

**SUMMARY:** The Department of the Air Force is updating the Department of the Air Force Privacy Act Program Rules, 32 CFR part 806b, by adding the (k)(1) thru (k)(7) exemptions to accurately describe the basis for exempting the records. The Privacy Act system of records notice, F051 AF JAA, entitled "Freedom of Information Appeal Records", has already been published on December 12, 2008 (73 FR 75688).

**DATES:** The rule will be effective on December 28, 2009 unless comments are received that would result in a contrary determination.

**ADDRESSES:** You may submit comments, identified by docket number and title, by any of the following methods.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Room 3C843, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ben Swilley at (703) 696-6648.

**SUPPLEMENTARY INFORMATION:**

**Executive Order 12866, "Regulatory Planning and Review"**

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

**Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6)**

It has been determined that Privacy Act rules for the Department of Defense do not have significant economic impact on a substantial number of small entities because they are concerned only with the administration of Privacy Act systems of records within the Department of Defense.

**Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)**

It has been determined that Privacy Act rules for the Department of Defense impose no information requirements beyond the Department of Defense and that the information collected within the Department of Defense is necessary and consistent with 5 U.S.C. 552a, known as the Privacy Act of 1974.

**Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"**

It has been determined that Privacy Act rules for the Department of Defense do not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

**Executive Order 13132, "Federalism"**

It has been determined that Privacy Act rules for the Department of Defense do not have federalism implications. The rules do not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

**List of Subjects in 32 CFR Part 806b**

Privacy.

Accordingly, 32 CFR part 806b is amended as follows:

**PART 806b—PRIVACY ACT PROGRAM**

1. The authority citation for 32 CFR part 806b continues to read as follows:

**Authority:** Pub. L. 93-579, 88 Stat. 1896 (5 U.S.C. 552a).

2. Paragraph (e) of Appendix D to 32 CFR part 806b is amended by adding paragraph (26) to read as follows:

**Appendix D to Part 806b—General and Specific Exemptions**

\* \* \* \* \*

(26) System identifier and name: F051 AF JAA, Freedom of Information Appeal Records.

(i) *Exemption:* During the processing of a Privacy Act request, exempt materials from other systems of records may in turn become

part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the Department of the Air Force hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority:* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reason:* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record, and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

\* \* \* \* \*

Dated: October 7, 2009.

**Patricia L. Toppings,**  
*OSD Federal Register Liaison Officer,*  
*Department of Defense.*

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**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**49 CFR Parts 190, 192, 195, and 198**

[Docket No. PHMSA-2009-0192]

RIN 2137-AE43

**Pipeline Safety: Pipeline Damage Prevention Programs**

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

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** This Advance Notice of Proposed Rulemaking (ANPRM) initiates a rulemaking procedure to establish criteria for determining adequate state enforcement of pipeline damage prevention laws. Under the Pipeline Inspection, Protection, Safety, and Enforcement (PIPES) Act of 2006,

establishment of these criteria is a prerequisite should PHMSA find it necessary to conduct an enforcement proceeding against an excavator for violation of one-call damage prevention laws in the absence of enforcement action by the state where the events occurred. This notice is issued to solicit feedback and comments regarding the criteria and procedures PHMSA should use to determine if a state's enforcement of its damage prevention laws is adequate. These procedures will encourage states to develop effective excavation damage prevention enforcement programs to protect gas and hazardous liquid pipelines, but also allow federal enforcement authority should any state fail to do so.

**DATES:** Persons interested in submitting written comments on this ANPRM must do so by December 14, 2009. PHMSA will consider late filed comments so far as practicable.

**ADDRESSES:** Comments should reference Docket No. PHMSA-2009-0192 and may be submitted in the following ways:

- *E-Gov Web Site:* <http://www.regulations.gov>. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

- *Fax:* 1-202-493-2251.

- *Mail:* DOT Docket Operations Facility (M-30), U.S. Department of Transportation, West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* DOT 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:** All comments are electronically posted without changes or edits, including any personal information provided.

