state where warranted. PHMSA may become aware of a potential need for Federal administrative enforcement through a variety of mechanisms, including notifications of reportable incidents, instances of a serious and recurring nature where excavators fail to comply with the Federal requirements proposed in this NPRM, or by other means, including complaints. PHMSA requests comments on ways or mechanisms that it can utilize to become aware of these incidents. PHMSA believes it is important to retain flexibility in the process used to make decisions concerning the use of Federal administrative enforcement authority. PHMSA will only conduct enforcement in states deemed to have inadequate enforcement programs in accordance with the criteria outlined in this NPRM.

Evaluate Enforcement Programs, Not Individual Enforcement Actions

INGAA and others commented that the standards and procedures for adequacy proceedings should be directed toward evaluating state enforcement *programs,* not specific enforcement *actions.* INGAA holds that applying adequacy standards and procedures to individual enforcement actions invites selective PHMSA involvement contrary to vesting primary enforcement responsibility with the states. Similarly, and consistent with using adequacy proceedings to examine programs instead of decisions, INGAA commented that PHMSA should specify that inadequacy findings are not retroactive—that a finding of inadequacy should not be used to revisit and alter a state's enforcement findings and sanctions.

Response

In determining a state program's adequacy, PHMSA would evaluate a state's overall damage prevention enforcement program, but may evaluate past specific state enforcement actions during the evaluation process. PHMSA did consider a system of addressing the adequacy of state enforcement programs on an incident-by-incident basis instead of through an annual review of the state enforcement programs. Under that scenario, upon determining that enforcement action in a given incident may deter future incidents, PHMSA would assess the state's ability to conduct effective enforcement in that particular incident and proceed with enforcement action if PHMSA found the state program inadequate. However, PHMSA believes that such a system would be inefficient and administratively burdensome and that an annual review may be more appropriate. PHMSA seeks comment on this issue.

Federal Funding

API, AOPL, TRA and WUCA commented that PHMSA should continue its assistance to state agencies seeking to develop and enforce effective excavation damage prevention programs through grants and other support mechanisms. They noted that this assistance should include providing quantitative analyses that demonstrate the effectiveness of existing excavation damage prevention programs and developing incentives to ensure that agencies and other stakeholders in the states cooperate in these efforts. TRA went on to comment that a state agency that is making a concerted effort to make changes to its excavation damage prevention law to meet the nine elements should not be punished by having its level of funding decreased.

PUCO was concerned that changes in how PHMSA evaluates state excavation damage prevention programs could result in a designation of a program being ''inadequate'' or ''nominally adequate,'' and that such a designation may affect funding and ultimately gas pipeline safety. PUCO commented that despite the stated assurance in the ANPRM that funding for the development and implementation of excavation damage prevention programs is ''intended to be in addition to, and independent of existing Federal funding of the state pipeline safety programs,'' the implications of designation of ''inadequate'' or ''nominally adequate'' on a state excavation damage prevention program's current funding is not addressed. PUCO commented that it would be beneficial for PHMSA to describe whether and how state funding for the gas pipeline safety program will be affected by a determination of ''inadequate'' or ''nominally adequate.''

The three Texas pipeline associations noted that PHMSA should evaluate the adequacy of state programs in a similar fashion to that of PHMSA's existing state program evaluation. They commented that a state's annual program performance evaluation could result in a reward of additional grant monies or a penalty of a reduction in grant moneys based on PHMSA's excavation damage prevention law enforcement program assessment, to a greater degree than is currently practiced.

Response

PHMSA intends to continue its support of states seeking to develop and enforce effective excavation damage prevention programs through grants and other means. PHMSA has undertaken a variety of both qualitative and quantitative initiatives that demonstrate the effectiveness of existing state excavation damage prevention programs. These initiatives are described in the ANPRM pertaining to this rulemaking (*http://www.regulations.gov,* Docket ID PHMSA–2009–0192). When evaluating a state's overall pipeline safety program, PHMSA will continue to consider the extent to which a state has implemented an effective excavation damage prevention enforcement program. The effect on base grant funding of a declaration that a state's excavation damage prevention enforcement program is inadequate is proposed in this NPRM.

State Authority for Interstate Pipeline Operators

Paiute Pipeline and three Texas pipeline associations submitted comments regarding how interstate pipeline operators are expected to be treated under a state's excavation damage prevention program and noted that PHMSA should provide clarification in this regard. The issue they noted is whether the operator is treated as an excavator or as an operator and whether state agencies have the authority to enforce state excavation damage prevention standards on interstate pipeline operators or on excavators working near interstate pipelines. They consider this to be especially the case for states that have not applied for, or been granted, interstate agent status for natural gas and/or hazardous liquid lines. Paiute commented that authority for inspection and enforcement of interstate pipelines pursuant to Federal regulations should remain with PHMSA, and that in states that don't have interstate pipeline inspection and enforcement authority, the state should treat an interstate pipeline as an excavator, not a pipeline operator.

The three Texas pipeline associations commented that there should be a process for states to clarify that they have the ability to enforce state excavation damage prevention standards with regard to interstate pipelines, through a statutory change or through a Memorandum of Understanding between PHMSA and the states when certain program standards are met. Spectra Energy commented that the existing enforcement process in 49 CFR Part 190 should continue to be applied to interstate pipeline operators.

Response

States that have an annual certification under 49 U.S.C. 60105 have authority to regulate the intrastate pipelines in that state covered by the certification. States that have an interstate agent agreement under 49 U.S.C. 60106 may conduct inspections and investigations on interstate pipelines, but must refer any alleged violations on interstate pipelines to PHMSA for enforcement action. While states are generally preempted from establishing or enforcing safety standards for interstate pipelines, 49 U.S.C. 60104 contains a specific provision that allows a state's pipeline damage prevention one-call program to apply to interstate pipelines as well as intrastate pipelines.

Accordingly, all excavators and pipeline operators in a certified state are

generally subject to the requirements of that state's excavation damage prevention laws (except when explicitly exempted by state law). The applicability of excavation damage prevention requirements within a state is determined by that state's law. Under the provisions included in this NPRM, state excavation damage prevention laws will continue to be enforced as specified by state laws except when PHMSA deems a state's enforcement program inadequate. In that case, PHMSA proposes to enforce the Federal requirements established by this rulemaking against excavators in that state who fail to comply with the Federal requirements. Regardless of the status of a state's damage prevention program, PHMSA is proposing to retain its existing enforcement authority over pipeline operators and will continue to enforce the requirements related to excavation damage prevention (49 CFR 192.614 and 195.442) for pipeline operators it regulates.

Model Programs

NAPSR, Missouri PSC, AGA and several pipeline operators noted that care should be exercised about urging states to adopt concepts of what a ''model'' excavation damage prevention program should be. They cautioned that PHMSA should be open-minded in its review of state programs, allow for alternate approaches for damage investigations, and not have preconceived ideas on what an effective state excavation damage prevention program should include. AGA and several operators noted that PHMSA should avoid taking a prescriptive approach on the overall review of the state's excavation damage prevention enforcement process. They suggested that PHMSA should adopt a holistic and data-driven approach to adequacy assessment. For a state with documented success at excavation damage prevention, compliance with specific PIPES Act criteria should be at most a basis for suggested improvement. They noted that a state program should never be deemed inadequate solely because it did not meet all of these criteria.

NAPSR noted that depending on how its proposed provisions are interpreted, a program such as the one apparently envisioned by PHMSA in the ANPRM could be burdensome and costly. NAPSR noted that PHMSA should not presume that states can or will readily change their laws in response to Federal initiatives, and should be mindful of unintended consequences that may arise upon re-opening the existing state law to further amendments. NAPSR stated that it is likely that if onerous provisions are adopted in the proposed rule, some states will simply defer to Federal administrative enforcement, in which case NAPSR expects PHMSA will undertake every action it would otherwise expect a state to perform.

API and AOPL commented that state excavation damage prevention program evaluations should be based primarily on the effectiveness of the overall programs in place and allow for flexibility in the statutory or regulatory language. They noted, for example, a state program may be considered adequate if it has met the fundamental requirements described in the introduction, but failed to meet other program elements required by PHMSA, as long as the state can demonstrate overall program effectiveness. They consider that an excavation damage prevention program that establishes a generally acceptable baseline should provide an objective measuring stick.

Panhandle Energy commented that a template or recommended practice for enforcement of excavation safety is required, so that both PHMSA and the states have a clear understanding of the requirements, before any program evaluation takes place.

Response

As noted, PHMSA's goal is to provide incentives to states to develop and implement effective excavation damage prevention and enforcement programs. PHMSA believes there are some fundamental components of effective state enforcement programs. For example, an adequate enforcement program requires, at a minimum, the existence of statutory enforcement authority that includes civil penalties for violations and the use of that authority. The criteria for evaluating state enforcement programs proposed in this NPRM address those fundamental components (see proposed section 198.55).

Evaluate the Entire State Program

NUCA commented that PHMSA should evaluate each state's excavation damage prevention program as a whole. Even if thorough enforcement exists in a particular state, if the program itself does not adequately address the nine elements of an effective excavation damage prevention program, the entire program itself may be inadequate. If a state's excavation damage prevention program and enforcement practices were to focus exclusively on excavator responsibilities, that program is not fully addressing excavation damage prevention. AGA, APGA, and several pipeline operators commented that for a state to have a documented excavation damage prevention program alone is not enough; it is critical for the state agency to have the resources and the incentive to exercise its authority, when necessary.

In this regard, NAPSR commented that an important factor to consider in assessing the overall adequacy of a state excavation damage prevention program would be the relative weight given to the various proposed individual assessment factors listed in the ANPRM. NAPSR noted, for example, that enforcement of excavation damage prevention laws has been shown to be an essential element of a successful excavation damage prevention program. The issuance of appropriate civil penalties has been a demonstrated deterrent to non-compliant behavior. When assessing the adequacy of excavation damage prevention programs, this factor could be given a heavier weight than, for example, exempting certain parties who perform less risky excavations. Similarly, APGA commented that some of the assessment factors should receive more weighting than others and that weighting should be discussed with the affected parties. APGA noted that the ANPRM is a good start in opening a dialogue with the affected public, industry and state governments.

With regard to weighting the assessment factors, AGA commented that the most important criteria are the ones involving timely reporting of pipeline damages, a universal requirement for all parties to notify the one-call center prior to excavation, establishment of a single agency responsible for oversight of excavation damage prevention laws, and an effective enforcement process. AGA noted that the list of criteria listed in the ANPRM appears thorough, but how the criteria are weighted and actually evaluated is open to several different approaches.

Michigan Consolidated Gas commented that consideration should be given to states that are working on revising their state laws.

Response

Effective excavation damage prevention law enforcement is critical to an effective excavation damage prevention program, but enforcement is just one component of an effective program. PHMSA has undertaken several efforts to document state excavation damage prevention programs in their entirety. Information regarding those efforts is available at *http://primis.phmsa.dot.gov/comm./*

damagepreventionsummary.htm. However, the PIPES Act states:

''(f) LIMITATION.—The Secretary may not conduct an enforcement proceeding under subsection (d) for a violation within the boundaries of a state that has the authority to impose penalties described in section 60134(b)(7) against persons who violate that state's damage prevention laws, unless the Secretary has determined that the state's enforcement is inadequate to protect safety, consistent with this chapter, and until the Secretary issues, through a rulemaking proceeding, the procedures for determining inadequate state enforcement of penalties.''

While evaluating state excavation damage prevention programs in their entirety is part of the annual review of a state's overall pipeline safety program performed by PHMSA in connection with the state grant process, this proposed rulemaking is focused solely on the enforcement component. In this NPRM, PHMSA has proposed the criteria for evaluating state excavation damage prevention law enforcement programs.

PHMSA does not propose to weight the criteria used in evaluating state excavation damage prevention law enforcement programs. Weighting the criteria could create an overly-prescriptive set of criteria. PHMSA believes the proposed criteria are simple enough to not warrant a specific scoring or weighting method. PHMSA specifically asks for comments on whether it should weight the criteria, how the critieria might be weighted, and the rationale for weighting the criteria in evaluating state excavation damage prevention law enforcement programs.

Evaluation of state enforcement programs will pertain to state laws and regulations in effect at the time of evaluation. PHMSA believes that states should have the opportunity to demonstrate improvements in their enforcement programs and petition PHMSA for reevaluation of their programs as necessary and appropriate.

Damage Reporting

Many commented that they do not support reporting all pipeline damages as this will create an unnecessary burden on the operator, the state, and PHMSA. Conversely, Northern Natural Gas commented that excavators should be required to report all pipeline damage to the affected pipeline operator.

Response

This proposed rulemaking does not address requirements for damage reporting by pipeline operators. However, the reporting of damages that provides enough detail for analysis and resource allocation is critical in developing effective excavation damage prevention programs because inadequate reporting will result in a failure to investigate incidents that should be investigated. Therefore, PHMSA encourages all states to develop effective excavation damage reporting requirements. The CGA Damage Information Reporting Tool (DIRT) is an effective means of collecting data on damages to pipelines and other underground facilities. This is a voluntary filing requirement that can assist in the collection of data on damages. The data is made available to the Federal government, states and the public by the CGA. As provided in the PIPES Act, this proposed rulemaking requires an excavator who causes damage to a pipeline facility to report the damage to the owner or operator of the facility promptly.

Perform Annual Reviews Only for State Enforcement Programs Deemed Inadequate

AGA and several pipeline operators commented that annual excavation damage prevention program reviews are not necessary for those states with adequate programs. They noted that it would be reasonable for PHMSA to establish a five-year review cycle for those states. Their basis is that a state's overall program will change minimally over the course of a year and that an annual audit of every program seems unnecessary. From the standpoint of administrative efficiency, it would be far better for PHMSA to lengthen its review cycle for programs found adequate after an initial audit, and focus its resources on the programs it found inadequate or adequate subject to specific corrective action. PHMSA should only perform annual reviews for states found to have a ''nominally adequate'' or inadequate program so that these states have the opportunity to have their status re-evaluated to identify areas for improvement and additional emphasis.

JULIE, Inc. commented that there appears to be no probationary period or other opportunity for states to improve upon PHMSA's recognized ''deficiencies'' prior to PHMSA undertaking enforcement actions.

Response

PHMSA agrees that resources and attention should be focused on state excavation damage prevention law enforcement programs that are deemed inadequate. However, PHMSA proposes that all SDP enforcement programs be evaluated concurrently with PHMSA's annual state pipeline safety program evaluations, or at the request of states as appropriate. PHMSA does not believe the addition of these evaluations will be overly cumbersome. PHMSA also proposes that states be given a five-year grace period after notification that their enforcement programs have been deemed inadequate to address deficiencies in their programs before state pipeline safety base grant funding levels are potentially affected. However, PHMSA proposes that Federal excavation damage prevention enforcement may take place at any time after a state's enforcement program is deemed inadequate. The process for evaluating state enforcement programs is described in this NPRM.

Comments on Section IV Issues on Which PHMSA Sought Comment

In Section IV of the ANPRM, pipeline operators, excavators, states and the public were urged to consider the appropriate procedures for determining the adequacy of state excavation damage prevention law enforcement programs, as well as the need for Federal administrative enforcement in the absence of an adequate state program. PHMSA posed specific questions to solicit stakeholder input. These included questions related to:

A. Criteria for Determining the Adequacy of SDP Enforcement Programs;

B. Administrative Process;

C. Federal Requirements for Excavators;

D. Adjudication Process; and

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

Many of the comments received were repetitious of those noted above under General Comments.

A: Criteria for Determining the Adequacy of SDP Enforcement Programs

In Section IV.A of the ANPRM, PHMSA noted 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 will likely consider the following issues in further evaluating the enforcement component of [state damage prevention] programs.'' The ANPRM then listed 13 items for consideration and comment. Following are comments received relative to those items:

Item 1: ''Does state law contain requirements for operators to be members of and participate in the state's one-call system (similar to

current federal pipeline safety regulations, 49 CFR 192.614 and 49 CFR 195.442)?''

Several commented that Federal pipeline safety regulations adequately address this requirement for pipeline operators. Several commenters also said that each state excavation damage prevention program should require all underground facilities operators to be members of the state's one-call system(s).

NUCA commented that ''participation'' in excavation damage prevention includes calling the one-call center before excavating. However, NUCA also commented that underground facility operators being members of the appropriate one-call center is fundamental to the excavation damage prevention process and that exemptions only increase the likelihood of facility damages. NUCA cites the Common Ground Study of One-Call Systems and Damage Prevention Best Practices, for which ''the underlying premise for prevention of damage to underground facilities, and the foundation for this study, is that all underground facility owners/operators are members of one-call centers, and that it is always best to call before excavation.''

