Excavator Enforcement Final Rule
History of the Rule

• Pipeline Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006
  – Heavy focus on preventing excavation damage to pipelines (a leading cause of serious pipeline incidents)
  – New limited enforcement authority for PHMSA pertaining to excavators who damage pipelines in states with inadequate damage prevention enforcement programs

• ANPRM published October 29, 2009
• NPRM published April 2, 2012
• FR published July 23, 2015
The Final 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
Policies – Criteria and Enforcement

• 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.
Evaluating State DP Enforcement

49 CFR 198 – New Subpart D

• Evaluation of state DP enforcement programs during annual review of state pipeline safety programs

• DP enforcement authority 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 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

7. Are exemptions from the DP law limited? Written justification of exemptions is required.
PHMSA 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 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 and membership exemptions, including the basis for the exemption, to include available data.
  – Noncompliance with this alone will not result in overall ineffective rating.
Policy – General
(this policy may be changed)

- Noncompliance with criteria 1, 2 = state deemed ineffective
- Noncompliance with criterion 3 = likely deemed ineffective
- Noncompliance with other criteria will not, alone, result in ineffective rating, but several noncompliances in combination could result in a state being deemed ineffective.
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
- State may petition PHMSA to reconsider at any time following a finding of inadequacy; PHMSA will respond not later than the date of the next review
- States that fail to establish an adequate enforcement program within five years of effective date of final rule may be subject to 4% reduction in base grant funding
Federal Standard for Excavators

- 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

• Focus will be on serious violations
• PHMSA will learn about violations through a variety of ways – no required reporting
• PHMSA’s standards for excavators are the “floor”. When conducting enforcement, PHMSA will be cognizant of state requirements.
Next steps

• Effective Date of Rule is 1/1/2016
• PHMSA implementation plan
  – Developing checklist, guidance that expands on policy document. Goal: consistency in evaluations
  – Developing FAQ’s, other resources for web posting
  – Developing timeline
  – Developing training
State Excavation Damage Prevention Law Enforcement Authority

Map produced May 19, 2015 by the U.S. Department of Transportation (U.S. DOT), Pipeline and Hazardous Materials Safety Administration (PHMSA)

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Questions?

• Annmarie Robertson
• 317-253-1622
• annmarie.robertson@dot.gov
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