#### Privacy Act Statement

Anyone can search the electronic form of comments received in response to any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). DOT's complete Privacy Act Statement was published in the **Federal Register** on April 11, 2000 (65 FR 19477).

#### FOR FURTHER INFORMATION CONTACT:

Steve Fischer, Director of Program Development, PHMSA by e-mail at [steve.fischer@dot.gov](mailto:steve.fischer@dot.gov); or Larry White, Attorney-Advisor, PHMSA by e-mail at [lawrence.white@dot.gov](mailto:lawrence.white@dot.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Objective

Excavation damage is a leading cause of pipeline failure incidents. Better, more effective enforcement of state damage prevention laws is seen as a key to making further reductions in pipeline damage incidents.

PHMSA is seeking to encourage states to strengthen their excavation damage prevention laws and to adequately enforce those laws. Toward this goal and in response to language included in the Pipeline Inspection, Protection, Enforcement, and Safety (PIPES) Act of 2006 (Pub. L. 109-468), PHMSA intends to issue criteria and procedures, through a rulemaking proceeding, for determining whether states are adequately enforcing their damage prevention laws, and for conducting federal enforcements if necessary. This ANPRM seeks feedback and comments regarding the development of those criteria and procedures.

##### II. Background

###### A. PHMSA Damage Prevention Efforts

PHMSA has made extensive efforts over many years to improve excavation damage prevention as it pertains to pipeline safety. These have included outreach to and cooperative efforts with a wide spectrum of 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

Current PHMSA programs and recent initiatives sponsored and/or supported by PHMSA designed to enhance pipeline safety through improvements in excavation damage prevention include:

- **State Pipeline Safety Partners**—Supported by funding agreements with PHMSA, state agencies can assume safety jurisdiction for intrastate and/or interstate gas and hazardous liquid pipeline operators. To assume jurisdiction, states must publish regulations that meet or exceed the federal safety regulations. Our state pipeline safety partners are represented

by the National Association of Pipeline Safety Representatives (NAPSR), which strives to strengthen state pipeline safety programs through promotion of improved pipeline safety standards, education, training, and technology. PHMSA frequently consults with NAPSR, especially for issues concerning intrastate pipelines.

- **Grants to States and Communities**—Each state has established laws, regulations, and procedures shaping the state damage prevention program. PHMSA provides grant opportunities intended to help states improve their damage prevention programs to protect pipelines. States seeking damage prevention program grants must incorporate the nine elements of effective damage prevention programs identified in the PIPES Act of 2006 into their programs. PHMSA also offers Technical Assistance Grants (TAG) to communities. Informed communities play a vital role in the safety and reliability of pipeline operations. PHMSA's TAG program offers new opportunities to strengthen the depth and quality of public participation in pipeline safety and damage prevention matters.

- **Consensus Standards**—Office of Pipeline Safety (OPS) works closely with several national consensus standards organizations, such as the American Society of Mechanical Engineers (ASME), the American Petroleum Institute (API) and the National Association of Corrosion Engineers (NACE). These organizations include members from various stakeholder groups and produce effective standards balanced through a consensus process. PHMSA recognizes the value of stakeholder consensus and appreciates the hard work required to develop and publish consensus technical safety standards. When these standards complement or enhance federal pipeline safety regulations, they may be incorporated into the regulations by reference. One example of an incorporated consensus standard intended to help improve pipeline damage prevention is American Petroleum Institute (API) Recommended Practice (RP) 1162, *Public Awareness Programs for Pipeline Operators*.

- **Research and Development (R&D)**—PHMSA technical review committees identify R&D priorities and select projects for funding. PHMSA's R&D program goal is to drive improvements in various aspects of pipeline safety, including damage prevention. The program focuses on the rapid conversion of new technology into tools pipeline stakeholders can use to improve pipeline safety. Completed

R&D projects often provide the technical basis for regulations and consensus safety standards. Other R&D projects summarize information necessary for well-informed decisions by pipeline safety stakeholders.