Michigan Consolidated Gas questioned how the state and/or PHMSA would take into account operators that do not have the resources, equipment, funding, etc., to locate their facilities.

Response

Sections 192.614 and 195.442 of the pipeline safety regulations require regulated pipeline operators to be members of qualified one-call systems in the states in which they operate. All states certified to regulate gas operators will have adopted § 192.614 allowing them to enforce it against the intrastate gas operators they regulate.

Items 2 and 3: ''Does state law require all 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 prior to digging? Has the state avoided giving exemptions to its one-call damage prevention laws to state agencies, municipalities, agricultural entities, railroads, and other groups of excavators?''

NAPSR commented that the standards to which PHMSA would hold a state in terms of ''excavation'' must be consistent with the terms used in that state's law. NAPSR noted that there may be very legitimate reasons for exemptions in a state one-call law. For example, agricultural exemptions may recognize the total impracticality of attempting to include normal farm tillage. Others may conclude that the risk of an activity is so low that regulation is not justified, such as opening a grave in a cemetery. Still others may be the result of carefully crafted legislative compromises to achieve passage of one-call legislation, the reopening of which could have negative consequences. NAPSR also noted that 49 U.S.C. 60114(d), which lists demolition, excavation, tunneling, or construction, or excavation as defined in paragraph 192.614(a), is far from all-inclusive, in that it seems to exclude farm tillage and gardening, and perhaps activities such as pipe or cable plowing. NAPSR considers that PHMSA must determine to what extent certain exemptions in individual states will be acceptable.

AGA, along with Nicor, Paiute Pipeline and Southwest Gas Corporation, agreed that exemptions are a critical consideration in evaluating the adequacy of state excavation damage prevention law enforcement programs. They noted that exemptions are inherently counter to the entire concept of excavation damage prevention being a shared responsibility. They noted that in several states, exemptions have been granted, for example, to state DOTs, counties, municipalities, railroads, and private land owners. The exemptions can take on different forms; some apply so that the entity does not need to belong to the one-call center for the purpose of marking its underground facilities, while others allow an entity to excavate freely without having to notify the one-call center, and still others allow certain parties to be free of enforcement penalties. The commenting organizations hold that exemptions often exist only because of private interests that enable certain entities to escape responsibility in the excavation damage prevention process.

They also commented that exemptions serve as an impediment when stakeholders attempt to craft new legislation for state excavation damage prevention laws. They referred to the DIMP Phase 1 Report (*http://primis.phmsa.dot.gov/dimp/docs/IntegrityManagementforGasDistributionPhase1Investigations2005.pdf*), in commenting that all stakeholders must participate in the excavation damage prevention process for it to be successful.

Spectra Energy commented that PHMSA's criteria should force states to eliminate all exemptions from their one-call requirements. Spectra noted that a number of states continue to exempt from the one-call requirements certain types of excavators, such as agriculture, railroads and state/county road commissions. Spectra considers that to provide exemptions is contrary to the goal of pipeline safety, noting that the pipeline operator is the most qualified entity to determine if a pipeline exists within the area of interest, to locate and mark the facility, and to determine the safety precautions necessary to ensure the pipeline is not impacted.

JULIE, Inc. expressed a concern that some states' cultures provide for the successful existence of more than one excavation damage prevention system (one-call center) that does not have overlapping geographic areas. There appears to be no process in the ANPRM to recognize separate evaluation results in those states, particularly when possibly one or both of the systems may have unique but strong enforcement programs in place.

Response

As noted in the response to the General Comments above, some exemptions may be justifiable in some states, especially where substantiated by data. If having absolutely no exemptions were a ''pass/fail'' criterion for evaluating state excavation damage prevention law enforcement programs, PHMSA believes that nearly every state (if not all states) would be declared inadequate.

PHMSA does not propose an absolute prohibition on exemptions from state one-call damage prevention requirements. States are ultimately responsible for establishing the excavation damage prevention laws that best suit their own circumstances. PHMSA policy strongly encourages states to limit exemptions, for both excavators and utility owners/operators, from excavation damage prevention laws to the extent practicable. To that end, one of the criteria for determining the adequacy of state excavation damage prevention law enforcement programs proposed in this NPRM is ''limited and justified'' exemptions for excavators from the requirements of state excavation damage prevention laws.

In assessing state excavation damage prevention law enforcement programs, PHMSA will assess all programs if the state under evaluation has multiple enforcement programs. In that case, PHMSA may declare one or more of the enforcement programs inadequate, thereby allowing PHMSA to conduct Federal administrative enforcement actions in geographic areas covered by the inadequate program.

Item 4: ''Are the state's requirements detailed and specific enough to allow

excavators to understand their responsibilities before and during excavating in the vicinity of a pipeline?''

Paiute Pipeline and Southwest Gas Corporation recommended that PHMSA extend this objective to include excavating in the vicinity of any underground facility and supported PHMSA's objective of states providing clarity to excavators to ensure that detailed and specific information is available so they understand their responsibilities before and during excavation within the vicinity of a pipeline. Similarly, AGL Resources commented that this item is an appropriate consideration when determining the adequacy of a state's excavation damage prevention program, and noted that ensuring that excavators understand expectations and consequences is an important aspect of promoting compliance.

NAPSR commented that addressing this criterion could be very subjective and that specific criteria would be needed for determining what is ''detailed and specific enough.'' They noted that some states may have extensive regulations, while others may have successful excavation damage prevention programs with limited regulatory intervention.

MidAmerican Energy Company commented that the detail and specificity of each state's law need not match the level of detail of the proposed Federal requirements. They noted that there is value in allowing states to tailor their statutory and regulatory requirements to the specific circumstances presented in that state. They further noted that the level of detail of responsibilities is best determined by each situation, condition and scheme and operator requirements for excavations on or near its underground facilities, given that underground pipelines are constructed and operated in varied geographic locations such as remote wilderness, prairie, active agricultural lands, forests, residential, commercial, industrial, and subsea environments.

AGA considers that state requirements for most professionals in the excavation industry adequately convey the responsibilities involved in proper excavation. However, it noted excavators are often non-professionals who do not understand safe digging practices or even the importance of notifying the one-call center. AGA noted that according to CGA's 2008 DIRT Report, occupants and farmers have been the excavator in 8 to 10 percent of the damage reports collected over the three-year period between 2006 and 2008.

Response

PHMSA encourages states to utilize plain language principles [6] when drafting their pipeline safety regulations. At the same time, though, PHMSA does not want to be overly subjective in establishing criteria for determining adequacy and PHMSA continues to believe that states can and should develop excavation damage prevention laws that best suit their particular needs. Therefore, PHMSA is not proposing to use the detail and specificity of state law as a criterion at this time. However, PHMSA believes that states should collect and manage data that is detailed enough to demonstrate that excavators clearly understand the requirements of state excavation damage prevention laws.

Item 5: ''Are excavators required to report all pipeline damage incidents to the affected pipeline operators?''

Many commenters considered this item to be essential in evaluating the adequacy of state excavation damage prevention law enforcement programs. The TRA commented that mandatory reporting of damages to pipeline facilities should be a part of any effective excavation damage prevention program. AGA views this as one of the most important issues for evaluation and cited it as being included in the PIPES Act. AGA noted that the failure of excavators to notify the pipeline operator of damage promptly has resulted in some significant pipeline ruptures involving fatalities, injuries, and property loss. AGA cited that past incidents have been a painful reminder that just nicking the pipe coating or cutting a cathodic protection wire can affect the long-term integrity of the pipe and lead to a leak or rupture. Nicor commented that despite the requirement, excavators have waited up to several hours before reporting damages, thereby exacerbating circumstances. Nicor also cited instances where excavators considered damage to be minor (coating knick or broken tracer wire) and backfilled an excavation prior to reporting it, requiring the operator to then re-expose the area of reported damage to make repairs. AGL Resources also commented that in addition to excavators reporting damages to the operator, all utility operators should be required to report damages to provide a more complete picture of damage and prevention needs. To whom operators should report was not addressed.

An additional comment received was that PHMSA should clarify how ''damage'' would be applied to the operator as an excavator, or operator's contract excavator and how this might be enforced.

NUCA commented that while excavators are subject to extensive damage reporting requirements in most state laws, the lack of state requirements to report ''near misses'' obstructs efforts to provide accurate data trends. NUCA considers that when underground facility operators fail to locate and mark their lines accurately, that data should be captured regardless of whether the facility was damaged. Even if reporting of ''near misses'' is required by state law, NUCA believes these requirements are rarely enforced.

Response

Reporting pipeline damages to affected pipeline operators is an essential component of pipeline safety. To that end, PHMSA believes that states must require that excavators report to pipeline operators all incidents that actually result in physical damage to pipelines as a criterion for evaluating a state's program. As noted above, states should also consider establishing criteria for operators in turn to report damage incidents to allow the state to determine whether an investigation and enforcement should be undertaken. Therefore, PHMSA is proposing, as part of the criteria for determining the adequacy of a state's program, that each state has a reliable means for learning about excavation damages to underground pipelines (see proposed section 198.55).

PHMSA agrees with the importance of damage reporting by all underground facility operators. However, PHMSA does not propose to use damage reporting by operators as a criterion for evaluating state enforcement programs. PHMSA has the authority to require pipeline operators to report damages, but does not have the authority to require other utility operators to report damages. PHMSA is concerned that this special requirement for pipeline operators would be confusing for utility operators and cumbersome for the states.

With regard to the comment about PHMSA's treatment of pipeline operators as excavators, PHMSA's existing regulations at 49 CFR 192.614 and 195.442 address these issues.

PHMSA is not proposing to require reporting pipeline excavation damage near-misses at this time. While data on

[6] Further information on plain language principles can be found in Federal guidance here: *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf.*

near-misses would be valuable in guiding state excavation damage prevention program improvements, this proposed rule pertains specifically to excavators who actually damage PHMSA regulated pipelines. In addition, this requirement could impose a significant cost on excavators. However, there is nothing stopping a state from adopting more stringent reporting requirements such as including near-misses. PHMSA seeks comments on the potential cost impacts of requiring reporting of pipeline excavation damage near-misses.

Item 6: ''Does state law contain a provision requiring that 911 be called if a pipeline damage incident causes a release of hazardous products?''

AGA and several gas pipeline operators commented that some states may adopt statutory language that does not exactly match the Federal legislation. For example, a state may adopt language that affords pipeline operators some latitude so that they do not need to dial 911 if they damage their own pipeline. Since operating personnel are already on the jobsite, AGA and the commenting companies agree that operators should not be required to dial 911 if they cause damage to their own pipeline that results in a release that the operators can safely control without the aid of emergency response personnel prior to making the necessary repair.

Paiute Pipeline and Southwest Gas Corporation also commented that this provision should apply only if the damage may endanger life or cause serious bodily harm or damage to property, and results in the escape of any flammable, toxic or corrosive gas, and that all releases of natural gas do not need to be reported by making a 911 phone call. They noted that PHMSA should distinguish between natural gas and other gases or liquids instead of trying to include all of these under the umbrella of ''hazardous products.''

NAPSR commented that with regard to calling 911, the question should be whether the excavator by law—or appropriate regulation—is required to notify local emergency responders and/or law enforcement if a release of product poses a danger to the public. NAPSR anticipates that where 911 is available the excavator would most likely use it to make that notice, but considers that it should not be necessary for state law to specify that method if the desired end is achieved. NAPSR noted that state laws may predate the advent of 911 emergency call systems, and therefore would not specify that 911 must be called. NAPSR also noted that calling 911 is generally promoted through state one-call centers and operators' public awareness programs, and the practice may best be achieved through best practices and not through Federal or state regulations.

Response

The PIPES Act requires excavators to promptly call the 911 emergency telephone number if damage to a pipeline results in the escape of any flammable, toxic, or corrosive gas or liquid that may endanger life or cause serious bodily harm or damage to property. PHMSA understands that excavators are often required to reimburse 911 centers for the cost of dispatching emergency response personnel to a damage site. Therefore, PHMSA proposes that states require excavators to call 911 in these instances, but is proposing to permit the excavator to exercise discretion as to whether to request that the 911 operator dispatch emergency response personnel to the damage site. However, the 911 operator will always have the discretion to dispatch emergency response personnel.

Item 7: ''Has the responsible state agency established a reliable mechanism to ensure that it receives reports of pipeline damage incidents on a timely basis?''

Paiute Pipeline and Southwest Gas Corporation commented that states that do not have interstate pipeline inspection and enforcement authority should treat an interstate pipeline operator as an excavator, not a pipeline operator. They consider that authority for inspection and enforcement of interstate pipelines should remain with PHMSA and no reporting of pipeline damage to the state is needed.

Southwest Gas Corporation commented that if PHMSA desires individual incident report information on non-Federally reported incidents from the states, PHMSA should recommend establishing a reporting time period with the state agencies. Southwest Gas Corporation noted that to eliminate any increased burden on the state agency, PHMSA should consider specific criteria levels for those state-only reportable incidents of which they want notification.

Paiute and Southwest Gas Corporation also commented that notification requirements are different than reporting requirements. They noted that state and Federal reporting requirements provide initial *notification* to the respective agency within a very short time (usually one to two hours) after discovery. The extent of product release, service interruptions, product loss, property damage, evacuations, injuries, fatalities, or environmental damage, which may not be known for days, are generally included on a written report form filed with the appropriate agency, within 30 days or less in accordance with state or Federal requirements. They noted that for interstate pipelines not subject to state jurisdiction, PHMSA has requirements for reporting incidents that meet certain criteria. The requirements include an initial notification deadline and a documented incident report deadline.

NAPSR inquired whether PHMSA is going to require that all reports be sent to PHMSA, or that specific reports be made available upon request, and commented that if PHMSA wants reports of all damages, it should simply require the operators report directly to PHMSA instead of placing an additional burden on the states.

Response

For a state to have an effective excavation damage prevention enforcement program, the enforcement authority must have a reliable mechanism for learning about excavation damage incidents. The details of how this mechanism functions, however, may vary considerably from state-to-state. For example, some state law may require mandatory reporting of excavation damages, while other states use complaint-based systems of reporting damages. Because PHMSA must evaluate state enforcement programs, PHMSA's goal is to assess how states learn of excavation damages and how this mechanism drives enforcement decisions, which has an effect on the adequacy of states' enforcement programs. PHMSA will not be collecting state damage reports, but may review them during evaluation of the state's program.

Item 8: ''Does the responsible state agency conduct investigations of all excavation damage to pipeline incidents to determine whether the excavator appropriately used the one-call system to request a facility locate, whether a dig ticket was generated, how quickly the pipeline operator responded, whether the pipeline operator followed all of its applicable written procedures, whether the excavator waited the appropriate time for the facilities to be located and marked, whether the pipeline operator's markings were accurate, and whether the digging was conducted in a responsible manner?''

NAPSR commented that the listing of anticipated review items during an excavation damage incident investigation may be helpful during

investigation of an event reportable as a pipeline incident or accident. However, it is unrealistic to expect an investigation of this magnitude into each and every event where a pipeline is damaged. NAPSR considers that the resources required would exceed those of entire state pipeline safety programs, and noted that PHMSA is considering these regulations at a time when many states are suffering financial hardship and their pipeline safety programs are struggling to remain afloat. Other commenters repeated this consideration.

NAPSR commented that the following listed items should be clarified and that, to the extent that any of them are incorporated into Federal regulations, PHMSA should clarify its intent and expectation for each item:

○ *''Whether the excavator appropriately used the one-call system to request a facility locate''*—Does having a ticket number suffice?

○ *''Whether the excavator appropriately used the one-call system to request a facility locate''*—Does one need to determine if the site was pre-marked?

○ *''Whether the dig ticket was generated''*—Does having the ticket number suffice? [Or] Does transmission of the ticket to operators need to be confirmed?

○ *''How quickly the pipeline operator responded''*—Is the question here whether the operator responded within the time frame allowed by the law or regulation in that state? And, would this information be relevant if the incident cause is that the facilities were marked and excavation practices were insufficient?

○ *''Whether the pipeline operator followed all of its applicable written procedures''*—Would this require a field audit and review of the operator's (employee or contract) locator on the site of the incident?

○ *''Whether the excavator waited the appropriate time for the facilities to be located and marked''*—Would this require verifying that all utilities had marked the site prior to the excavator performing the work? [Or] Would comparing the start date on the ticket to the incident date suffice?

