

# Excavator Enforcement Rule



# Overview of the Rule

- The Pipeline Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006 gave PHMSA new enforcement authority over excavators who damage pipelines in states with inadequate excavation damage prevention law enforcement programs.
- PHMSA developed the excavator enforcement rule as a prerequisite to using this new enforcement authority. The rule amends the pipeline safety regulations to establish the following:
  1. The criteria and procedures for determining the adequacy of state pipeline excavation damage prevention law enforcement programs;
  2. An administrative process for making state adequacy determinations;
  3. The federal requirements PHMSA will enforce in states with inadequate enforcement programs;
  4. The adjudication process for administrative enforcement proceedings against excavators where federal authority is exercised.





# The Rule Creates...

- Part 198, Subpart D – **Criteria for adequate state DP enforcement programs and process for assessment**
- Administrative procedures for states to contest a notice of inadequacy
- New Part 196 – **Standards for excavators** digging near pipelines
- Adjudication process for excavators cited by PHMSA – **Same as for operators cited by PHMSA for violations of pipeline safety regulations**



# Evaluating State DP Enforcement

## 49 CFR Part 198 – New Subpart D

- Evaluation of state damage prevention law enforcement programs as part of annual review of state pipeline safety programs
- State damage prevention law enforcement authority – if it exists – is not always with pipeline safety enforcement agency





# Criteria for Evaluating State DP Enforcement Programs

1. Does the state have enforcement authority (with civil penalties)?
2. Is there a designated enforcement body?
3. Is the state using its authority and making enforcement records available to the public?
4. Does the state have a reliable means of learning about damages?
5. Does the state have damage investigation practices that are adequate to determine the at-fault party when a damage occurs?





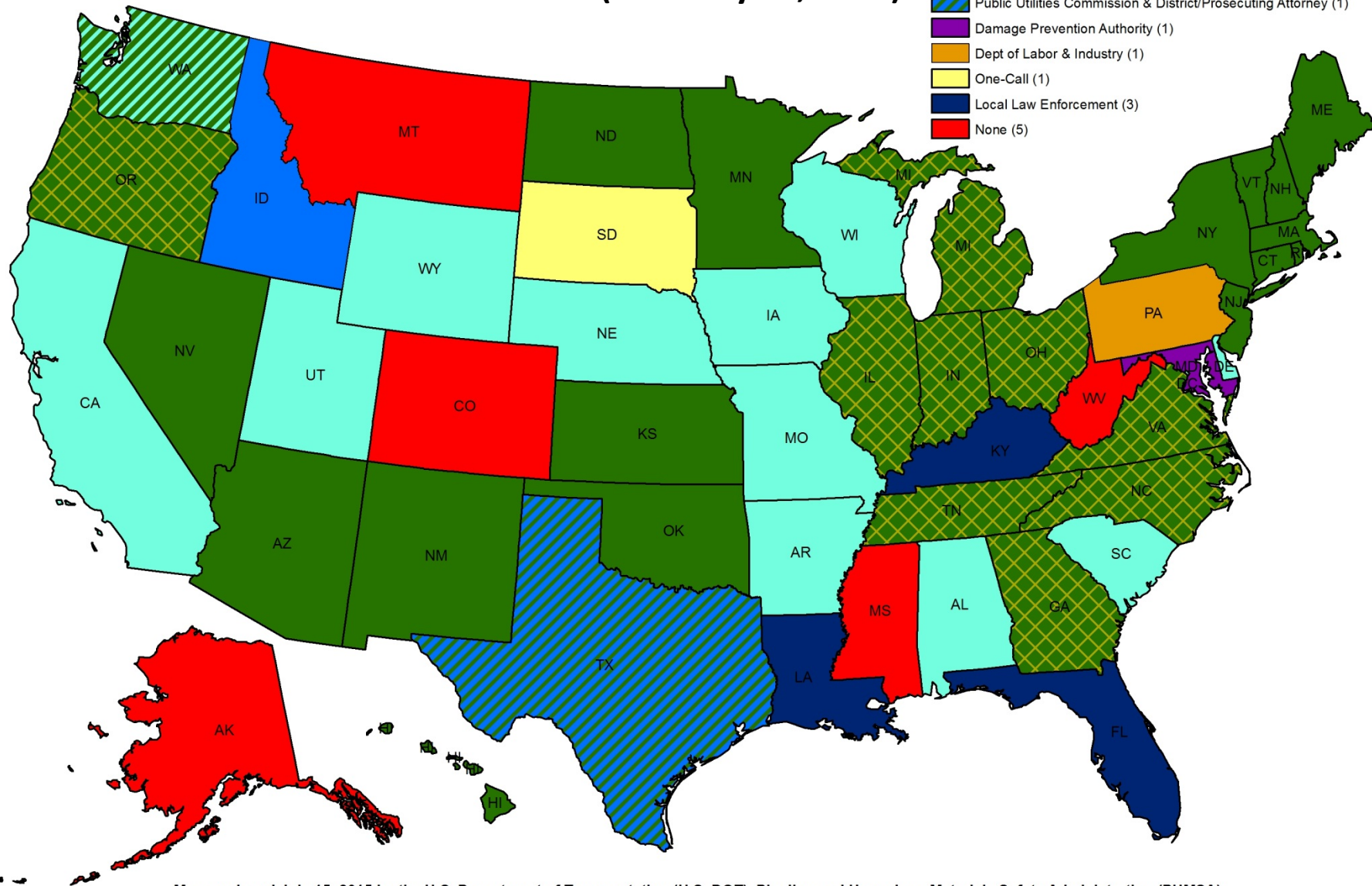
# Criteria for Evaluating State DP Enforcement Programs

6. At a minimum, does the state require:
  - a. Excavators must call 811 before digging
  - b. Excavators must “respect the marks”
  - c. If damage to a pipeline occurs...
    - i. Excavator must report damage to operator at earliest practical moment
    - ii. If release occurs, excavator must call 911
7. Are exemptions from the DP law limited?  
Written justification of exemptions is required.