- **Public Awareness Programs**—Pipeline safety regulations address all aspects of public awareness communications. Pipeline operators are required to implement public awareness programs in communities traversed by their pipelines. They must inform stakeholders, including the public, excavators, emergency responders, and local officials, on how to recognize pipeline failures and of what actions to take in such an event. Operators must develop plans for carrying out their public awareness activities and must evaluate the effectiveness of their programs to identify needed improvements. These requirements are reflected in PHMSA's adoption of API RP 1162 into the pipeline safety regulations, as noted above.

- **Focused Damage Prevention Initiatives**—PHMSA invests considerable resources in identifying damage prevention best practices and in raising stakeholder awareness regarding pipeline damage prevention. PHMSA's Stakeholder Communications Web site (<http://primis.phmsa.dot.gov/comm>) provides additional information on these and other recent PHMSA damage prevention initiatives, including:

- **Damage Prevention Best Practices**—In 1999, PHMSA sponsored the landmark *Common Ground Study* to identify "best practices" to prevent damage to pipelines and other underground facilities. The nonprofit Common Ground Alliance (CGA) now provides stewardship to ensure the Damage Prevention Best Practices are maintained, updated, and promoted for implementation. The CGA Best Practices are recognized nationally and internationally.

- **Common Ground Alliance**—The CGA promotes damage prevention across all underground facility damage prevention stakeholder groups. Its individual members and member/sponsor organizations represent the diverse spectrum of these stakeholders. PHMSA supported the formation and incorporation of the CGA and continues to support its efforts toward pipeline damage prevention through grants and cooperative agreements.

- **811**—PHMSA supported and championed the national 3-digit dialing number to provide a standard and easily remembered number for excavators to call to access the local one-call damage prevention center.

- **Community Assistance and Technical Services (CATS) Managers**—PHMSA established the CATS program and deploys CATS personnel in each of its five regions. CATS Managers provide community assistance and technical services to all stakeholders. The main focus of the CATS program is to foster effective communications regarding pipeline safety among PHMSA and other stakeholders, and assist permitting agencies issuing permits required for safety-related pipeline repairs and construction projects.

- **VA Pilot Project**—PHMSA sponsors and supports the Virginia Pilot Project for Incorporating Global Positioning System (GPS) Technology to Enhance One-Call Damage Prevention. The report for Phase I of the VA Pilot Project is available from PHMSA's Stakeholder Communications Web site.

- **Pipelines and Informed Planning Alliance (PIPA)**—PIPA was initiated by and is supported by PHMSA. It is driven by requirements in the Pipeline Safety Improvement Act of 2002 (PSIA) and recommendations in the Transportation Research Board (TRB) Special Report 281. The PIPA initiative aims to improve damage prevention and pipeline safety by enhancing communication between pipeline operators and property owners/developers, and to ensure that decisions about land use and development near transmission pipelines are risk-informed.

- **Damage Prevention Assistance Program (DPAP)**—PHMSA has developed guidance, "Strengthening State Damage Prevention Programs," to assist stakeholders. The guidance draws on the definition of effective damage prevention programs found in the PIPES Act of 2006. It examines the nine elements specified in the PIPES Act and makes suggestions for implementing them at the state level. State programs can be improved by incorporating the nine elements and by identifying and implementing positive changes in processes, procedures, technologies and damage prevention laws.

These efforts are producing benefits. Data from PHMSA Significant Incident Files dated July 14, 2009, indicates that serious pipeline incidents caused by excavation damage have begun to trend downward. However, despite these efforts and the efforts of the states, pipeline operators, and other stakeholders, excavation damage to gas and hazardous liquid pipelines continues to be the single leading cause of pipeline incidents. Based on data

provided to PHMSA,<sup>1</sup> during a recent 10-year period, from 1998–2008, excavation damage alone was cited as the cause in almost 26 percent of significant incidents for all pipeline systems. Better, more effective enforcement of state damage prevention laws is seen as a key to making further reductions in pipeline damage incidents.

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 Distribution Integrity Management for Gas Distribution, Report of Phase I Investigations (DIMP Report) was issued in December 2005. 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.