○ *''Whether the pipeline operator's markings were accurate''*—Would this require field verification of the marks? If yes, how much delay can be justified in an excavator's downtime while the marks are being verified? Can the word of the operator and excavator be taken as fact? Can an emergency locate be performed and excavation activities resumed before arrival of a government inspector on site?

○ *''Whether the digging was conducted in a responsible manner''*—Would this require a field investigation including interviews with the foreman, operator and laborers? Can the results of the investigation by the operator be considered as fact? If it is ascertained that best practices were not followed, would this constitute a ''violation''? What are the essential elements of an ''investigation''?

NAPSR also commented that all DOT-reportable excavation damage incidents should be investigated. However, it noted that there are many thousands of DOT non-reportable incidents each year that involve superficial damage and no escaping gas. NAPSR considers that a one-size-fits-all investigation approach is not practical, and that the extent of investigation of non-reportable incidents should be on a state-by-state basis, left to the discretion of the responsible state agency. The state should be allowed to adopt a basis for investigation, such as establishing thresholds, or perform periodic sampling coupled with enforcement proceedings on the incidents sampled, so a deterrent effect is achieved.

NAPSR further commented that it may be possible that the PHMSA Office of Pipeline Safety Failure Investigation Policy document will play a role in connection with this aspect of the proposed rulemaking. NAPSR, therefore, suggested that this policy be considered along with other factors before formalizing a notice of proposed rulemaking.

AGA commented that the evaluation process should recognize those states that have adopted some basis for investigation. The basis could be event significance or it could investigate some subset of the damages, such as state reportable incidents. AGA noted that it is not feasible for a state agency to conduct a formal investigation for every occurrence of excavation damage to pipelines in a state. AGA also commented that most importantly, the state should have a mechanism that enables all stakeholders to express formal concerns and complaints with non-compliant parties, citing, for instance, that excavators should have a process to file complaints against utilities that fail to mark their facilities accurately or on time. Additionally, pipeline operators should have a process to file complaints or seek injunctions against excavators who either fail to notify the one-call center, fail to respect the markings or fail to wait the required time before beginning excavation activity.

APGA commented that this consideration should apply only to reportable incidents as defined in 49 CFR Part 191 because it would not be reasonable to expect operators and/or state agencies to investigate and report in this detail on all excavation damage events. APGA noted that some lesser level of reporting may be considered for events that do not meet the reportable incident criteria. Nicor suggested that states should have a process for determining which reported excavation damages will be investigated. APGA also noted that under the Distribution Integrity Management Programs (DIMP) rule, operators will annually report the number of excavation damages to PHMSA, and that these reports could also be made available to states.

Southwest Gas Corporation commented that if PHMSA means only reportable incidents (as defined by each state) that result from excavation damage, then determining the effectiveness of the state excavation damage prevention program should include a review of all excavation damage, not just excavation damage to pipelines, and include analysis of any trends and areas for improvement.

NUCA commented that states must ensure that those conducting damage investigations look at the entire excavation damage prevention process, from the excavator notifying the one-call center to the facility operator providing accurate and timely markings, to safe excavation and backfill practices by the excavator. NUCA believes that the ANPRM adequately addressed the factors needed to be investigated, but that several state authorities fail to fulfill their investigative responsibilities in all areas of excavation damage prevention, especially with regard to locating and marking of facilities.

Response

PHMSA's primary interest with regard to pipeline damage investigations is to ensure that state enforcement is fair and balanced and is targeted to the at-fault party in an excavation damage incident. PHMSA recognizes that states have resource issues to contend with and need the ability to focus investigatory resources on significant incidents as opposed to minor incidents. PHMSA intends to address this consideration in determining the adequacy of enforcement programs by reviewing state enforcement records and the adequacy of the investigations that preceded enforcement actions. In addition, PHMSA intends to assess states' incident investigation practices to ensure their adequacy in determining the at-fault party in an excavation damage incident involving a pipeline subject to PHMSA pipeline safety

regulations. PHMSA does not intend to use PHMSA's Failure Investigation Policy as a model for assessing the adequacy of state damage incident investigation practices.

Item 9: ''Does the state's damage prevention law provide enforcement authority including the use of civil penalties, and are the maximum penalties similar to the federal maximums (see 49 U.S.C. 60122(a))?''

With regard to the amount of the civil penalty, PUCO noted that the ANPRM does not indicate how large state maximum civil penalties would have to be in order to be considered ''similar'' to Federal maximums or the appropriateness of Federal maximum penalties against non-gas pipeline excavators. NAPSR commented that for pipeline operators some states' fines are equal to the Federal maximums, but that for excavators, fines may vary from small amounts per violation and gradually increase, depending on the circumstances, with no maximum. NAPSR noted that in practice, some states have found that an administrative process with modest fines (i.e., large enough to have a financial impact on the offender) works well. The larger the fine, the harder it is to collect and the collection process tends to consume a lot of the state agency's resources. NAPSR also commented that in state legislatures, the authorized amount of a civil penalty can be a serious issue. Legislatures may be reluctant to approve penalties so high that small companies could be put out of business, noting that although the assessed penalty does not have to be the maximum, the possibility remains a concern. NAPSR notes that the penalties incorporated in state laws may be the product of laborious and protracted negotiations—and the penalties provided for in 49 U.S.C. 60122 are quite high by many state standards. NAPSR notes that there is no evidence that state penalties must be comparable to Federal penalties for state enforcement to be effective, and that if such a comparison must be a consideration it should be a minor one.

MidAmerican Energy commented that the amount of the maximum civil penalty that may be assessed may not be the critical factor in evaluating a state's enforcement program. Instead, the aggressiveness and consistency by which a state investigates and enforces the excavation damage prevention laws may be a more effective gauge. Michigan Consolidated Gas noted that consideration should be made regarding a state's funding and resources to administer its enforcement program, i.e., does the state have the manpower to investigate, hold hearings, document findings, etc., for every violation found or complaint filed especially if this includes non-regulated or non-pipeline entities?

The PST commented that if PHMSA is going to ascertain whether the amounts of civil penalties assessed reflect the seriousness of the incident, then PHMSA must develop a set of guidelines that sets out each type of offense and the range of penalties that PHMSA deems appropriate. PST noted that this will also help to provide clarity regarding the question in the ANPRM about whether a state program's civil penalties ''are the maximum penalties similar to the Federal maximums.''

The several Texas pipeline associations commented that a substantial portion of state grant monies should be tied to enforcement and collection of substantial civil penalties for failure to comply with a state one-call law that is found to be adequate. They also suggested that penalties related to excavation damage prevention being collected by states should be dedicated to pipeline safety, and not just the general revenue fund.

Spectra Energy Transmission commented that PHMSA's criteria should consider a state's historical enforcement action against excavators that fail to place one-call tickets prior to excavating or fail to adhere to the mandatory waiting period following one-call notification. Spectra also commented that states should take enforcement action against intrastate pipeline or distribution system operators that fail to respond to one-call tickets or fail to properly locate or mark their facilities. They noted that penalties should escalate for repeated violations and that the existence of repeat violations may signal a weakness of deterrents and need for PHMSA action.

Response

While state civil penalty levels must be high enough to deter violations, PHMSA recognizes that states will often be conducting enforcement against smaller entities. Therefore, penalty levels lower than the Federal levels may be sufficient to achieve deterrence. Accordingly, PHMSA does not propose to require states to assess civil penalties at a level equal to Federal civil penalties. PHMSA's primary interest with regard to state civil penalties is that (1) civil penalty authority exists within the state, and (2) civil penalty authority is used by the state consistently enough to deter violation of state excavation damage prevention laws. PHMSA seeks comments on this issue.

PHMSA does not intend to address impacts to pipeline safety grant funding levels for states with excavation damage law enforcement programs PHMSA deems adequate.

Item 10: ''Has the state designated a state agency with responsibility for administering the damage prevention laws?''

Marathon Pipeline commented that a state agency should be responsible for receiving and investigating reports of pipeline damage and near miss incidents caused by excavation. Paiute Pipeline agrees that the agency responsible for administering the excavation damage prevention laws should be designated in states where excavation damage prevention laws exist. Echoing this comment, the Texas pipeline associations commented that the first criterion for a state should be a single state agency designated to oversee the state's underground excavation damage prevention program. They noted that a state agency must not only be designated as the agency responsible for the program, but must also have the authority to enforce the safety standards to protect underground facility operators, excavators, and the public.

Going further, AGA and AGL Resources commented that effective excavation damage prevention requires more than merely designating a state agency with responsibility for administering the excavation damage prevention laws. They noted that although many states have agencies that have been delegated authority for administering the excavation damage prevention laws, often the state agency has not been given either the personnel, financial resources, or the incentives needed to exercise its authority. The three Texas pipeline associations commented that the adequacy of funding should be documented and reported by the states through several basic data elements. Such elements could include items like ratio of reported damages to calls, numbers of damages reported per mile and number of enforcement actions completed. There may be better measures of enforcement effectiveness, but whatever is used must demonstrate that enforcement is occurring.

AGL Resources also commented that a state should establish, designate and utilize an ''advisory type'' committee made up of the various stakeholders as the responsible state agency.

Response

PHMSA's primary interest in this area is assessing whether a state has a

designated excavation damage prevention law enforcement authority to act as the lead in law enforcement cases. That authority needs to establish a close working relationship with the state pipeline investigators and develop a familiarity with the state's pipeline safety and damage prevention laws and requirements. Once that authority begins to take enforcement action consistently, PHMSA will be interested to learn whether the state enforcement authority has adequate resources to perform its mission. In addition, PHMSA's periodic review of states' damage prevention enforcement records performed under the state certification process will provide PHMSA with information on the adequacy of enforcement resources.

Committees comprised of representatives of all excavation damage prevention stakeholders that advise enforcement agencies may help to ensure fair and balanced excavation damage prevention law enforcement. However, PHMSA does not believe that advisory committees should have a ''veto'' on enforcement decisions made by responsible officials and PHMSA also believes that advisory committees are not the only effective means of ensuring fair and balanced enforcement. PHMSA, therefore, does not propose to use as a criterion whether states utilize advisory committees in assessing the adequacy of states' enforcement programs.

Item 11: ''Does the state official responsible for determining whether or not to proceed with enforcement action document the reasons for the decision in a transparent and accountable manner? Are the records of these investigations and enforcement decisions made available to PHMSA?''

NAPSR commented that in some jurisdictions this would be privileged information not subject to disclosure. It also noted that a decision on whether to take formal enforcement action is a decision on whether to prosecute; thus, the concept of ''prosecutorial discretion'' may apply. NAPSR also inquired about what kind of documentation would be expected.

Paiute Pipeline and Southwest Gas Corporation commented that transparency and consistency are important to an effective enforcement program. They consider that states should be responsible for documenting and recording investigations, decisions, and enforcement actions taken or not taken to ensure consistency in decisions and enforcement actions with all excavators. They also commented that PHMSA should consider if instead of being informed of every investigation and enforcement decision of every state, it would be more effective for PHMSA to recommend specific criteria levels for being informed of investigations and enforcement decisions.

Response

PHMSA will be reviewing state enforcement records to help assess whether states that have enforcement authority are actually using their authority and how they are using their authority. PHMSA believes that states should be able to explain the reasons behind their decisions as to whether or not to take enforcement action, but is not necessarily seeking access to privileged and confidential information.

Item 12: ''With respect to cases where enforcement action is taken, is the state actually exercising its civil penalty authority? Does the amount of the civil penalties assessed reflect the seriousness of the incident? Are remedial orders given to the violator legally enforceable?''

AGA, API and AOPL supported the focus on utilization of civil penalties to enforce excavation damage prevention laws. API and AOPL supported PHMSA's proposed threshold criteria to determine whether a state has established and exercised authority to assess civil penalties for violation of one-call laws. They noted that most of the other criteria listed in the ANPRM derive from these criteria and demonstrate that laws are in place and being enforced.

AGA and others, including several pipeline operators, commented that fines and penalties should be significant enough to affect behaviors, yet they should not be so high that they give excavators incentive to be deceitful or fearful of reporting damages due to the potential repercussions. They consider that fines and penalties should escalate for repeat and willful violators, particularly those who have a history of being counseled on the importance of adhering to all safe digging laws and practices. They also commented that the maximum fine or penalty for any Federal administrative enforcement actions taken within state jurisdiction should be no more than the maximum amount cited in the state law, even if that state's enforcement has been deemed inadequate. They commented that maximum penalties in 49 U.S.C. 60122(a) should not be used for excavation damage prevention law enforcement as they are excessive for excavation damage prevention programs and can have adverse unintended consequences.

Nicor commented that the state's one-call statute should set forth aggravating or mitigating factors in determining the civil penalty. They also commented that when considering a history of noncompliance, excavator violations should not aggravate the penalty calculation for locating and marking violations, and vice versa, and that penalty assessments should be transparent to all excavators.

Paiute Pipeline and Southwest Gas Corporation commented that PHMSA's evaluation of a state's enforcement program should consider whether the state has the ability to exercise its authority to assess civil penalties and whether it is fair and consistent in doing so. They also noted that not all damage incidents warrant financial penalties, and PHMSA should not limit its review to only penalties of a financial nature. They acknowledged that civil penalties are part of an effective excavation damage prevention program; however, they commented that in some states excavation damage prevention training has been effectively mandated in lieu of civil penalties.

Response

PHMSA's primary interests with regard to state civil penalties for violations of excavation damage prevention law are that: (1) Civil penalty authority exists within the state, and 2) the state uses civil penalty authority to deter violation of state excavation damage prevention laws. PHMSA proposes to assess these two factors through a review of state law/regulation and records of past enforcement actions. PHMSA does not intend to hold states to an overly-prescriptive construct of civil penalty authority or to an overly-prescriptive civil penalty fee schedule. Sanctions other than civil penalties may have the desired effect of deterring non-compliant behavior. State excavation damage prevention enforcement records should be made available to the public to the extent practicable. PHMSA seeks comment on these issues.

Item 13: ''Are annual statistics on the number of excavation damage incidents, investigations, enforcement actions, penalties proposed, and penalties collected by the state made available to PHMSA and the public?''

AGA agreed that statistics are useful to understand trends and areas deserving attention, that past enforcement actions are one barometer of the enforcement activity in the state, and that past reports of enforcement against excavators should be reviewed for the type of excavator that is being fined or penalized. AGA also

commented that other items should be considered to determine whether or not enforcement has been active and effective, but noted that many states only collect data on excavation damages involving natural gas pipelines. AGA commented that each state should be expected to establish some clear, minimum reporting guidelines for the state enforcement agency, but that PHMSA should not expect the various state reporting guidelines to be uniform.

NAPSR commented that although annual statistics are important, PHMSA should not place much emphasis on comparing the states against each other on the basis of these parameters. It noted that there is bound to be significant variability between the states due to factors including, but not limited to, the volume of excavation activity in the state, the density of the underground infrastructure, the number of one-call centers, the resources available to the entity in charge of enforcement, and the political climate in the state with respect to the prevailing preference as to what the excavation damage prevention law should cover.

Paiute Pipeline and Southwest Gas Corporation commented that having data available to the public is not the standard for which a state's program should be judged. They consider that damage incident investigations, enforcement actions, and penalties proposed or collected should not be provided to the general public without providing a clear and concise description of the information, as most of the general public has limited knowledge of, or experience with, the information that would be provided.

Nicor commented that statistics collected should include damages by all excavators and on all facilities, not just pipelines. Paiute and Southwest Gas Corporation noted that data from the CGA DIRT could be used for analyzing excavation damages; however, providing damage information to DIRT is not mandated in all states.

NUCA commented that timely gathering of damage data is important, as is the type of information collected. However, NUCA considers that damages incurred by the excavator should be collected as well. This should include costs to the excavator in cases where a facility is hit because of a failure to locate and mark facilities accurately in a timely fashion, including any damage to the excavator's equipment or property, and any downtime incurred by the excavator while the true location of underground facilities is determined.

Washington Transportation Builders Association commented that its industry is concerned that contractors will be singled out for incidents that were caused by others, such as mismarked utilities and failure to address utilities during the design process, and that PHMSA should determine what are appropriate ''annual stats on damage incidents'' to report to the public.