# Organizations with Enforcement Authority for State Excavation Damage Prevention Laws (as of July 15, 2015)

- Public Utilities Commission or Equivalent without Advisory Board(16)
- Public Utilities Commission or Equivalent with Advisory Board (9)
- Attorney General (12)
- Public Utilities Commission & Attorney General (1)
- District/Prosecuting Attorney (1)
- Public Utilities Commission & District/Prosecuting Attorney (1)
- Damage Prevention Authority (1)
- Dept of Labor & Industry (1)
- One-Call (1)
- Local Law Enforcement (3)
- None (5)



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# Policies: State Program Evaluations and the Enforcement Standard

- The preamble outlines two policies:
  1. How the state program **evaluation criteria** will be applied
  2. How the excavator **enforcement standard** will be applied

The policies are not part of the rule; they are flexible and can evolve as the rule is implemented.





# Policy: State Evaluations – Criteria 1 & 2

1. Does the state have enforcement authority (with civil penalties)?
  2. Is there a designated enforcement body?
- A ‘no’ to either of these questions will result in a state being deemed ineffective.



# Policy: State Evaluation – Criterion 3

- Is the state using its authority and making enforcement records available to the public?
  - Lack of documentation showing enforcement = likely ineffective
  - Info about enforcement/statistics should be available through a web site, but noncompliance with this alone will not result in overall ineffective rating
  - PHMSA will seek records to show the extent to which enforcement is impacting damage rate, but noncompliance with this alone will not result in overall ineffective rating



# Policy: State Evaluation – Criterion 4

- Does the state have a reliable means of learning about damages?
  - PHMSA will review how states learn about damages, the extent to which there is parity so that both excavators and operators may be held accountable, and the methods used to make stakeholder aware of the process
  - Noncompliance with this alone will not result in overall ineffective rating



# Policy: State Evaluation – Criterion 5

- Does the state have damage investigation practices that are adequate to determine the at-fault party when a damage occurs?
  - PHMSA will look for policies, enforcement patterns that reflect consistent, fair and balanced enforcement.
  - Noncompliance with this alone will not result in overall ineffective rating.



# Policy: State Evaluation – Criterion 6

6. At a minimum, does state law require:
  - a. Excavators must call 811 before digging
  - b. Excavators must “respect the marks”
  - c. If damage to a pipeline occurs...
    - i. Excavator must report damage to operator at earliest practical moment
    - ii. If release occurs, excavator must call 911
- PHMSA will review state requirements for compliance. Noncompliance with this alone will not result in overall ineffective rating.



# Policy: State Evaluation – Criterion 7

- Are exemptions from the DP law limited?  
Written justification of exemptions is required.
  - PHMSA will expect documentation for all notification exemptions, including the basis for the exemption, to include available data.
  - Noncompliance with this alone will not result in overall ineffective rating.



# Policy: State Program Evaluation – General

(this policy may be changed)

- Noncompliance with criteria 1, 2 = state program deemed inadequate
- Noncompliance with criterion 3 = state program likely deemed inadequate
- Noncompliance with other criteria will not, alone, be deemed inadequate, but several noncompliances in combination could result in a state program being deemed inadequate



# Administrative Process for States to Contest Notices of Inadequacy

- PHMSA issues a notice of inadequacy to the state in accordance with 49 CFR 190.5
- State will have 30 days to submit written response
- PHMSA issues final decision
- States may petition PHMSA to reconsider at any time following a finding of inadequacy; PHMSA will respond no later than the date of the next review
- **States that fail to establish an adequate enforcement program within five years of a finding of inadequacy may be subject to 4% reduction in base grant funding**





# Federal Standard for Excavators in States Deemed Inadequate

- Call 811 before excavating
- Wait for pipeline operators to establish and mark the location of underground pipelines before excavating
- Excavate with proper regard for the marks, take all practicable steps to prevent excavation damage
- Make additional use of one-call as necessary
- Any contact with pipelines must be reported to operator at earliest practical moment
- If there is a release, excavator must call 911

NOTE: There are no exemptions in the final rule. PHMSA will be considerate of exemptions in state laws when undertaking federal enforcement action.





# Policy: Enforcement

- PHMSA's enforcement focus will be on serious violations
- PHMSA will learn about violations through a variety of ways; the rule does not create a reporting requirement
- PHMSA's standards for excavators are the "floor" or "baseline"; when conducting enforcement, PHMSA will be cognizant of state requirements
- PHMSA and states have existing authority to enforce against non-compliant pipeline operators





# Next Steps

- Effective Date of Rule is 1/1/2016
- PHMSA implementation plan
  - Developing checklist, guidance that expands on policy document
    - Goal: consistency in state evaluations
  - Developing FAQ's, other resources for web posting
  - Developing timeline
  - Developing training





# More Information

- For more information, visit our website at <http://phmsa.dot.gov/pipeline/safety-awareness-and-outreach/excavator-enforcement>
- Contact:
  - Sam Hall at [sam.hall@dot.gov](mailto:sam.hall@dot.gov)
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