<sup>1</sup> PHMSA Significant Incidents Files, April 15, 2009.

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 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 prepared on behalf of PHMSA<sup>2</sup> 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, it noted that many pipeline operators consider lack of enforcement to be degrading the effectiveness of one-call programs. The report also noted that administrative enforcement measures managed through government departments are relatively easy to implement and have proven to be effective. It 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.

<sup>2</sup>Mechanical Damage Final Report, Michael Baker Jr., Inc., April 2009.

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 also 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."

#### *B. The Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006*

On December 29, 2006, the Pipeline and Hazardous Materials Safety Administration's pipeline safety program was reauthorized for an additional four years, through 2010, by enactment of the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (Pub. L. 109-468). The PIPES Act of 2006 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 assist states in developing effective excavation damage prevention programs.

With respect to resources, the PIPES Act of 2006 provides incentives through funding grants for states to improve the overall quality and effectiveness of their damage prevention programs. It provides an increased funding level up to 80% for state agencies that submit an annual certification and participate in the pipeline and/or hazardous liquid safety programs. As noted in 49 U.S.C. 60105(b), each certification submitted must state that the state authority "(4) is encouraging and promoting the establishment of a program designed to prevent damage by demolition, excavation, tunneling, or construction

activity to the pipeline facilities to which the certification applies that subjects persons who violate the applicable requirements of that program to civil penalties and other enforcement actions that are substantially the same as are provided under this chapter.\* \* \*

PHMSA's damage prevention grants will facilitate the establishment of comprehensive damage prevention programs in states that do not have such programs and will help improve damage prevention programs in states that do. PHMSA posted a Grants.gov opportunity in November 2007, with a \$100,000 maximum grant per state and \$1.5 million in total grant funding available. During 2008-2009, PHMSA awarded 27 grants to state agencies or one-call centers under state authority for improvements in their state damage prevention programs. The grant awards covered a wide scope of projects. Examples include: A study on the scope and effectiveness of the underground utility damage prevention system within the state; the design and implementation of a computer-based system that tracks, measures, analyzes and reports the overall effectiveness of damage prevention training programs; staff training; development of software and world wide web applications; development of a state-of-the-art plastic pipe locating device; and additional staff positions and equipment purchases to enhance enforcement of the state damage prevention laws and regulations. Summaries of these projects are available at <http://primis.phmsa.dot.gov/comm/DamagePreventionGrantsToStates.htm>.

With respect to program guidelines and authorities, the PIPES Act of 2006 identifies nine elements that effective damage prevention programs will include. These are, essentially, identical to those nine elements noted in the DIMP Report discussed in the previous subsection.

Of particular note, relevant to this ANPRM, is Element 7, which identifies effective enforcement of state damage prevention laws and regulations, including the use of civil penalties for violations, as a key part of an effective state program. The PIPES Act also provided PHMSA with limited authority to conduct civil enforcement proceedings against excavators who damage pipelines in a state that has failed to adequately enforce its damage prevention laws. Specifically, Section 2 of the PIPES Act established 49 U.S.C. 60114 to provide that the Secretary of Transportation may take civil enforcement action against excavators who (1) fail to use a one-call system

before excavating, or (2) who fail to regard the location information or markings established by a pipeline facility operator, and (3) who cause damage to a pipeline facility that may endanger life or cause serious bodily harm or damage to property and fail to promptly report the damage and fail to call 911 if the damage results in a release of pipeline products. The PIPES Act limited the Secretary's ability to take civil enforcement action against these excavators, in that the Secretary may not conduct an enforcement proceeding for a violation within the boundaries of a state that has the authority to impose penalties described in 49 U.S.C. 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. This ANPRM initiates that rulemaking procedure. Following is citation of these additions 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.