API and AOPL commented that the reporting requirements suggested as a basis for evaluation could have the effect of requiring duplicate (or even triplicate) reporting for pipeline operators and/or other regulated entities. They noted that given that recently proposed revisions to PHMSA's own accident and incident reports (7000.1 and 7000.2) would collect, and CGA's DIRT report already collects, significant information about excavation damage incidents, PHMSA should consider changing the reporting requirements by which a state program is judged to allow for the use of the CGA or PHMSA data. Similarly, the WUCA commented that state agencies and PHMSA should explore means to share reported information electronically rather than imposing additional reporting requirements.

The Michigan Public Service Commission (PSC) commented that reportable information should include the nature of the incident, the cause of the incident, the extent of service interruptions, property damage, evacuations, injuries and fatalities, and that product loss would be factored into the total dollar amount of the incident.

Response

Variability among the states makes it difficult to seek standardized information pertaining to excavation damage incidents, investigations, enforcement actions, penalties proposed, and penalties collected. Variability also makes it difficult to compare state enforcement programs. PHMSA does, however, propose under criterion 3 that availability of this type of information to the general public be a factor in evaluating state enforcement programs because public understanding and involvement of state enforcement can help to drive more effective enforcement.

Additional Comments Related to Section IV.A

Commenters were also invited to comment on additions and alternatives to the items listed in the ANPRM, as noted above, that may be equally suitable for the purpose of evaluating the adequacy of state excavation damage prevention law enforcement programs.

Clarification

PST and several other commenters noted that state excavation damage prevention programs apply to many utilities besides pipelines, and that it is unclear from the ANPRM whether a state's entire excavation damage prevention program, including other utilities such as waterlines, sewer, electric, etc., will be judged or whether PHMSA will only review how excavation damage prevention is working for pipelines. PST commented that it is also unclear whether PHMSA intends to expand its authority to include damage to utilities other than pipelines, and if not, what effect PHMSA's selective enforcement of only the part of the program regarding pipelines will have on a state's more comprehensive excavation damage prevention program. Will states be driven to create two separate excavation damage prevention programs? What would be the unintended consequences of not regulating utilities other than pipelines? Similarly, the TRA commented that the proposed rule should distinguish between enforcing one-call laws and pipeline facility excavation damage prevention. TRA noted that one-call laws in many states cover many different types of utilities, and that it appears that a state may meet the requirements stated in the PIPES Act by enforcing pipeline facility excavation damage prevention without exercising the same level of authority over other underground utilities, such as water, sewer, telecommunications and electricity.

PST also commented that it concurs with the general criteria set out in the ANPRM for determining whether a state's enforcement program is adequate, and the use of the nine elements from the PIPES Act as a foundation for excavation damage prevention law enforcement programs. However, it noted that PHMSA also needs to consider and clarify:

1. Whether each criterion is of equal importance or if a relative weight should be assigned to each;

2. Whether the failure of a state to meet a single criterion results in the state's damage prevention program being inadequate; and,

3. Whether the failure to meet certain ''core'' criteria or attain a ''passing'' score (based on relative weights of each criterion) will trigger an ''inadequacy'' determination.

Response

PHMSA proposes to review the adequacy of states' excavation damage prevention law enforcement programs.

However, PHMSA's regulatory authority extends only to pipelines subject to PHMSA's pipeline safety regulations. PHMSA does not have the authority to enforce Federal excavation damage prevention standards in cases of damage to underground utilities other than pipelines. Despite PHMSA's limited regulatory authority, PHMSA believes that if states implement effective enforcement programs that are driven by the goal of preventing excavation damage to pipelines, other utilities and excavation damage prevention stakeholders will benefit. PHMSA does not intend for states to develop separate excavation damage prevention programs for pipelines and other utilities.

PHMSA proposes in this notice to use seven criteria to evaluate state enforcement programs. PHMSA, however, will not take a one-size-fits-all approach. Because of the wide variability among state enforcement programs, PHMSA believes these reviews must take into account the experiences of each state and limit comparison between state programs.

PHMSA's primary goal in evaluating the adequacy of state excavation damage prevention law enforcement programs is to seek clear evidence that:

- State laws/regulations are adequate to protect underground infrastructure from excavation damage;
- The state has a designated authority responsible for enforcement of the excavation damage prevention law;
- The enforcement authority has a reliable means of learning about excavation damage incidents and possible violations of state excavation damage prevention law; and,
- Enforcement authority is exercised effectively, including the use of civil penalties, to ensure compliance with state excavation damage prevention law.

There are multiple ways a state can meet the more subjective criteria. Reviews of state enforcement programs would entail detailed conversations with excavation damage prevention stakeholders at the state level and must allow for some flexibility to permit a thorough and accurate review of state enforcement programs.

PHMSA strongly believes that excavation damage prevention law enforcement is a state responsibility. Overly prescriptive Federal criteria for the review of state enforcement programs would be counter to this principle. This rulemaking is intended to provide limited, backstop Federal administrative enforcement authority regarding excavation damage to pipelines in states PHMSA finds to have inadequate enforcement programs and to encourage those states to enhance their existing excavation damage prevention programs or to implement programs to include effective enforcement through the use of civil penalties.

Criteria for Review of SDP Enforcement Programs

AGC of Texas recommended that when evaluating the adequacy of a state's excavation damage prevention program, PHMSA should include criteria for a mandatory positive response system, which requires operator and excavator participation, enforceable with penalties.

The WUCA commented that state excavation damage prevention law enforcement processes should include an appeals process that includes an appeals board with members who have adequate knowledge of design and construction administration processes, allowing them to assign responsibility to the appropriate party. They commented that failure to assign responsibility to the appropriate parties, such as operators, one-call centers, locators and design engineers, creates uncontrollable risk for contractors.

API and AOPL commented that PHMSA should establish clear guidelines and criteria for determining which state excavation damage prevention programs are effective and effectively enforced, and noted that these criteria should be based on transparent data, where available, but should not impose additional data collection on the states. AGA noted that the most important criteria are the ones involving timely reporting of pipeline damages, a universal requirement for all parties to notify the one-call center prior to excavation, establishment of a single agency responsible for oversight of excavation damage prevention laws, and an effective enforcement process. AGA also commented that the criteria regarding the evaluation of state programs, as listed in the ANPRM, appears thorough, but acknowledged that how the criteria are weighted and actually evaluated is open to several different approaches.

Several commenters expressed support for the need and intent of the proposed rulemaking, the development of criteria by which to evaluate state excavation damage prevention programs, and Federal administrative enforcement, if needed, when state enforcement is deemed inadequate. EPPG commented that a ''standard model'' for enforcement of excavation safety is needed to ensure existing state programs are not audited against unsettled standards. However, EPPG commented that Federal administrative enforcement intervention should not occur prior to a state being audited and provided an opportunity to improve on any deficiencies.

NAPSR expressed the view that most of the items listed in the ANPRM are subjective and that additional examination of the assessment factors may be required to further eliminate some of the subjectivity. Alternatively, they suggested there may be need to develop some non-mandatory guidance to provide added detail.

PST commented that if PHMSA decides to create a situation where a state can be found to have a program that is ''nominally adequate,'' PHMSA needs to define clearly what this means and how a state can achieve an ''adequate'' status. PST's preference would be for PHMSA to clearly communicate possible areas where improvements could be made in a state's program rather than to create a hard to define status of ''nominally adequate.'' They encouraged PHMSA to create criteria that are clear enough that a state's program is either adequate or inadequate.

Spectra Energy commented that PHMSA criteria should weigh whether state excavation damage prevention laws include requirements for excavators to notify the state and the pipeline operator if they damage a pipeline during excavation and whether enforcement procedures exist for instances of non-compliance.

TRA commented that the threshold criterion for evaluating the adequacy of a state's excavation damage prevention program should include the lack of exemptions to the state's excavation damage prevention laws, such as exemptions for state agencies, municipalities, agricultural entities, railroads, and other groups of excavators. TRA cautioned, however, that it, and likely other state regulatory agencies, does not have authority to make changes to the state pipeline excavation damage prevention law. To minimize exemptions, much effort and time must be expended to reach consensus regarding the entities to be exempted and to determine the extent of an exemption. While TRA agrees with the threshold criteria noted in the ANPRM, TRA asserted that as part of the evaluation to determine the adequacy of a state's enforcement of its pipeline excavation damage prevention law, the state's record of progress in strengthening its law should be considered. Every effort should be made to allow a state to continue working with stakeholders to improve pipeline excavation damage prevention laws without Federal intervention.

AGA commented that PHMSA should build flexibility into how it applies the performance criteria for the 13 criteria listed in the ANPRM. AGA noted that several of the items listed do not lend themselves to a simple rating or score, or even a definitive 'yes' or 'no' evaluation. For example, a state may require all parties to call before they dig, but it may give certain exemptions when the type of excavation involves the use of hand tools, noting that CGA's 2008 DIRT report indicates that 22 states fall into this category. AGA wondered how this type of scenario would affect a state's evaluation.

Response

PHMSA does not propose to include a criterion for a mandatory positive response system that requires operator and excavator participation. PHMSA believes this criterion is outside the scope of this rulemaking.

Effective excavation damage prevention enforcement programs require adequate processes for identifying the at-fault party in damage incidents to enable action to be taken against the at-fault party in any enforcement case. PHMSA does not consider this proposed rule to unfairly target excavators for enforcement action, but instead to address an enforcement gap in pipeline safety excavation damage prevention.

PHMSA does not propose to make a distinction between ''nominally adequate'' and ''adequate'' state enforcement programs. The proposed criteria for evaluating state enforcement programs are designed to establish the threshold for minimum adequacy of state enforcement programs. PHMSA intends to deem state enforcement programs either adequate or inadequate through use of the review criteria and processes outlined in this NPRM. PHMSA does not propose to use weighted criteria in the evaluation.

B. Administrative Process

Section IV.B of the ANPRM sought comment on the administrative procedures available to a state that elects to contest a notice of inadequacy, should it receive one. It noted that the procedures would likely involve a ''paper hearing'' process where PHMSA would notify a state that it considers its excavation damage prevention law enforcement inadequate (i.e., following its annual review), 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 administrative procedures would also likely provide for an opportunity for the state to petition for reconsideration of the decision, and would likely allow the state to show later that it has improved its excavation damage prevention law enforcement program to an adequate level and request that PHMSA discontinue Federal administrative enforcement in that state.

The ANPRM asked for comments regarding whether the described process would strike the right balance between the Congressional directive to PHMSA to undertake Federal administrative enforcement, where necessary, while providing a state with a fair and efficient means of showing that the state's enforcement program is adequate.

Section IV.B suggested that PHMSA would likely evaluate state excavation damage prevention enforcement programs on an annual basis, considering factors such as those set forth in Section IV.A. It noted that this annual review would likely include a review of all of the enforcement actions taken by the state over the previous year.

Section IV.B noted that if the state's enforcement program is ultimately deemed inadequate in its most recent annual review, direct Federal administrative enforcement against an excavator who violated Federal requirements and damaged a pipeline in that state could proceed without further process.

The ANPRM also asked if the process should enable PHMSA to evaluate a state enforcement decision concerning an individual incident during the course of the year and potentially conduct Federal administrative enforcement where a state deemed ''nominally adequate'' in its most recent annual review decided not to undertake enforcement for an incident that PHMSA believes may warrant enforcement action.

Process for Determining the Adequacy of State Enforcement

PUCO commented that the administrative due process for determining whether a state program is ''inadequate,'' as stated in the ANPRM, is very general and appears to be an informal process. PUCO noted that it is unclear whether the determination that a state program is ''inadequate'' is to be made by the head of PHMSA, PHMSA regional managers, a board or panel at PHMSA, or some other entity altogether.

The WUCA commented that PHMSA should provide information and guidance that will clearly outline what the state must do to create an acceptable damage enforcement program by PHMSA's standards.

The Greater Chicago Damage Prevention Council commented that it endorses the development and implementation of best practices to prevent damage to pipelines and other underground facilities, but that it opposes enactment of the proposed rule. Its opposition is based on the following regarding Section IV, Paragraph B—Administrative Process: The proposed rule: (a) Fails to use imperative language and speaks in generalities, such as, what ''the process would likely involve;'' (b) is devoid of elements mandating PHMSA provide those states deemed ''inadequate'' or ''nominally adequate'' with detailed evaluation results that support PHMSA's determination; (c) fails to provide adequate due process in the appeal of PHMSA's determination; in fact, there is no appeal process identified relative to PHMSA's ''final'' determination, other than to try again next year; (d) offers the state no opportunity whatsoever to undertake corrective action or improvement prior to PHMSA undertaking enforcement actions; and (e) fails to ''strike the right balance between the Congressional directive to PHMSA to undertake Federal administrative enforcement where necessary while providing a state with a fair and efficient means of showing that the state's enforcement program is adequate.'' The Council also noted that the proposed rule fails to meet ''Element 7,'' stipulated in the Rule as mandatory for a ''comprehensive damage prevention program.'' The commenter noted that the proposed rule is limited to PHMSA regulated pipelines and excludes all other underground facilities. It considers that by undertaking enforcement actions relating only to pipelines, PHMSA creates a de facto dual enforcement system, which in itself is a key criterion in determining whether an enforcement program is adequate. Therefore, the proposed rule establishes an ''inadequate enforcement program'' and should not be implemented.

Response

This NPRM proposes a clearly-defined process for determining the adequacy of state enforcement programs. PHMSA is authorized by Congress through the PIPES Act of 2006 to pursue this rulemaking. The ANPRM was designed to solicit input from interested stakeholders on how to construct the proposed rule. To the extent the ANPRM used the term ''likely'' in discussing a given approach, it only means that PHMSA has not made any final decisions on anything at the ANPRM or NPRM stage. Once the final

rule is published, the word likely will not appear in the text of any final requirement.

PHMSA agrees that specific reasoning should be provided for any declaration of state excavation damage law enforcement program inadequacy. In addition, PHMSA would evaluate states' progress on a yearly basis to assess adequacy. PHMSA proposes to make public the results of the reviews of state excavation damage prevention law enforcement programs. As noted above, comparisons of states are not practical given the wide variety seen in state enforcement programs.

Findings

Missouri PSC commented that a state's enforcement program should either be deemed adequate or not adequate; a process that would set ''levels'' of adequacy would simply be more subjective. Similarly, API and AOPL noted that a state either has an adequate program or it doesn't, and that the state should not be held in ''limbo'' and should not constantly be second-guessed. They agree that if a state program is deemed deficient then PHMSA should work with the state to make it better.

The WUCA commented that if a written statement is provided to the state notifying it of an inadequate excavation damage prevention law enforcement program, specific reasoning must be provided for the ruling. Additionally, rather than a ''likely'' opportunity to provide a showing at a later time, if deemed inadequate, a clear policy should be developed.

AGC commented that the administrative procedures should include public notice of PHMSA's determination of inadequacy in the **Federal Register** with a detailed explanation of the circumstances justifying PHMSA's determination.

Paiute Pipeline and Southwest Gas Corporation commented that PHMSA should not pursue a comparison of one state to another, but should only evaluate individual states through review of their excavation damage prevention programs, including state laws and enforcement authority.

Response

PHMSA is proposing to have state excavation damage prevention law enforcement programs be deemed either adequate or inadequate; PHMSA is not proposing to establish levels of adequacy. PHMSA intends to continue its SDP grant program, one-call grant program, and various other initiatives designed to assist states with improving their excavation damage prevention programs. These initiatives were described in more detail in the ANPRM.

Federal Administrative Enforcement

Regarding the precept in the ANPRM, *''If the state's enforcement program is ultimately deemed inadequate, direct Federal administrative enforcement against an excavator who violated the state's damage prevention law and damaged a pipeline in that state could proceed,''* AGA commented:

- PHMSA should also consider what will trigger Federal administrative enforcement action. Is damage the only trigger or is there a potential for enforcement action due to repeated complaints from operators of reckless excavation activities? (e.g., no notification to 811; failure to hand-expose pipeline; etc.)
- The process should not allow PHMSA to evaluate a state enforcement decision that has already been made.
- Only states determined to have an inadequate program should have the possibility of PHMSA intervention.

Like AGA, APGA, AGC, others commented that PHMSA should not evaluate a state's enforcement decision concerning an individual damage incident in a state where PHMSA has found the enforcement program to be adequate or nominally adequate. Instead, APGA suggested PHMSA should consider whether certain high profile events received adequate enforcement action by the state in the course of its periodic review of the state's overall enforcement program.

