



211 North Union Street
Suite 100
Alexandria, VA 22314
Tel. (703) 574-7376

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Docket Management Facility
United States Department of Transportation
1200 New Jersey Ave, SE
Room W12-140
Washington, DC 20590-0001

**Subject: U.S. Department of Transportation, Docket DOT-OST-2017-0069,
“Notification of Regulatory Review”**

Pursuant to Docket DOT-OST-2017-0069 published in the Federal Register on October 2, 2017, titled *Notification of Regulatory Review* (82 FR 45750), the Alliance for Innovation and Infrastructure respectfully submits the attached information requesting that the Pipeline and Hazardous Materials Safety Administration amends the code of federal regulations to improve efficiencies, and consequently safety outcomes, in damage prevention programs nationwide.

Thank you for your consideration.

Respectfully Submitted,

/s/ Shane Skelton

Shane Skelton
Policy Advisor
Alliance for Innovation & Infrastructure
www.aii.org

49 CFR § 198.55

Under the authority of 49 U.S.C. Sections 60105, 60106, and 60114 the United States Department of Transportation's (U.S. DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) promulgated regulations articulating the criteria PHMSA will use in assessing state damage prevention programs as a prerequisite to initiating an enforcement proceeding. More specifically, under Congressional mandate,¹ on July 23, 2015, PHMSA issued a final rule² 49 C.F.R. 198.55, articulating the criteria PHMSA will use to determine whether a state's damage prevention program is effective – the first step in determining whether PHMSA has the authority and obligation to begin an enforcement action against an owner, operator, or excavator that would otherwise be carried out by the state where the incident occurred.

The “Burden”

Rather than drafting a regulation that would harness new technologies, increase excavator and operator efficiencies, and create cost savings for operators, and state and federal governments, the final rule included a series of questions (see text below) to be weighed in totality to determine the relative strength of a state program. Some of the criteria in the final rule are critically important and consistent with a state's obligation to act in the best interest of their citizenry, including enforcement against bad actors. However, replacing subjective metrics with a technology-based alternative can better satisfy many of the criteria.

As described in more detail below, a more recent PHMSA study pointed to a field tested technology based system call Enhanced Positive Response (EPR) as a game-changing technology, and one that may be worth adopting nationwide in place of more subjective state-by-state requirements. New technologies can bring new opportunities, and EPR has proven to be a simple and effective path to eliminating unnecessary pipeline incidents, increasing operational efficiency, and reducing costs.

§ 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 using civil penalties and other appropriate sanctions for violations?

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

¹ See The Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006.

² 49 C.F.R. 198.55

(3) Is the State assessing civil penalties and other appropriate sanctions for violations at levels sufficient to deter noncompliance 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) for learning about excavation damage to underground facilities?

(5) Does the State employ excavation damage investigation practices that are adequate to determine the responsible party or parties when excavation damage to underground facilities occurs?

(6) At a minimum, do the State's excavation damage prevention requirements include the following:

(i) 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.

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

(iii) An excavator who causes damage to a pipeline facility:

(A) Must report the damage to the operator of the facility at the earliest practical moment following discovery of the damage; and

(B) If the damage results in the escape of any PHMSA regulated natural and other gas or hazardous liquid, 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 consider individual enforcement actions taken by a State in evaluating the effectiveness of a State's damage prevention enforcement program.

Less Burdensome Alternative – Enhanced Positive Response

The Protecting our Infrastructure of Pipelines and Enhancing Safety Act (PIPES Act) required that the Pipeline and Hazardous Material Safety Administration (PHMSA) conduct a study on how new technologies can improve excavation damage programs by harnessing technology to more accurately locate and map the presence of underground

pipelines, and facilitate communication among all parties to an excavation process. The study was completed and transmitted to Congress in August. Summarized in more detail below, the study found that EPR was a great tool for streamlining the damage prevention process and improving excavation safety outcomes. The study also noted that national standards might be appropriate for certain one-call requirements.³

This August, PHMSA transmitted their final report back to Congress. The report explained what EPR is, highlighted its safety benefits, and discussed how a specific EPR pilot project increased efficiency in real-world circumstances:

What does EPR do?

Enhanced positive response. After an underground facility locate has been completed, the excavator receives comprehensive information about the site, including the locate request information, facility maps, photos, and virtual manifests.⁴

How does EPR impact safety?

According to information submitted to the CGA by Utiliquest, users of enhanced positive response report up to a 67 percent decrease in damage rates.⁵

An EPR pilot project proved successful.

For example, in 2005, PHMSA, with support from other key stakeholders, initiated a pilot project in Virginia to enhance the one-call damage prevention process through the use of GPS technology. The project was undertaken as a 'proof-of-concept' project to research and implement new technology to significantly enhance the development and communication of accurate information among stakeholders regarding the exact locations of planned excavations and of underground utilities. Phase I of the Virginia Pilot Project focused on technology that allowed the boundaries of the one-call excavation tickets to be more accurately identified by excavators in the field using GPS-enabled mobile phones. Phase II of the Virginia Pilot Project applied GPS technology, along with enhanced software and locating equipment, to improve the underground facility locating process by improving the accuracy, amount, and functionality of data resulting from facility locates. Phase II resulted in the creation of geographically accurate "electronic ticket manifests" to provide an electronic graphical overview and utility mapping of an excavation site. Phase III of the Virginia Pilot Project demonstrated a GPS-based system that monitors excavation activity. The System provides a warning if excavation activity is

³ See Department of Transportation, Pipeline and Hazardous Materials Safety Administration, "A Study on Improving Damage Prevention Technology," August 3, 2017.

⁴ Id at 19.

⁵ Id at 22.

*occurring outside of a valid one-call ticket or in close proximity to underground facilities.*⁶

It is our position, supported by the report's findings, that uniform implementation of EPR could more effectively demonstrate compliance with the minimum requirements of one-call notification systems specified in 49 USC 60114, while also providing a digitized record of all the facts and circumstances surrounding an excavation project, which will prevent incidents, and likely obviate the need to make use of 49 CFR 198.55 in deploying limited federal resources to investigate and enforce violations better handled at the state level.

Additionally, as a federal standard, EPR could be used seamlessly across states lines, allowing for consolidation of one-call centers working off of one common network, leading to cost savings at the operator, state and federal level.

Affected Entities

A number of private and public sector entities would benefit from a technology-based platform that could be used in all states and territories. In the private sector, pipeline owners and operators would benefit in multiple ways, including significantly reduced incident rates, which means less times out of operation, less capital spent on repairing damaged infrastructure, and less risk of liability from harm or injury to property or persons inflicted by a pipeline rupture.

Similarly, excavators will save time in the planning process and benefit from a reduced likelihood of liability. Having a digital record of all actions related to the worksite in hand, including a digital map detailing the location of all underground infrastructure, eliminates the possibility that physical markings will be undetectable and the need to follow up with the locate firm that made the digital markings to query about potentially unmarked infrastructure. Keeping a record accessible to all parties will also help excavators demonstrate that they acted appropriately and followed quality control procedures should something out of the ordinary occur.

Both the public and private sector would benefit from cost savings in consolidating one-call centers. Right now each state is serviced by one or more one-call centers. Using the same technology and providing access to the same database across state lines could significantly increase efficiencies and reduce program costs, creating savings for those who fund these programs, i.e. operators, state governments, and the U.S. Department of Transportation. Additionally, digital manifests and detailed project records will simplify enforcement proceedings at the state level should an incident occur. This will save state enforcement offices money and obviate the need for federal intervention.

⁶ Id at 9-10.