### III. Purpose and Scope of the ANPRM

PHMSA is a strong supporter of expanded state damage prevention enforcement to protect pipelines. PHMSA strongly believes that individual states should retain the primary responsibility to effectively enforce damage prevention laws. PHMSA's goal is to minimize the need to take federal enforcement action against excavators that damage pipelines by encouraging states to strengthen their damage prevention laws to include the authority to impose penalties against persons who violate those laws and to adequately enforce those laws through the use of civil penalties. However, PHMSA must follow Congressional direction and assume that responsibility if it is determined that a state is not doing so adequately. In order to do so, PHMSA must have procedures in place to evaluate state programs to make such determinations. These procedures will enable PHMSA to conduct civil enforcement proceedings against excavators who damage pipelines, in accordance with the limitations prescribed in 49 U.S.C. 60114(f), as noted above. The procedures to be used to determine if a state is adequately enforcing its one-call damage prevention laws will necessarily include a means of allowing a state the opportunity to contest a determination that it is not adequately enforcing its damage prevention laws and will provide an adjudication process to be used if PHMSA determines that an excavator is to be subject to federal enforcement as the result of a violation of the damage prevention requirements cited in 49 U.S.C. 60114. These procedures will enhance pipeline safety and will encourage states to develop effective damage prevention programs. The purpose of this ANPRM is to enable PHMSA to begin the process of rulemaking to establish procedures for determining the adequacy of state enforcement of damage prevention requirements and to articulate a

proposed process for federal enforcement. To that purpose, PHMSA is soliciting feedback and comments regarding: (1) The criteria for determining the adequacy of a state's enforcement program; (2) the procedures PHMSA will use to make this determination; (3) the federal standards to be enforced against an excavator in the event PHMSA determines a state to have inadequate enforcement; and (4) the administrative process for imposing fines or penalties on an excavator alleged to have violated the applicable standards.

### IV. Issues on Which PHMSA Seeks Comment

Pipeline operators, excavators, states and the public are urged to carefully consider the appropriate procedures for determining the adequacy of state damage prevention enforcement programs, as well as the need for federal enforcement in the absence of an adequate state program. Commenters should be aware that the information and data generated in response to this ANPRM could result in a notice of proposed rulemaking. We invite commenters to submit data and information on the following:

#### A. Considerations for Determining the Adequacy of State Damage Prevention Enforcement Programs

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:

- Current federal pipeline safety regulations, 49 CFR 192.614 and 49 CFR 195.442, require that gas and hazardous liquid pipeline operators, respectively, comply with certain damage prevention requirements through participation in a qualified one-call system. Specifically, this involves the receipt and recordation of notifications from excavators of planned excavation activities and performing their locating and marking responsibilities. Does state law contain similar requirements for operators to be members of and participate in the state's one-call system?
- 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?

- 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?
- Are excavators required to report all pipeline damage incidents to the affected pipeline operators?
- Does state law contain a provision requiring that 911 be called if a pipeline damage incident causes a release of hazardous products?
- Has the responsible state agency established a reliable mechanism to ensure that it receives reports of pipeline damage incidents on a timely basis? Damage reports should include documentation of the consequences of any product release, including the extent of service interruptions, product loss, property damage, evacuations, injuries, fatalities, and environmental damage, and copies of the reports should be made available to the appropriate PHMSA Regional Office.
- 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?
- 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))?
- Has the state designated a state agency with responsibility for administering the damage prevention laws?
- 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?
- 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?

- 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?
- Commenters are invited to provide comment on these considerations and may also offer additions and alternatives that may be equally suitable for the purpose of evaluating the adequacy of state damage prevention enforcement programs.

#### *B. Administrative Process*

PHMSA seeks comment on the administrative procedures available to a state that elects to contest a notice of inadequacy should it receive one. The procedures would likely involve a "paper hearing" process where PHMSA would notify a state that it considers its damage prevention 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. If the state's enforcement program is ultimately deemed inadequate, direct federal enforcement against an excavator who violated the state's damage prevention law and damaged a pipeline in that state could proceed. The procedures would also likely give states the right to make a showing at a later time that it has improved its damage prevention enforcement program to an adequate level and request that PHMSA discontinue federal enforcement in that state.