NAPSR strongly suggested that only the states with inadequate programs be subject to PHMSA examination of enforcement decisions made at the state level, and only after PHMSA determines the principal factor of the state's inadequacy has been repeated failure to enforce the law against clear cases of egregious violations. Similarly, Nicor stated that if a state is deemed nominally adequate, the state's enforcement decision concerning an individual event should be upheld, but PHMSA should provide guidance to that state so that it improves its program for the next review. EPPG noted that if PHMSA took action in a state that had passed the most recent assessment of its enforcement program, it would undermine the purpose of the assessment itself.

EPPG commented that PHMSA should define how enforcement responsibility between PHMSA and the state would be implemented. EPPG noted that as important as it is to identify and intercede in states found to have inadequate one-call enforcement, it is also important to clarify how enforcement responsibility should be conducted elsewhere. Excavators should not be exposed to multiple, divergent and possibly conflicting enforcement authorities and standards, and the standards and procedures should clearly define which agency will have jurisdiction.

NUCA commented to reemphasize the importance of balanced enforcement in that Federal administrative enforcement against an excavator who violated the state's excavation damage prevention law should be coupled with Federal administrative enforcement against pipeline operators who fail to locate and mark their pipelines accurately in accordance with the law.

API and AOPL commented that they question the efficacy of direct Federal administrative enforcement against an excavator who violates a state's excavation damage prevention law and damages a pipeline. They noted that state one-call laws vary with respect to elements such as notification time, ticket life, tolerance zone, and white lining. Without a Federal minimum standard to support Federal administrative enforcement, they do not believe it is appropriate or practical for PHMSA to enforce state laws evenly or consistently.

AGC noted that the goal of enforcement should be to fairly arrive at rational outcomes, such as education and penalties that correspond to the gravity of the violation, without imposing unnecessarily high transaction costs on any participant, including the enforcement authority.

PST offered comments/questions regarding consequences to states that choose to be inadequate. PST noted that ''PHMSA should clearly define in the NPRM what the consequences are for a state that is found to have an ''inadequate'' or ''nominally adequate'' excavation damage prevention program. Will excavation damage prevention grants/monies be the only thing affected or will other state funding and authority be penalized as well?'' Additionally, PST noted ''While we agree with PHMSA and Congress that states have a responsibility to ensure a system is in place to protect underground pipelines, what are the consequences if a state chooses to ignore that responsibility in hopes that PHMSA will take it on? Will the financial consequences or loss of authority be greater than the possible short-term financial benefits to a state faced with a budget crisis? Is PHMSA staffed and funded adequately to take on such a greater enforcement role?''

Response

PHMSA intends to evaluate the existence and adequacy of state excavation damage prevention law enforcement programs. PHMSA is proposing that this will be done, in part, by reviewing state enforcement records to ascertain whether a state is effectively applying its enforcement authority, assuming such authority is provided for in state excavation damage prevention law. PHMSA proposes to evaluate states' pipeline damage investigation practices to ensure they are adequate to determine the at-fault party for excavation damage incidents. As noted, excavators will be subject to Federal administrative enforcement only in states determined to have inadequate enforcement programs, and PHMSA is proposing to make decisions regarding Federal administrative enforcement in those states on a case-by-case basis.

Balanced enforcement of excavation damage prevention laws is important. As appropriate, PHMSA is proposing to enforce either this rule (once it is final) against excavators or existing regulations applicable to pipeline operators and their contractors against the at-fault party. PHMSA has enforced existing excavation damage prevention regulations applicable to pipeline operators. PHMSA believes that enforcement of existing excavation damage prevention regulations applicable to pipeline operators, at both state and Federal levels, is a deterrent to non-compliant behavior and reduces excavation damage to pipelines.

PHMSA does not have authority to enforce state laws and has included the proposed Federal requirements for excavators in this proposed rulemaking.

PHMSA proposes to consider state enforcement program adequacy to be a factor in determining state pipeline safety grant funding levels (after a lengthy grace period). PHMSA believes this approach will provide a financial disincentive for states to disregard their enforcement responsibility. PHMSA is seeking comment on this conclusion.

Appeals

Several commenters, including API, AOPL, PUCO, and Michigan Consolidated Gas, commented that states should be provided opportunities to respond to and appeal PHMSA's decisions on the adequacy of a state enforcement program. PUCO noted that procedures for determining the adequacy of a state's program and the process for appeals for reconsideration should be more fully described, and include a requirement for PHMSA to review and respond to any petition for reconsideration within a certain time frame. API, AOPL, Nicor, and Panhandle Energy support the development of administrative procedures that would be available for states that elect to contest a notice of inadequacy. Nicor noted that this would afford the state a fair and efficient means of showing that the enforcement program is adequate.

PUCO noted that a definition of ''nominally adequate,'' a description of how states may be qualified as ''nominally adequate,'' and a listing of the implications of this designation for state programs should be provided.

MidAmerican Energy noted that the ''paper hearing'' process described in the ANPRM would be appropriate.

Response

The criteria PHMSA will use to determine the adequacy of state enforcement programs and the administrative process for a state to appeal a determination of inadequacy are proposed in this NPRM.

Civil Penalties

AGC commented that PHMSA must consider education as an alternative or supplement to civil or other penalties, and in cases where financial penalties are assessed revenues generated must be reserved to finance excavation damage prevention education and technologies used in support of excavation damage prevention activities.

Response

Enforcement tools other than civil penalties, such as compliance orders, can be useful tools for enforcement of excavation damage prevention laws. However, PHMSA believes that civil penalty authority and effective use of that authority are essential components of effective excavation damage prevention law enforcement programs. PHMSA does not propose to require the use of sanctions other than those provided in existing pipeline safety statutes or regulations.

Costs

API and AOPL noted that PHMSA may consider using its grant resources, such as the SDP grants, to encourage state compliance with the elements of this rulemaking. That may require changes to the existing grant criteria that could be included in a proposed and final rule.

Response

PHMSA agrees that the SDP grant program can be targeted to improve state excavation damage prevention law enforcement programs, and PHMSA does have discretion in weighting the evaluation criteria applicable to SDP grant applications. However, PHMSA has not proposed any changes to the SDP grant criteria in this proposed rule.

Process

AGC commented that subsequent to public hearings, a commission should be convened to establish a predetermined timeline in which states must meet certain benchmarks demonstrating steps to address inadequacies and that any penalties or enforcement be coupled with direct enforcement against pipeline operators who fail to accurately locate and mark facilities.

The Texas pipeline associations commented that the first step in the process used to determine the adequacy of a state's program should be an evaluation of each state's program against a common set of known factors. They commented that once PHMSA completes its evaluation, the state should be permitted to comment on the evaluation before it is finalized. They also consider that excavation damage prevention stakeholders should be given an opportunity to comment on the evaluation. When a final determination has been made and a state's program is found inadequate in some respect, the state should be provided an opportunity to make improvements to its program.

API and AOPL commented that PHMSA should use a multi-step process when determining whether a state's program is inadequate, perhaps including preliminary determinations, interim determinations, and eventually final determinations. They also noted that at each step of the process, PHMSA should clearly describe, in functional rather than prescriptive terms, changes required for a state's program to be deemed adequate. They commented that the process for this provision should be the same as is currently used in the state certification program and that assessment of a state's program should be at the program level, not at an individual case level. API and AOPL also consider that enough time should be granted at each step of the process to allow states time to modify their programs as needed at the legislative and/or regulatory level. This process should, however, be completed expeditiously to ensure that compliance is timely and the public interest is preserved.

Similarly, PST commented that the administrative process for states to contest notices of inadequacy described in the ANPRM seems fair to the states. Among the concerns PST expressed, however, are the time periods that

would be established for: (1) PHMSA to issue a notice of inadequacy after its annual review; (2) a state to contest this notice; (3) PHMSA to make a final written determination; (4) a state to petition for reconsideration; and (5) PHMSA to rule on the petition for reconsideration. PHMSA needs to strike the right balance between waiting too long to intervene and not waiting long enough.

The Texas pipeline associations echoed this comment in that the opportunity for a state to make improvements must take into account an appropriate time period for the state agency to make the required improvements in a manner complying with state law. These time periods will need to be tailored to each situation because some may require legislative action while others may only require an internal agency policy change. They noted that while Federal administrative enforcement may be necessary in some states, reasonable efforts should be exerted and sufficient time provided to promote adequate state-based enforcement of excavation damage programs. They suggested that there may be situations where PHMSA could facilitate discussions between state stakeholders to establish a plan to address certain deficiencies.

Missouri PSC commented that the process outlined in the ANPRM appears to strike an appropriate balance between the Congressional directive to PHMSA to undertake Federal administrative enforcement while providing a state with a fair and efficient means of showing that its enforcement program is adequate. However, Missouri PSC noted further comments may well be necessary depending on the provisions of the actual proposed rule.

NAPSR questioned how PHMSA would anticipate seeking information from other agencies in those states where the enforcement agency is not the state pipeline safety agency?

Response

PHMSA does not propose to convene a commission to establish a predetermined timeline in which states must meet benchmarks demonstrating steps to address inadequacies in their damage prevention enforcement programs. PHMSA believes the state enforcement program evaluation criteria proposed in this NPRM, in effect, establish benchmarks.

PHMSA has proposed the process for evaluation of state enforcement programs and the process by which states may contest notices of inadequacy. PHMSA does not propose to consider excavation damage prevention stakeholder comments on state enforcement program evaluations.

PHMSA proposes to evaluate the states' enforcement programs whether they are administered by state pipeline agencies or other state authorities. PHMSA proposes to communicate the implications of this proposed rule with state enforcement authorities outside of state pipeline safety agencies, including attorneys general, state police agencies, and other authorities, as required.

PHMSA would plan to make its determination as to the adequacy of a state program as soon as practicable after completion of the state annual review. A state would then have 30 days from receipt of the notice of inadequacy to respond.

Review Cycle

API and AOPL noted that PHMSA should require annual reviews of state excavation damage prevention programs, but such reviews should be initiated after initial adequacy determinations have been completed. They noted that annual reviews should focus on continuing effectiveness indicators (i.e., whether or not excavation damage incidents are declining) and not simply on whether every incident has merely been documented and investigated.

NAPSR commented that the frequency of review of a state excavation damage prevention program should be tailored to the level of adequacy initially determined for the program, using criteria included in the final rule resulting from this ANPRM. Thus, states with the lowest level of initial adequacy could be reviewed annually, while states with higher levels could be reviewed less often. NAPSR also noted that the ANPRM speaks about an annual review that will likely include a review of all of the enforcement actions taken by the state over the previous year, and questioned whether this would be the state liaison asking a few additional questions during the annual evaluation or something more substantial with extensive documentation.

Similarly, Paiute Pipeline and Southwest Gas Corporation suggested that if a state is found nominally adequate in its most recent annual review, PHMSA should recommend placing the state on a staggered review period, such as two or more years. They commented, however, that if a state is found to be inadequate, PHMSA should recommend continuing with an annual review to assist the state in enhancing its excavation damage prevention program.

Michigan Consolidated Gas commented that considering the state has the funding and resources to administer its enforcement program, a periodic review is acceptable, but suggested that yearly is not necessary.

MidAmerican Energy commented that an annual review of a state's excavation damage prevention law enforcement program would be appropriate with the provision that a state should be allowed to petition PHMSA to show that its previously inadequate enforcement program has been upgraded so that Federal administrative enforcement is no longer required.

Response

PHMSA agrees that annual reviews of state excavation damage prevention law enforcement programs should include reviews of program effectiveness indicators and is proposing this in the NPRM. However, PHMSA believes it appropriate to include program adequacy as part of its annual review process, but does not propose to include additional evaluation of continuing effectiveness indicators.

Standards

API and AOPL commented that PHMSA should consider the establishment of minimum standards for critical elements of state one-call laws, such as, but not limited to, notification time, tolerance zones and white-lining (or otherwise denoting the area of intended proposed excavation).

EPPG and Panhandle Energy also noted that prior to an audit by Federal authorities of any state program, a clear and understood ''standard'' should be prepared that a state can be audited against and met. EPPG supports the ANPRM's annual audit proposal of state programs but is concerned that this effort could draw unnecessary resources away from PHMSA's other safety programs. Therefore, EPPG advocated a ''standard,'' which is understood by all parties that could be more quickly used as an audit tool during the annual audit.

Response

The criteria for review of state enforcement programs are proposed in this NPRM and PHMSA welcomes comment on these criteria. However, PHMSA is not proposing a model state one-call law or other audit standard in this rulemaking.

State Resources

APGA expressed concern that the review process may become very time consuming for both PHMSA and the states, which would have the unintended effect of diverting limited resources away from the excavation damage prevention effort. APGA

considers that there should be further discussion about exactly what this review would entail before a rule is proposed.

Michigan Consolidated Gas commented that PHMSA should consider when evaluating a state's enforcement program that this proposed process can be influenced by the ability of the state to carry out enforcement (i.e., state resources, funding, volume of complaints, etc.). Similarly, the Michigan PSC commented that PHMSA must be flexible depending upon the resources given to the state to provide for an adequate program.

Response

The state enforcement program review process should not be too time consuming or divert resources away from excavation damage prevention responsibilities. The review criteria and process in this proposed rule have been written to be as simple as possible to address this concern. However, PHMSA is seeking comment on this conclusion.

Resources can affect the ability of a state to meet its excavation damage prevention law enforcement responsibilities. However, PHMSA does not propose to assess state enforcement resources, but instead to assess state enforcement records. If state resources are insufficient to enforce the state excavation damage prevention law adequately, state enforcement records are likely to reflect the insufficiency.

C. Federal Requirements for Excavators

Section IV.C of the ANPRM sought comment on the establishment of the Federal requirements for excavators that PHMSA would be enforcing in a state that PHMSA has found to have an inadequate enforcement program. It noted that at a minimum the standards will reflect the words cited in the PIPES Act regarding requirements for excavators.

Section IV.C gave examples to which some commenters addressed specifically, including:

- Should the Federal requirements for excavators be limited to the minimum requirements reflected in the PIPES Act or should they be more detailed and extensive?
- Will implementing the 911 requirement cause any unintended consequences in practice?
- Are there suggested alternatives to these standards?

The ANPRM also suggested that the CGA Best Practices and API Recommended Practice 1166, Excavation Monitoring and Observation (November 2005), could be used to inform the development of such standards.

Federal Requirements

Several commenters, including AGA, API, AOPL, Michigan Consolidated Gas, and others, support establishing a Federal requirement for excavators. They noted that the minimum requirements in the PIPES Act and the U.S. Code are sufficient for establishing Federal requirements, and that keeping it simple is the most effective approach. API and AOPL commented that the proposed requirements should lead to greater pipeline safety by making excavators more aware of their one-call responsibilities and the consequences of failing to comply with state laws and regulations. AGA commented, however, that the ANPRM was unclear whether PHMSA intends to try and impose these standards on excavators that might include homeowners, land owners, private contractors, and other utilities.

AGC commented that if PHMSA deems a state's excavation damage prevention law enforcement program inadequate, the basic premises in the ANPRM are reasonable. AGC suggested that PHMSA should refer to the CGA Best Practices as a template for guidance standards in the absence of appropriate state standards until a determination of the adequacy of the state excavation damage prevention program is made.

Similarly, EPPG fully supports the development of a Federal requirement that PHMSA could use to determine if a state's excavation safety program is adequate but that PHMSA should not be the sole, or even primary, developer of this standard. A national consensus standard should be developed by all the various stakeholders, including Federal and state agency regulators, industry, the excavation community, members of the public, one-call organizations, and other excavation-affected parties.

GulfSafe commented that setting standards for excavators would bring some consistency to the excavation community, especially for those excavators who consistently work in multiple states. GulfSafe also considers it important that any prescriptive rule use the CGA Best Practices as a foundation for the rule to gain acceptance in the excavation community. The organization noted that the CGA Best Practices have long been a consensus based approach that has understood that one size doesn't fit all and has made allowances for geography and soil types as well as local practices. Best Practices are intended to be voluntary, not prescriptive, and there is evidence that they are working.

The APGA opposes establishment of Federal requirements for excavators and considers that PHMSA should defer to existing state laws where they prescribe excavation damage prevention requirements. APGA considers that creating a Federal requirement that would overrule state requirements only if the state is found not to be enforcing its excavation damage prevention law would create confusion in both the excavation and utility communities as to which requirements apply. APGA noted that only where a state has no standards for such activities should PHMSA apply Federal requirements. On the other hand, API and AOPL consider that while conditions vary from state-to-state and that ''one size does not fit all,'' PHMSA should establish minimum requirements through a notice and comment rulemaking process.

MidAmerican Energy Company commented that the minimum requirements presented in the ANPRM are an appropriate starting point, and that if experience reveals that additional or revised requirements are necessary, then revisions can be made based on the documented record. However, they noted that any additional or revised standards should consider that state excavation damage prevention laws pertain to more than just pipelines—they pertain to all types of underground facilities. It does not appear to be practical or prudent to approach this set of issues soley from a pipeline-only perspective, or to promote a ''one size fits all'' approach to underground facilities excavation damage prevention.

Missouri PSC, Paiute Pipeline, and Southwest Gas Corporation commented that Federal requirements limited to the minimum requirements reflected in the referenced Federal statute should be sufficient. However, Missouri PSC noted that Federal requirements should also refer to any state statutory provisions that are either more stringent or different in practice (such as damages being reported to the one-call center rather than the pipeline operator directly). EPPG and Panhandle Energy support the development of a template that PHMSA could use to determine if a state's excavation safety program is adequate. Panhandle considers that a national consensus standard or recommended practice should be developed by all the involved stakeholders, including Federal and state agency regulators, industry, the excavation community, members of the public, one-call organizations, and other excavation-affected parties. EPPG and Panhandle consider that a national consensus standard should address the issues mentioned in the ANPRM in

Section IV.C, at a minimum, but should also address many other issues including, among others:

- Expectations of individual state's programs; expectations of excavators, regardless of legal or contractual affiliation.
- Types of excavators covered by the standard (all excavators regardless of affiliation).
- Individual state's abilities to contest an annual Federal audit's findings.
- Physical excavation guidelines (locating, marking, communications, etc.).
- The role of one-call programs.
- Excavation damage reporting requirements.
- Description of excavator's responsibilities prior to and following any excavation, including any spill or damaging incident to the pipeline operator.
- Requirements to contact 911 if any release of product or natural gas occurs.
- Establishment of a mechanism to ensure the state receives reports of pipeline damage incidents in a timely manner.
- Use of ''emergency'' excavation processes.
- Excavation investigation requirements if pipeline damage occurs.
- Explicit state authority.
- Enforcement documentation requirements.
- Reference to other useful guidance documents, such as the Common Ground Alliance's work.
- Due process criteria for excavators if liability is found.

EPPG noted that some of these issues may not be suitable for a national consensus standard, and enforcement provisions are left out altogether since they are not suitable for a national consensus standard, but those not included in a standard could be incorporated within a future PHMSA ''state guide'' for excavation safety.

Michigan PSC commented that more detailed and extensive requirements are not necessary and may be in direct conflict with various states' laws. It also asked that ''excavator'' be defined. For example, will homeowners be subject to the Federal requirements?

NAPSR commented that PHMSA should not undermine state requirements with a second layer of excavator standards, but should defer to the individual states in such matters. They noted that the Federal law appears to define the expectations for excavators reasonably and provides a basis for enforcement. If PHMSA adopts regulations further defining what standards it believes an excavator should be held to, it risks creating two sets of standards, state and Federal, which excavators must follow. Due to the diversity of state requirements, the Federal requirements would undoubtedly contain inconsistencies and conflicts with the standards of at least some states.

Nicor commented that one aspect of the minimum standards that is inadequate involves the locating and marking of facilities for which ownership is unclear. During this period prior to completion, such facilities may be left unmarked after a call to the one-call system. As an example, Nicor noted that in a new subdivision, it is often unclear who has ownership of and responsibility for locating and marking sewer and water lines prior to completion, at which point the property owner or municipality takes ownership.

NUCA commented that the proposed Federal requirements effectively cover the primary responsibilities of the excavator, and are consistent with past DOT excavation damage prevention messages, such as the ''Dig Safely'' initiative of the 1990s. However, NUCA noted that utilization of ''location information'' is too vague for inclusion in a new Federal requirement. General information of underground pipeline facilities should never substitute for meeting all of the operator's locating and marking responsibilities.

Ohio PUC commented that requirements for pipeline operators and excavators should parallel, and PHMSA should consider providing guidance on how it intends to evaluate liability and enforcement if an excavator damages a pipeline system due to a pipeline owner/operator failing to mark underground lines or marking them incorrectly or inaccurately. Ohio PUC also commented that any Federal requirements should avoid specific requirements for marking standards that may conflict with reasonable and appropriate marking standards developed by individual states.

The PST commented that there are a number of issues that need to be addressed if PHMSA imposes Federal requirements on excavators when PHMSA deems a state to have an inadequate enforcement program. For example: (1) Will these standards be permanent or will excavators again be held to state standards once the state program is deemed adequate? (2) What happens if the state enforcement program is deemed inadequate but some of the state's standards or requirements are more stringent than the Federal government's? Will PHMSA impose its lesser standards? (3) If the standards revert to those of the state once the enforcement program is deemed adequate, it is conceivable that excavators would only be required to meet the Federal requirements for a short period of time (from one annual review to another). Should this happen, excavators are likely to become confused about their compliance responsibilities.

Southern California Gas and California Gas and Electric prefer that the standards for excavators for reporting damage should define ''damage'' in more detail, similarly to California Government Code 4216.4.(c). They noted that all damage, even coating or cathodic protection wire damage, can affect the integrity of the pipeline over time.

The three Texas pipeline associations commented that it is probably best if PHMSA adopts some set of Federal requirements for excavation damage prevention to be enforced in situations where a state program is determined to be inadequate. They noted that if the scope of a state agency's excavation damage prevention standards was not the source of the finding of inadequacy, it would be least disruptive to all aspects of industry for PHMSA to simply enforce the existing state standards. They further noted that this approach may cause some legal and practical issues for PHMSA to provide consistent enforcement. It could represent a significant challenge for PHMSA to educate its staff on the large variety of state standards that they would need to enforce.

USIC Locating Services' comments indicate that it is in favor of establishing standards for excavators with regard to: the use of a mandatory 72-hour notice requirement; limiting the scope of a ticket to 1,320 feet; use of a 24″ tolerance zone on either side of the buried facility; requiring white-marking (as opposed to just suggesting white-marking); emergency locate requests made by excavators; and strict penalties levied against excavators abusing emergency locate provisions.

The Wisconsin Transportation Builders Association (WTBA) commented that industry is concerned about the emphasis being placed solely on the excavator. They noted that while some requirements may be appropriate and helpful, they will nearly always create unintended consequences such as unnecessary cost and uncontrollable risk. According to the WTBA, there is rarely discussion regarding who is responsible for costs associated with unexpected delays to contractors. These costs are substantial and continue to affect the cost of public projects adversely.

Response

PHMSA proposes to apply Federal requirements to all excavators, with the exception of homeowners excavating with hand tools on their own property, in states PHMSA deems to have inadequate excavation damage prevention law enforcement programs. The term ''excavator'' is defined in this proposed rule. PHMSA cannot enforce state laws in the absence of Federal requirements because, to the extent state requirements go above and beyond the minimum Federal laws, PHMSA has no authority to enforce such requirements. Development of Federal requirements is, therefore, a prerequisite to Federal administrative enforcement. The standards proposed in this NPRM are designed to establish minimum requirements for excavators to avoid excavation damage to pipelines.

PHMSA does not propose to develop the Federal requirements through a consensus process, but rather through this rulemaking process. PHMSA used the PIPES Act to inform the development of the proposed Federal requirements.

This proposed rule does not refer to any state standards; PHMSA believes to do so could create an overly-prescriptive set of standards. Different states have different geographic and demographic conditions and an effective damage prevention program for one state may not necessarily work for another. However, PHMSA considers the proposed Federal regulations to be the minimal standard that is basic to any effective excavation damage prevention law enforcement program. Because state and Federal requirements will never be enforced simultaneously, the existence of a Federal requirement should not present any conflicts with existing state requirements for excavators. However, PHMSA is seeking comment on this issue. PHMSA does recognize that excavators should be informed of the Federal requirements in states where those standards will apply. To that end, PHMSA intends to continue to work with excavator trade associations, state agencies and one-call centers, the Common Ground Alliance, and other key excavation damage prevention stakeholders to communicate the requirements of the final rule and the adequacy status of each state as broadly as possible.

As we have stated previously, PHMSA's statutory enforcement authority pertains only to excavation damage prevention as it relates to pipelines. Because PHMSA has no jurisdiction over sewer and water facility operators, this proposed rule does not address those operators' responsibilities.

Requirements for pipeline operators regarding locating and marking their facilities are clearly defined in existing pipeline safety regulations (49 CFR Parts 190–199). PHMSA will continue to enforce existing Federal excavation damage prevention regulations applicable to pipeline operators if investigations reveal that pipeline operators fail to comply with those regulations. PHMSA does not propose to amend the standards currently applicable to pipeline operators in this rulemaking proceeding.

PHMSA considered the comments regarding one-call standards, but believes those types of standards would be overly-prescriptive and confusing for the purposes of this proposed rule. This proposed rulemaking does not impede any party's legal rights to pursue restitution of damages from any other party involved in a damage incident.

Implementing 911 Requirement

AGA commented that implementation of the 911 requirement can result in some unintended consequences that may actually cause behaviors and actions that are detrimental to pipeline safety. It noted that as a practice in responding to 911 calls being made, fire departments often bill their costs to the excavator and in some circumstances the natural gas utility. Very often, the excavator is a professional contractor. As a result, excavators are having second thoughts about dialing 911 when damage results in a leak, particularly on smaller diameter plastic pipe that is viewed as an ''easy'' repair for professional contractors who think they have the ability and the means to make an acceptable repair. Having unqualified personnel making repairs on natural gas lines can lead to catastrophic consequences.

AGA also noted that natural gas utilities try to foster a culture that encourages a contractor to notify the gas utility promptly when a pipe is dented or nicked, its coating scratched, or even when a tracer wire is cut or anode wire broken. The motivation for the utility is that it can respond and determine what repair actions are needed, to ensure the pipe will not fail or leak at some point in the future, and that the pipe can be located in response to future excavation activity. The utilities have developed relationships with contractors so that they trust they will not be billed in circumstances where the contractors are forthcoming and can demonstrate they have made a reasonable attempt to dig responsibly and follow one-call and state statutes.

AGA, Missouri PSC, NUCA, Southern California Gas, California Gas and Electric, and others expressed concern that the volume of calls resulting from this requirement may be unmanageable and could result in limited emergency response resources being used in situations that really do not necessitate an emergency response. AGA, Southern California Gas, and California Gas and Electric noted, for example, that as a result fire departments could have to respond to every excavation damage incident reported via 911, including breaks on small diameter service lines where the gas may be safely venting to the atmosphere and public safety is generally not threatened. The response of fire departments to potentially thousands of inconsequential excavation damages could compromise their ability to respond to other events that are actually life-threatening emergencies. Missouri PSC was aware of one major gas distribution operator that is having its practice of advising excavators to call 911 questioned by local emergency officials.

MidAmerican Energy Company, Paiute Pipeline and Southwest Gas Corporation commented that the 911 requirement should not be mandated for all releases of hazardous materials. If a violation of the excavation damage prevention laws results in a public safety emergency that may endanger life or cause serious bodily harm or damage to property, then, as for any public safety emergency, the use of the 911 telephone notification system would be appropriate. Otherwise, calling 911 should not be necessary.

Regarding emergency responders, NUCA commented that the proposed rule should address the role of first responders in situations where the escape of flammable, toxic, or corrosive product is released as a result of damage to an underground pipeline. NUCA noted that if a 911 call is made, the responders must be trained in how to respond to the situation effectively. NUCA noted that traditionally, representatives from the company that owns the gas or hazardous liquid pipeline are best educated and equipped to handle these situations.

Nicor commented that the 911 requirement is most appropriate when someone other than the pipeline owner or operator damages the pipeline. Operators who accidentally damage their own facilities should have the flexibility of calling 911 if they need further assistance in making an area safe. As a basis, Nicor cited that pipeline operators are also sometimes excavators and that provisions should be developed for instances where an

operator's excavation crew accidentally damages its own facility and that results in a release of natural gas. The crews are trained and qualified to handle emergency response and to make repairs. Often times, the release of gas is secured very quickly and should not warrant calling 911. Additionally, after responding to a 911 call involving excavator damage and a release of natural gas from a pipeline, some fire departments have sent invoices to natural gas operators for costs incurred for hazmat response. Nicor noted that the inability of an operator to exercise discretion in calling 911 may lead to strained relationships between natural gas pipeline operators and fire departments.

NUCA, Paiute Pipeline and Southwest Gas Corporation commented that PHMSA should specify that excavators must call 911 if the ''damage results in the escape of any flammable, toxic, or corrosive gas or liquid,'' as specified in the PIPES Act, instead of trying to include all of these under the umbrella of ''hazardous products.'' They noted that excavators are not emergency responders, and the regulation should be as specific as possible to distinguish between natural gas and other gases or liquids to identify what products are considered ''hazardous'' by PHMSA.

Michigan PSC noted that implementing the 911 requirement will not cause any unintended consequences in practice. Paiute and Southwest Gas Corporation also commented that all API RP 1162 related communications and activities should promote the requirement of calling 911 if a pipeline damage incident causes a release of product. They also noted that although they cannot reference any empirical evidence that identifies any unintended consequences of implementing the 911 requirement, as excavators become better educated on this requirement, calls to emergency response agencies will likely increase.

Response

PHMSA considered all of the comments pertaining to implementing the 911 requirement. The PIPES Act requires excavators to promptly call the 911 emergency telephone number if a damage results in the escape of any flammable, toxic, or corrosive gas or liquid that may endanger life or cause serious bodily harm or damage to property. PHMSA understands that excavators and utility operators are sometimes required to reimburse 911 centers for the cost of dispatching emergency response personnel to a damage site. Therefore, PHMSA is proposing that excavators must call 911 in these instances, but may exercise discretion as to whether to request that the 911 operator dispatch emergency response personnel to the damage site. PHMSA welcomes additional comments on the 911 issue.

Reference to API RP 1166

AGA commented that API RP 1166 does not apply in developing standards for excavators in that it does not apply to natural gas distribution operators. AGA noted that this standard is a useful resource for gas transmission pipeline operators, but that the decision to monitor and possibly observe any excavation activity is at the discretion of the pipeline operator.

Several commenters noted that the CGA Best Practices and API Recommended Practice 1166 could be used to inform the development of such standards, but that the minimum requirements stated in 49 U.S.C. 60114 are appropriate. Paiute Pipeline and Southwest Gas Corporation commented that PHMSA should refrain from citing best practices from any organization, publication or individual entity as regulation.

Response

PHMSA is not proposing to use API RP 1166 to inform the development of the Federal requirement for enforcement and believes the requirements stated in the PIPES Act are appropriate.

D. Adjudication Process

Section IV.D of the ANPRM sought comment on the adjudication process that PHMSA would use if it cited an excavator for failure to comply with Federal requirements established by this rulemaking process in a state where PHMSA has deemed the enforcement program inadequate. It noted that at a minimum, an excavator that allegedly violated the applicable requirement would have the right to: receive written notice of the allegations, including a description of the factual evidence supporting the allegations; file a written response to the allegations; request a hearing; be represented by counsel if the excavator chooses; examine the evidence; submit relevant information and call witnesses on his or her behalf; and otherwise contest the allegations of violation. Hearings would likely be held at one of PHMSA's five regional offices or via teleconference. The hearing officer would be an attorney from PHMSA's Office of Chief Counsel. The excavator would also likely have the opportunity to petition for reconsideration of the agency's administrative decision and judicial review of final agency action would be available to the same extent it is available to a pipeline operator.

Commenters were invited to submit their views on this process or suggest alternatives. For example:

- Is the process too formal in the sense that excavators contesting a citation would have to prepare a written response for the record and potentially appear before a hearing officer?
- Is the process not formal enough in the sense that it does not provide for formal rules of evidence, transcriptions, or discovery? Or does this process strike the right balance by being efficient and at the same time providing enough formality that excavators feel the process is fair and their due process rights are maintained?
- How should the civil penalty criteria found in 49 U.S.C. 60122(b) apply to excavators?

All Parties

AGC and NUCA commented that the adjudication process outlined by PHMSA seems fair; however, PHMSA must carefully consider that if an excavator is not found to be at fault, excavators must maintain the right to pursue damages for downtime and the ability to recover legal expenses. Allowing excavators all rights to due process should be recognized, and the same privileges afforded to others subject to Federal administrative enforcement (i.e., pipeline operators) should be afforded to excavators. NUCA noted that ensuring excavators the right to pursue damages (i.e., downtime expenses), must be considered when establishing a new Federal adjudication process. NUCA also noted that excavators regularly lose significant revenue in downtime expenses after having to shut down projects because of underground facilities that were either not marked or marked inaccurately. According to NUCA, this is an enormous financial problem facing professional excavators, and one that must be addressed in the PHMSA regulation. AGC agreed that hearings should be open to the public and conducted at one of PHMSA's five regional offices or an alternative location accessible to all parties.