Commenters are invited to submit their views on this process or suggest alternatives. In particular, does this process strike the right balance between the Congressional directive to PHMSA to undertake federal enforcement where necessary while providing a state with a fair and efficient means of showing that the state's enforcement program is adequate? PHMSA will likely evaluate state damage prevention enforcement programs on an annual basis, considering factors such as those set forth in paragraph A above. This annual review will likely include a review of all of the enforcement actions taken by the state over the previous year. For states that have been deemed to have inadequate programs in their most recent annual reviews and in

accordance with the process outlined in paragraph B, PHMSA could conduct federal enforcement without further process.

With respect to a state that has been deemed nominally adequate in its most recent annual review, should the process also enable PHMSA to evaluate a state enforcement decision concerning an individual incident during the course of the year and potentially conduct federal enforcement where a state decided not to undertake enforcement for an incident that PHMSA believes may warrant enforcement action?

#### *C. Federal Standard for Excavators*

PHMSA also seeks comment on the establishment of the federal standards for excavators that PHMSA would be enforcing in a state that has been found to have an inadequate enforcement program. At a minimum the standards will directly reflect the words in the U.S. Code cited above and include requirements for an excavator to: Use an available one-call system before digging, wait the required time, excavate with proper regard for location information or markings established by the pipeline operator, promptly report any damage to the pipeline operator, and report any release of hazardous products to appropriate authorities by calling 911.

Commenters are invited to submit their views on these standards or to suggest alternatives. For example:

- Should the federal standards for excavators be limited to the minimum requirements reflected in the above-referenced statute 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 Common Ground Alliance Best Practices and API Recommended Practice 1166, Excavation Monitoring and Observation (November 2005), could be used to inform the development of such standards.

#### *D. Adjudication Process*

PHMSA also seeks comment from the excavator community on the adjudication process that would be used if an excavator were cited by PHMSA for failure to comply with the standards established as discussed in section C above in a state in which the enforcement has been deemed inadequate. 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 the allegations are based on;

file a written response to the allegations; request an informal hearing; be represented by counsel if he or she 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 the PHMSA 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 are 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 considerations found in 49 U.S.C. 60122(b) apply to excavators?

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

Commenters are also invited 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 damage prevention programs that require, in part, that the operator provide for marking its pipelines in the area of an excavation for which a locate request has been submitted by the excavator.

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.

### **V. Regulatory Notices**

#### *A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

E.O. 12866 requires 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." We therefore request comments, including specific data if possible, concerning the costs and benefits of evaluating state damage prevention programs and enforcing federal requirements.

#### *B. Executive Order 13132: Federalism*

Executive Order 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Because evaluating the effectiveness of state damage prevention enforcement programs necessarily involves states, we invite state and local governments with an interest in this rulemaking to comment on the effect that adoption of criteria for effective damage prevention programs and enforcement requirements may have on state pipeline safety programs.

#### *C. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), we must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their

fields, and governmental jurisdictions with populations under 50,000. If your business or organization is a small entity and if adoption of specific requirements applicable to using one-call systems could have a significant economic impact on your operations, please submit a comment to explain how and to what extent your business or organization could be affected.

#### *D. National Environmental Policy Act*

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to consider the consequences of federal actions and that they prepare a detailed statement analyzing if the action significantly affects the quality of the human environment. Interested parties are invited to address the potential environmental impacts of this ANPRM. We are particularly interested in comments about compliance measures that would provide greater benefit to the human environment or on alternative actions the agency could take that would provide beneficial impacts.

#### *E. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that "significantly or uniquely affect" Indian communities and that impose "substantial and direct compliance costs" on such communities. We invite Indian tribal governments to provide comments on any aspect of this ANPRM that may affect Indian communities.

#### *F. Paperwork Reduction Act*

Under 5 CFR Part 1320, PHMSA analyzes any paperwork burdens if any information collection will be required by a rulemaking. We invite comment on the need for any collection of information and paperwork burdens, if any.

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

Issued in Washington, DC, on October 26, 2009.

**Jeffrey D. Wiese,**

*Associate Administrator for Pipeline Safety.*

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