MidAmerican Energy Company also noted that participation in any process should not preclude the ability to pursue further legal remedies a participant may determine to be appropriate.

USIC Locating Services commented that whatever process is established should provide interested parties a right of intervention so that the resulting record accurately reflects the positions of all affected parties.

Nicor noted that excavators who are also operators of pipelines regulated under 49 CFR Part 192 already fall under the enforcement requirements of Subpart B in 49 CFR Part 190. If PHMSA determines that it must take enforcement action against other excavators the same process could be followed.

Response

PHMSA agrees that an excavator must maintain the right to pursue damages for downtime and the ability to recover legal expenses if the excavator is not found to be at fault in an excavation damage incident investigation; this proposed rule does not infringe upon those rights. In addition, this proposed rule is intended to establish adjudication procedures that protect the rights of excavators to due process. PHMSA also believes that interested parties should have the opportunity to attend and observe hearings and the opportunity to request intervention status within the PHMSA adjudication process so that the resulting record accurately reflects the position of all affected parties.

Appeals

AGC commented that the excavator should have the opportunity to petition for reconsideration of PHMSA's administrative decision, and judicial review of final agency action should be available to the same extent it is available to a pipeline operator. Similarly, the three Texas pipeline associations commented that there should be an appeals process for a party to challenge the outcome of the hearing.

Response

The process for an excavator to request reconsideration or appeal a finding of violation by PHMSA is provided in this proposed rule.

Arbitration and Advisory Committees

Spectra Energy commented that each state should have a clearly defined process for arbitration or review of enforcement actions for violations of excavation damage prevention regulations. Spectra suggested that one possible method is to have an independent panel that would review and recommend final enforcement action. The panel should include members that represent the one-call center, pipeline operators and the excavator community.

Response

As noted above, committees composed of representatives of all excavation damage prevention stakeholders to advise enforcement agencies are a proven method of ensuring fair and balanced excavation damage prevention law enforcement. Such may be the case with arbitration committees. While PHMSA does not propose to use an advisory committee for Federal administrative enforcement proceedings, PHMSA does not object to a state's use of an advisory committee in the state enforcement process.

Civil Penalties

AGA noted that PHMSA must distinguish between levying any fines on entities or persons engaged in excavation damage prevention activities, as opposed to the fines and enforcement actions PHMSA traditionally takes against pipeline operators under 49 U.S.C. 60122(a). Similarly, Paiute Pipeline and Southwest Gas Corporation commented that the penalty criteria found in 49 U.S.C. 60122(b) are excessive to the average excavator and to the average excavation damage.

Paiute Pipeline, Southwest Gas Corporation, and Missouri PSC commented that PHMSA should work with the individual states on invoking civil penalties in their individual laws. Missouri PSC agreed, commenting that unless the civil penalty provisions existing in a state's law are the reason a state's enforcement program is deemed inadequate, the state's penalties should be applied rather than the Federal penalties.

Paiute Pipeline and Southwest Gas Corporation commented that the adjudication process outlined is generally adequate, but to make the process fair and efficient a step should be added allowing an alleged violator to accept PHMSA's recommendation for a reduced penalty and agreement to take some remedial action such as attending an educational seminar on underground excavation damage prevention and pipeline safety.

WTBA commented that civil penalties should not apply to excavators unless there was a truly unlawful act of negligence.

MidAmerican Energy Company agreed that the penalty criteria found in 49 U.S.C. 60122(b) are reasonable to consider in evaluating the amount of a civil penalty to assess for a violation of the one-call provisions. MidAmerican also questions whether the violator's (1) ability to pay and (2) any effect on the ability of the violator to continue doing business are necessarily relevant criteria in all cases. MidAmerican noted that the remainders of the penalty criteria appear to provide the flexibility for the agency to tailor the assessment of a civil penalty to the specific circumstances of a particular violation. It considers that ''an egregious violation or a pattern of violations evidencing an intentional or negligent disregard of the one-call provisions could present a serious threat to the public safety. In those, hopefully unusual, cases, the dangers presented by an excavator continuing to exhibit such a callous disregard for the public safety should take precedence over the effect that the assessment of a civil penalty might have on the violator's ability to pay or to continue doing business. The Illinois administrative regulations also contain these two penalty criteria.''

The three Texas pipeline associations commented that regardless of process, any person or entity found guilty of violating the Federal requirements should face financial penalties that provide incentives for future compliance and reflect the seriousness of the violation.

Response

PHMSA proposes to use the civil penalty provisions described in 49 U.S.C. 60101 et seq. as a basis for civil penalties levied against excavators subject to this proposed rule. PHMSA believes this approach is preferable to establishing alternate civil penalty provisions specific to this proposed rule. PHMSA proposes to take into account a violator's ability to pay, ability to continue to do business, and the seriousness of the violation when determining appropriate civil penalties. PHMSA seeks comment on the proposed use of civil penalties.

Formality

AGA, AGC, MidAmerican Energy, and Missouri PSC agree that the adjudication process noted in the ANPRM is not too formal. API, AOPL, and NUCA all support the process as described. API and AOPL commented that the adjudication should allow the hearing officer sufficient flexibility to conduct the proceeding promptly and efficiently, such that decisions may be rendered without undue delay.

Panhandle Energy and EPPG both suggested that the processes defined in 49 CFR Part 190 be followed. Spectra Energy Transmission noted that when an enforcement action relating to violation of excavation damage prevention regulations is initiated, the excavator and pipeline operator should have the opportunity for a hearing.

AGA commented that the adjudication process must be a formal one, where the excavator is able to defend his or her actions, explaining how and why the damage occurred, and to contest an alleged violation. AGA and

AGC both noted that the adjudication process must provide for formal rules of evidence, transcriptions, and discovery, to conduct fair proceedings that ensure all parties' rights to due process are maintained. AGC commented that a formal adjudication process should be adopted to preserve the rights of an excavator charged with a violation. The process should include the right(s) to: receive written notice of the allegations, including a description of the evidence the allegations are based on; allow for a submission in response to the allegations; and, allow for an informal hearing with counsel if necessary. AGC also noted that the adjudication procedure should thoroughly examine the evidence and allow for submission of relevant information and testimony from witnesses to adjudicate the allegation of violation thoroughly.

MidAmerican Energy commented that while the proposed process strikes the appropriate balance, strict adherence to the formal rules of evidence or extensive discovery is not necessary or appropriate. MidAmerican also suggested that transcripts could be optional at the expense of the state or requesting party.

Paiute Pipeline and Southwest Gas Corporation commented that the adjudication process should remain at the state level, and not a formal Federal process. They noted that excavators would appreciate the efficiency of maintaining the adjudication process at the state level, and that if damages are involved, there is always the claim/court system for excavators, operators and states with enforcement authority for billable and damage awards. They consider that PHMSA should only step in when the entire program is deemed inadequate, and should not mandate enforcement at the Federal level but rather partner with the states to enhance the enforcement at the state or local level. They consider that PHMSA's support of states and their excavation damage prevention programs will ultimately provide the excavation damage prevention authority and enforcement PHMSA is seeking with the proposed rulemaking procedures. They commented that PHMSA may want to include a provision for the excavating community to submit a request for Federal involvement if they feel the process is unfair and their rights are not being maintained at the state level.

WTBA commented that the proposed process appears to be too formal and does not sound like an ''informal hearing.'' It noted that there must be an opportunity for a true informal hearing, at a location near the project, to discuss actual facts of the incident. It also commented that an informal hearing must involve individuals that are knowledgeable of construction and design that are capable of determining whether reasonable efforts were made by all parties involved.

APGA agrees that enforcement proceedings should be conducted at the PHMSA regional office level rather than headquarters. APGA also noted that Virginia has an excavation damage prevention law enforcement program that involves a panel comprised of excavators, facility owners and others to advise on the appropriate level of penalties, if any. APGA suggests that PHMSA consider whether a similar system could work for any Federal administrative enforcement actions.

Response

The majority of commenters support PHMSA's approach for the adjudication process proposed in this NPRM and that the process is sufficiently formal to protect the rights of excavators to due process, but not so formal as to be overly burdensome for alleged violators.

PHMSA is not proposing to use an advisory panel modeled after Virginia's excavation damage prevention program, but instead to follow the process described in this proposed rule.

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

Section IV.E of the ANPRM invited commenters to submit their feedback and comments on the adequacy of PHMSA's existing requirements for pipeline operators to participate in one-call organizations, respond to dig tickets, and perform their locating and marking responsibilities. Under existing pipeline safety regulations 49 CFR 192.614 for gas pipelines and 49 CFR 195.442 for hazardous liquid pipelines, operators are required to have written excavation damage prevention programs that require, in part, that the operator provide for marking its pipelines in the area of an excavation for which the excavator has submitted a locate request.

Comments could address, for example, whether PHMSA should consider making the existing regulatory requirements more detailed and explicit in terms of:

- 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 following receipt of an excavation notification.

Federal One-Call

No commenters that addressed the existing pipeline safety damage prevention regulations, 49 CFR 192.614 and 195.442, considered these requirements to be inadequate, nor did they believe that PHMSA needed to make these requirements more detailed or specific. Several commented that to do otherwise would lead to confusion where the Federal requirements were different from state standards.

Commenters suggested that PHMSA should enforce states' laws and that states already have the ability to establish more detailed regulations on pipeline operators for facility locating and marking. AGA considers that it is not logical for PHMSA to suggest that Federal requirements addressing one-call types of issues can be imposed at the national level. They consider that adding more details at the Federal level will be problematic since it may conflict with existing state regulations and cannot take unique state laws into consideration. AGA also commented that no language in the Federal regulations is necessary regarding the ability of excavators to request a consultation or job-site meeting with underground facility operators, since most one-call centers already have a procedure for this.

AGC suggested that PHMSA encourage state regulatory authorities to equally enforce state laws applicable to underground facility owners and operators who fail to respond to a location request or fail to take reasonable steps, in response to such a request. AGC also noted that state enforcement programs should consider the costs involved for excavators when they incur downtime due to a violation by an operator or a locator.

Nicor commented that state authorities must make enforcement of owner/operator requirements a higher priority and should consider the CGA Best Practices.

API and AOPL commented that pipeline operators should be held to the same standards as other facility owners and excavators, and should be held accountable to respond to locate requests in a timely and accurate manner. They noted, however, that they do support regulations, such as those in California (CA Govt. Code Section 4216–4216.9), that impose more explicit and additional requirements for both the owner and the excavator when excavating in close proximity to high priority, subsurface installations.

GulfSafe commented that offshore operators are exempt from being members of a one-call system. It noted

that this was an appropriate exemption at the time it was written but may need revisiting as technology has progressed over the past two decades to be a more practicable solution to prevent damages offshore. GulfSafe also suggested that this is the suitable time to address the enforcement issue that goes along with this exemption, since there are large differences in state laws regarding offshore pipelines and enforcement may fall to Federal agencies by default.

Ancillary to this concern, Michigan Consolidated Gas commented that PHMSA consider the excavator's ability to call in an unreasonable number of tickets per day causing resource allocation issues for locate personal. Also, Michigan PSC recommended that all meetings between an excavator and operator be documented and digital pictures be taken at job-sites prior to excavation activity.

Response

PHMSA does not have the authority to enforce state laws. PHMSA believes that specifying the number of tickets per day an excavator can create, as well as how meetings between excavators and operators should be documented as part of the Federal requirement is not appropriate given the ''backstop'' (i.e., Federal enforcement only in the absence of adequate state enforcement) nature and use of the Federal authority. In addition, PHMSA believes that addressing the exemption for offshore operators is outside the scope of this NPRM.

V. Regulatory Analysis and Notices

The proposed rule would amend the Federal Pipeline Safety Regulations (49 CFR Parts 190–199) to establish criteria and procedures PHMSA will use to determine the adequacy of state pipeline excavation damage prevention law enforcement program.

Statutory/Legal Authority for This Rulemaking

PHMSA's general authority to publish this proposed rulemaking and prescribe pipeline safety regulations is codified at 49 U.S.C. 60101 *et seq.* Section 2(a) of the PIPES Act (Pub. L. 109–468) authorizes the Secretary of Transportation to enforce pipeline damage prevention requirements against persons who engage in excavation activity in violation of such requirements provided that, through a proceeding established by rulemaking, the Secretary has determined that the relevant state's enforcement is inadequate to protect safety.

Executive Order 12866, Executive Order 13563, and DOT Policies and Procedures

This proposed rule is a significant regulatory action under section 3(f) of Executive Order 12866 (58 FR 51735) and 13563, therefore, was reviewed by the Office of Management and Budget. This proposed rule is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

Executive Orders 12866 and 13563 require agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.''

Because excavation damage is one of the major causes of pipeline incidents, the expected benefits of this rulemaking action are an increased deterrent to violations of one-call requirements and the attendant reduction in pipeline incidents and accidents caused by excavation damage. Failure to use an available one-call system is a known cause of pipeline accidents.

A regulatory evaluation containing a statement of the purpose and need for this rulemaking and an analysis of the costs and benefits is available in the docket.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), PHMSA must consider whether rulemaking actions would have a significant economic impact on a substantial number of small entities. Pursuant to 5 U.S.C. 603, PHMSA has made an initial determination that the proposed rule will not have a significant economic impact on a substantial number of small entities. This determination is based on the minimal cost to excavators to call the one-call center. In addition, the proposed rule is procedural in nature and its purpose is to set forth an administrative enforcement process for actions that are already required. The proposed rule would appear to have no material effect on the costs or burdens of compliance for regulated entities, regardless of size. Thus, the marginal cost, if any, that would be imposed by the rule on regulated entities, including small entities, would not be significant. Based on the facts available about the expected impact of this rulemaking, I certify that this proposed rulemaking will not have a significant economic impact on a substantial number of small entities. PHMSA invites public comments on this certification.

Since the Regulatory Flexibility Act does not require an initial (or final) regulatory flexibility analysis when a rule will not have a significant economic impact on a substantial number of small entities, such an analysis is not necessary for this proposed rule. Nonetheless, PHMSA invites public comment on the proposed rule's effect on the costs, profitability, competitiveness of, and employment in small entities to ensure that no significant economic impact on a substantial number of small entities would be overlooked. The following information is provided to assist in such comment:

Description of the small entities to which the proposed rule will apply.

In general, the enforcement process set forth in the proposed rule will potentially apply to any person conducting excavation activity in the vicinity of a pipeline who fails to call the one-call center or otherwise violates applicable requirements. The rule does not apply to homeowners excavating with hand tools on their own property. A precise estimate of the number of small entities is not currently feasible because Federal administrative enforcement will only be considered in states that do not have an adequate enforcement program and determinations on state programs turn on a number of factors that will require a factual analysis on a case-by-case basis. PHMSA seeks any information or comment on these issues, as noted below.

Description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

This proposed rule imposes no additional reporting costs to businesses, including small businesses. The proposed rule is procedural in nature and its purpose is to set forth an administrative enforcement process for actions that are already required. The costs impacts associated with this proposed rulemaking would be imposed on Federal and state governments.

Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule.

PHMSA is unaware of any duplicative, overlapping, or conflicting Federal rules. As noted below, PHMSA seeks comments and information about any such rules, as well as any industry

rules or policies that would conflict with the requirements of the proposed rule.

Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.

PHMSA seeks comments and information about any alternatives such as: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) any exemption from coverage of the rule, or any part thereof, for such small entities.

Executive Order 13175

PHMSA has analyzed this proposed rule according to the principles and criteria in Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments.'' Because this proposed rule would not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

Paperwork Reduction Act

Pursuant to 5 CFR 1320.8(d), PHMSA is required to provide interested members of the public and affected agencies with an opportunity to comment on information collection and recordkeeping requests. PHMSA estimates that the proposals in this rulemaking will cause an increase to the currently approved information collection titled ''Gas Pipeline Safety Program Certification and Hazardous Liquid Pipeline Safety Program Certification'' identified under Office of Management and Budget (OMB) Control Number 2137–0584. Based on the proposals in this rule, PHMSA estimates a 20% increase to states with gas pipeline safety program certifications/agreements. PHMSA estimates the increase at 12 hours per respondent for a total increase of 612 hour (12 hrs*51 respondents). As a result, PHMSA will submit an information collection revision request to OMB for approval based on the requirements in this proposed rule. The information collection is contained in the pipeline safety regulations, 49 CFR Parts 190–199. The following information is provided for that information collection: (1) Title of the information collection; (2) OMB control number; (3) Current expiration date; (4) Type of request; (5) Abstract of the information collection activity; (6) Description of affected public; (7) Estimate of total annual reporting and recordkeeping burden; and (8) Frequency of collection. The information collection burden for the following information collection will be revised as follows:

Title: Gas Pipeline Safety Program Certification and Hazardous Liquid Pipeline Safety Program Certification.

OMB Control Number: 2137–0584.

Current Expiration Date: 6/30/2012.

Abstract: A state must submit an annual certification to assume responsibility for regulating intrastate pipelines, and certain records must be maintained to demonstrate that the state is ensuring satisfactory compliance with the pipeline safety regulations. PHMSA uses that information to evaluate a state's eligibility for Federal grants.

Affected Public: State and local governments.

Annual Reporting and Recordkeeping Burden:

Total Annual Responses: 67.

Total Annual Burden Hours: 4,532 (this estimate includes an increase of 612 hours).

Frequency of Collection: Annually and occasionally at states' discretion.

Requests for a copy of this information collection should be directed to Cameron Satterthwaite, Office of Pipeline Safety (PHP–30), Pipeline Hazardous Materials Safety Administration (PHMSA), 2nd Floor, 1200 New Jersey Avenue SE., Washington, DC 20590–0001, Telephone (202) 366–4595.

Comments are invited on:

(a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Send comments directly to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attn: Desk Officer for the Department of Transportation, 725 17th Street NW., Washington, DC 20503. Comments should be submitted on or prior to June 1, 2012.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It would not result in costs of $141 million, adjusted for inflation, or more in any one year to either state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the proposed rulemaking.

National Environmental Policy Act

PHMSA analyzed this proposed rule in accordance with section 102(2)(c) of the National Environmental Policy Act (42 U.S.C. 4332), the Council on Environmental Quality regulations (40 CFR Parts 1500–1508), and DOT Order 5610.1C, and has preliminarily determined that this action will not significantly affect the quality of the human environment. A preliminary environmental assessment of this rulemaking is available in the docket and PHMSA invites comment on environmental impacts of this rule, if any.

Executive Order 13132

PHMSA has analyzed this proposed rule according to the principles and criteria of Executive Order 13132 (''Federalism''). A rule has implications for federalism under Executive Order 13132 if it has a substantial direct effect on state or local governments, on the relationship between the national government and the states, or on the distribution of powers and responsibilities among the various levels of government.

The Federal pipeline safety statutes in 49 U.S.C. 60101, et seq., create a strong Federal-state partnership for ensuring the safety of the Nation's interstate and intrastate pipelines. That partnership permits states to regulate intrastate pipelines after they certify to PHMSA, among other things, that they have and are enforcing standards at least as stringent as the Federal requirements, and are promoting a damage prevention program. PHMSA provides Federal grants to states to cover a large portion of their pipeline safety program expenses, and PHMSA also makes grants available to assist in improving the overall quality and effectiveness of their damage prevention programs.

In recognition of the value of this close partnership, PHMSA has made and continues to make every effort to ensure that our state partners have the

opportunity to provide input on this rulemaking. For example, at the ANPRM stage, PHMSA sought advice from the National Association of State Pipeline Safety Representatives (NAPSR) and offered NAPSR officials the opportunity to meet with PHMSA and discuss issues of concern to the states. As a result of these consultation efforts with state officials and their comments on the ANPRM, PHMSA became aware of state concerns regarding the rigorousness of the criteria for program effectiveness. PHMSA has taken these concerns into account in developing the proposed criteria in the NPRM. State and local governments will be able to raise any other federalism issues during the comment period for this NPRM and we invite state and local officials with an interest in this rulemaking to comment on any impacts to their governments.

Under the proposed rule, Federal administrative enforcement against an excavator that violates damage prevention requirements would be taken only in the demonstrable absence of enforcement by a state authority. Additionally, the proposed rule would establish a framework for evaluating state programs individually so that the exercise of Federal administrative enforcement in one state has no effect on the ability of all other states to continue to exercise state enforcement authority. This proposed rule would not preempt state law in the state where the violation occurred, or any other state, but would authorize Federal enforcement in the limited instance explained above. Finally, a state that establishes an effective damage prevention enforcement program has the ability to be recognized by PHMSA as having such a program.

For the reasons discussed above, and based on the results of our consultations with the states, PHMSA has concluded the proposed rule will not have a substantial direct effect on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. In addition, this proposed rule does not impose substantial direct compliance costs on state and local governments. Accordingly, the consultation and funding requirements of Executive Order 13132 do not apply.

Executive Order 13211

This proposed rule is not a ''significant energy action'' under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). It is not likely to have a significant adverse effect on supply, distribution, or energy use. Further, the Office of Information and Regulatory Affairs has not designated this proposed rule as a significant energy action.

Privacy Act Statement

Anyone may search the electronic form of all comments received for any of our dockets. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (70 FR 19477) or visit *http://dms.dot.gov.*

List of Subjects

49 CFR Part 196

Administrative practice and procedure; Pipeline safety; Reporting and recordkeeping requirements.

49 CFR Part 198

Grant programs-transportation; Pipeline safety; Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, PHMSA proposes to amend 49 CFR Subchapter D as follows:

1. Part 196 is added to read as follows:

PART 196—PROTECTION OF UNDERGROUND PIPELINES FROM EXCAVATION ACTIVITY

Subpart A—General

Subpart B—One-Call Damage Prevention Requirements

Subpart C—Administrative Enforcement Process

Authority: 49 U.S.C. 60101 *et seq.*

Subpart A—General

§ 196.1 What is the purpose and scope of this part?

This part prescribes the minimum requirements that excavators must follow to protect underground pipelines from excavation-related damage. It also establishes an enforcement process for violations of these requirements.

§ 196.3 Definitions.

Damage or *excavation damage* means any impact that results in the need to repair or replace a pipeline due to a weakening, or the partial or complete destruction, of the pipeline, including, but not limited to, the pipe, its protective coating, lateral support, cathodic protection or the housing for the line device or facility.

Excavation means any operation using non-mechanical or mechanical equipment or explosives used in the movement of earth, rock or other material below existing grade. This includes, but is not limited to, augering, blasting, boring, demolishing, digging, ditching, dredging, drilling, driving-in, grading, plowing-in, pulling-in, ripping, scraping, trenching, and tunneling. This does not include homeowners excavating on their own property with hand tools.

Excavator means any person or legal entity, public or private, proposing to or engaging in excavation.

One-call means a notification system through which a person can notify pipeline operators of planned excavation to facilitate the locating and marking of any pipelines in the excavation area.

Pipeline means all parts of those physical facilities through which gas, carbon dioxide, or a hazardous liquid moves in transportation, including, but not limited to, pipe, valves, and other appurtenance attached or connected to pipe, pumping units, compressor units, metering stations, regulator stations, delivery stations, holders, fabricated assemblies, and breakout tanks.

Subpart B—One-Call Damage Prevention Requirements

§ 196.101 What is the purpose and scope of this subpart?

This subpart prescribes the minimum requirements that excavators must follow to protect underground pipelines from excavation-related damage.

§ 196.103 What must an excavator do to protect underground pipelines from excavation-related damage?

Prior to commencing excavation activity where an underground gas or hazardous liquid pipeline may be present, the excavator must:

(a) Use an available one-call system before excavating to notify operators of underground pipeline facilities of the timing and location of the intended excavation;

(b) If underground pipelines exist in the area, wait for the pipeline operator to arrive at the excavation site and establish and mark the location of its underground pipeline facilities before excavating;

(c) Excavate with proper regard for the marked location of pipelines an operator has established by respecting the markings and taking all practicable steps to prevent excavation damage to the pipeline; and

(d) Make additional use of one-call as necessary to obtain locating and marking before excavating if additional excavations will be conducted at other locations.

§ 196.105 Are there any exceptions to the requirement to use one-call before digging?

Homeowners using only hand tools, rather than mechanized excavating equipment, on their own property are not required to use a one-call prior to digging.

§ 196.107 What must an excavator do if a pipeline is damaged by excavation activity?

If a pipeline is damaged in any way by excavation activity, the excavator must report such damage to the pipeline operator, whether or not a leak occurs, at the earliest practicable moment following discovery of the damage.

§ 196.109 What must an excavator do if damage to a pipeline from excavation activity causes a leak where product is released from the pipeline?

If damage to a pipeline from excavation activity causes the release of any flammable, toxic, or corrosive gas or liquid from the pipeline that may endanger life or cause serious bodily harm or damage to property or the environment, the excavator must immediately report the release of hazardous products to appropriate emergency response authorities by calling 911. Upon calling the 911 emergency telephone number, the excavator may exercise discretion as to whether to request emergency response personnel be dispatched to the damage site.

§ 196.111 What if a pipeline operator fails to respond to a locate request or fails to accurately locate and mark its pipeline?

PHMSA may enforce existing requirements applicable to pipeline operators, including those specified in 49 CFR 192.614 and 195.442 and 49 U.S.C. 60114 if a pipeline operator fails to respond to a locate request or fails to accurately locate and mark its pipeline. The limitation in § 60114(f) does not apply to enforcement taken against pipeline operators and excavators working for pipeline operators.

Subpart C—Enforcement

§ 196.201 What is the purpose and scope of this subpart?

This subpart describes the enforcement authority and sanctions exercised by the Associate Administrator, OPS for achieving and maintaining pipeline safety under this Part. It also prescribes the procedures governing the exercise of that authority and the imposition of those sanctions.

§ 196.203 What is the administrative process PHMSA will use to conduct enforcement proceedings for alleged violations of excavation damage prevention requirements?

PHMSA will use the existing adjudication process for alleged pipeline safety violations set forth in 49 CFR Part 190, Subpart B. This process provides for notification that a probable violation has been committed, a 30-day period to respond including the opportunity to request an administrative hearing, the issuance of a final order, and the opportunity to petition for reconsideration.

§ 196.205 Can PHMSA assess administrative civil penalties for violations?

Yes. When the Associate Administrator, OPS has reason to believe that a person has violated any provision of the 49 U.S.C. 60101 *et seq.* or any regulation or order issued thereunder, including a violation of excavation damage prevention requirements under this Part and 49 U.S.C. 60114(d) in a state with an excavation damage prevention law enforcement program PHMSA has deemed inadequate under 49 CFR Part 198, Subpart D, PHMSA may conduct a proceeding to determine the nature and extent of the violation and to assess a civil penalty.

§ 196.207 What are the maximum administrative civil penalties for violations?

The maximum administrative civil penalties that may be imposed are specified in 49 U.S.C. § 60122.

§ 196.209 May other civil enforcement actions be taken?

Whenever the Associate Administrator, OPS has reason to believe that a person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of 49 U.S.C. 60101 *et seq.,* or any regulations issued thereunder, PHMSA, or the person to whom the authority has been delegated, may request the Attorney General to bring an action in the appropriate U.S. District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, civil penalties, and punitive damages as provided under 49 U.S.C. 60120.

§ 196.211 May criminal penalties be imposed for violations?

Yes. Criminal penalties may be imposed as specified in 49 U.S.C. 60123.

PART 198—REGULATIONS FOR GRANTS TO AID STATE PIPELINE SAFETY PROGRAMS

2. The authority citation for part 198 is amended to read as follows:

Authority: 49 U.S.C. 60101 *et seq.;* 49 U.S.C. 6101 *et seq.;* 49 CFR 1.53.

3. 49 CFR Part 198 is amended by adding a new Subpart D to read as follows:

Subpart D—State Damage Prevention Enforcement Programs

Sec.

Subpart D— State Damage Prevention Enforcement Programs

§ 198.51 What is the purpose and scope of this subpart?

This subpart establishes standards for effective state damage prevention enforcement programs and prescribes the administrative procedures available to a state that elects to contest a notice of inadequacy.

§ 198.53 When and how will PHMSA evaluate state excavation damage prevention law enforcement programs?

PHMSA conducts annual program evaluations and certification reviews of state pipeline safety programs. PHMSA will also conduct annual reviews of state excavation damage prevention law enforcement programs. PHMSA will use the criteria described in § 198.55 as the basis for the reviews, utilizing information obtained from any state agency or office with a role in the state's excavation damage prevention law enforcement program. If PHMSA finds a state's enforcement program inadequate, PHMSA may take immediate enforcement against excavators in that state. The state will have five years from the date of the finding to make program improvements that meet PHMSA's criteria for minimum adequacy. A state that fails to establish an adequate enforcement program in accordance with 49 CFR 198.55 within five years of the finding of inadequacy may be subject to reduced grant funding established under 49 U.S.C. 60107. The amount of the reduction will be determined using the same process PHMSA currently uses to distribute the grant funding; PHMSA will factor the findings from the annual review of the excavation damage prevention enforcement program into the 49 U.S.C. 60107 grant funding distribution to state pipeline safety programs. The amount of the reduction in 49 U.S.C. 60107 grant funding shall not exceed 10% of prior year funding. If a state fails to implement an adequate enforcement program within five years of a finding of inadequacy, the Governor of that state may petition the Administrator of PHMSA, in writing, for a temporary waiver of the penalty, provided the petition includes a clear plan of action and timeline for achieving program adequacy.

§ 198.55 What criteria will PHMSA use in evaluating the effectiveness of state damage prevention enforcement programs?

(a) PHMSA will use the following criteria to evaluate the effectiveness of a state excavation damage prevention enforcement program:

(1) Does the state have the authority to enforce its state excavation damage prevention law through civil penalties?

(2) Has the state designated a state agency or other body as the authority responsible for enforcement of the state excavation damage prevention law?

(3) Is the state assessing civil penalties for violations at levels sufficient to ensure compliance and is the state making publicly available information that demonstrates the effectiveness of the state's enforcement program?

(4) Does the enforcement authority (if one exists) have a reliable mechanism (e.g., mandatory reporting, complaint-driven reporting, etc.) for learning about excavation damage to underground facilities?

(5) Does the state employ excavation damage investigation practices that are adequate to determine the at-fault party when excavation damage to underground facilities occurs?

(6) At a minimum, does the state's excavation damage prevention law require the following:

a. Excavators may not engage in excavation activity without first using an available one-call notification system to establish the location of underground facilities in the excavation area.

b. Excavators may not engage in excavation activity in disregard of the marked location of a pipeline facility as established by a pipeline operator.

c. An excavator who causes damage to a pipeline facility:

i. Must report the damage to the owner or operator of the facility at the earliest practical moment following discovery of the damage; and

ii. If the damage results in the escape of any flammable, toxic, or corrosive gas or liquid that may endanger life or cause serious bodily harm or damage to property, must promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.

(7) Does the state limit exemptions for excavators from its excavation damage prevention law? A state must provide to PHMSA a written justification for any exemptions for excavators from state damage prevention requirements. PHMSA will make the written justifications available to the public.

(b) PHMSA may also consider individual enforcement actions taken by a state in evaluating the effectiveness of a state's damage prevention enforcement program.

§ 198.57 What is the process PHMSA will use to notify a state that its damage prevention enforcement program appears to be inadequate?

PHMSA will issue a notice of inadequacy to the state in accordance with 49 CFR § 190.5. The notice will state the basis for PHMSA's determination that the state's damage prevention enforcement program appears inadequate for purposes of this subpart and set forth the state's response options.

§ 198.59 How may a state respond to a notice of inadequacy?

A state receiving a notice of inadequacy will have 30 days from receipt of the notice to submit a written response to the PHMSA official that issued the notice. In its response, the state may include information and explanations concerning the alleged inadequacy or contest the allegation of inadequacy and request the notice be withdrawn.

§ 198.61 How is a state notified of PHMSA's final decision?

PHMSA will issue a final decision on whether the state's damage prevention enforcement program has been found inadequate in accordance with 49 CFR 190.5.

§ 198.63 How may a state with an inadequate excavation damage prevention law enforcement program seek reconsideration by PHMSA?

At any time following a finding of inadequacy, the state may petition PHMSA to reconsider such finding based on changed circumstances including improvements in the state's enforcement program. Upon receiving a petition, PHMSA will reconsider its finding of inadequacy promptly and will notify the state of its decision on reconsideration promptly but no later than the time of the next annual certification review.

Issued in Washington, DC on March 26, 2012.

Jeffrey D. Wiese,

Associate Administrator for Pipeline Safety.

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