**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**49 CFR Parts 196 and 198**

**[Docket No. PHMSA–2009–0192; Amdt. No. 196–1; 198–7]**

**RIN 2137–AE43**

# Pipeline Safety: Pipeline Damage Prevention Programs

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

**ACTION:** Final rule.

**SUMMARY:** Pursuant to the Pipeline Inspection, Protection, Enforcement, and Safety (PIPES) Act of 2006, this final rule establishes review criteria for State excavation damage prevention law enforcement programs as a prerequisite for PHMSA to conduct an enforcement proceeding against an excavator in the absence of an adequate enforcement program in the State where a pipeline damage prevention violation occurs. This final rule amends the pipeline safety regulations to establish the following: Criteria and procedures for determining the adequacy of State pipeline excavation damage prevention law enforcement programs; an administrative process for making State adequacy determinations; the Federal requirements PHMSA will enforce in States with inadequate excavation damage prevention law enforcement programs; and the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised. The development of the review 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:** This final rule is effective January 1, 2016.

**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

### *A. Purpose of the Regulatory Action*

The purpose of this final rule is to reduce pipeline accidents and failures resulting from excavation damage by strengthening the enforcement of pipeline damage prevention requirements. 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.[1] Excavation damage means any excavation activity 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, appurtenances to the pipe, protective coatings, support, cathodic protection or the housing for the line device or facility. Better, more effective enforcement of State excavation damage prevention laws, such as the requirement to ''call before you dig,'' is a key to reducing pipeline excavation damage incidents. Though all States have a damage prevention program, some States may not adequately enforce their State damage prevention laws. Under section 2(a)(1) of the PIPES Act (Pub. L. 109–468), PHMSA developed criteria and procedures for determining whether a State's enforcement of its excavation damage prevention laws is adequate. Under the PIPES Act, such a determination is a prerequisite for PHMSA if the agency finds it necessary to conduct an administrative enforcement proceeding against an excavator for violating Federal excavation standards.

### *B. Summary of the Major Provisions of the Regulatory Action*

Pursuant to the PIPES Act of 2006, this final rule amends the Federal pipeline safety regulations to establish the following: (1) Criteria and procedures PHMSA will use to determine the adequacy of State pipeline excavation damage prevention law enforcement programs; (2) an administrative process for States to contest notices of inadequacy from PHMSA should they elect to do so; (3) the Federal requirements PHMSA will enforce against excavators for violations in States with inadequate excavation damage prevention law enforcement programs; and (4) the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised. The establishment of regulations specifying the criteria that PHMSA will use to evaluate a State's excavation damage prevention law enforcement program is a prerequisite for PHMSA to conduct an enforcement proceeding against an excavator in the absence of an adequate enforcement program in a State where a damage prevention violation occurs.

### *C. Costs and Benefits*

The total first year costs of this rulemaking action is estimated to be $658,145. The following years, the costs are estimated to be approximately $183,145 per year. The total cost of this alternative over 10 years, with a 3% discount rate is $2,084,132 and at a 7% percent discount rate is $1,720,214. The average annual benefits of this alternative range from $4,642,829 to $14,739,141. Evaluating just the lower range of benefits over 10 years results in a total benefit of over $38,000,000, with a 3% discount rate, and over $31,000,000, with a 7% discount rate. Therefore, the estimated benefits of this alternative far outweigh the relatively minor costs, both annually and over ten years.

## II. Background

### *A. Pipeline Incidents Caused by Excavation Damage*

Excavation damage is a leading cause of natural gas and hazardous liquid pipeline failure incidents. From 1988 to 2012, 188 fatalities, 723 injuries, 1,678 incidents, and $474,759,544 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.[2]

While excavation damage is the cause of a significant number of all pipeline failure incidents, it is cited as the cause of a relatively higher number of natural gas distribution incidents. In 2005, PHMSA initiated and sponsored an investigation of the risks and threats to gas distribution systems. This investigation was conducted through the efforts of four joint work/study

[1] 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.*

[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.*

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.[3] 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 improving distribution pipeline safety.
- 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 to 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 action is needed to support the development and implementation of damage prevention programs that includes effective enforcement as a part of the State's pipeline safety program. This is consistent with a State's pipeline safety program's objectives, which are to ensure the safety of the public by addressing threats to the distribution infrastructure. Federal action must include provisions for ongoing funding, such as Federal grants, to support State pipeline safety efforts. This funding is intended to be in addition to, and independent of, existing Federal funding of State pipeline safety programs.

Other studies have indicated that improvements in State damage prevention enforcement can contribute to lowering excavation damage rates. A 2009 Mechanical Damage Final Report, prepared on behalf of PHMSA, 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.[4] In that regard, the 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.[5]

With respect to the effectiveness of current regulations, the 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—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.'' In addition, ''failure to take responsible care, to respect the instructions of the pipeline personnel, and to wait the proper time accounted for 50 percent of the incidents.''

*B. State Damage Prevention Programs*

States have historically been the primary enforcers of pipeline damage prevention requirements, and while this final rule will allow PHMSA to conduct Federal enforcement where necessary, PHMSA's view is that States should remain the primary enforcers of these requirements to the greatest extent possible. In analyzing the need for Federal enforcement authority, PHMSA notes that 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; rural and agricultural States have different underground infrastructure densities and excavation patterns than more urbanized States.

There is no single, comprehensive national damage prevention law setting forth requirements for excavators. 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 tool to better understand the variability in these State laws at *http://primis.phmsa.dot.gov/comm/DamagePreventionSummary.htm.*

*C. PHMSA Damage Prevention Efforts*

Prior to developing this final rule, PHMSA has made extensive efforts over many years to improve excavation damage prevention as it relates to

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

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

[5] Effectiveness of Prevention Methods for Excavation Damage, Chen, Q. and Chebaro, M., C FER Report L110, June 2006.

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 Advance Notice of Proposed Rulemaking (ANPRM) on this subject that PHMSA published in the **Federal Register** on October 29, 2009 (74 FR 55797).

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

On December 29, 2006, PHMSA's pipeline safety program was reauthorized by the 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 focus on damage prevention, including additional resources in the form of State damage prevention grants, clear program guidelines as well as additional enforcement authority to encourage States to develop and sustain effective excavation damage prevention programs. The PIPES Act identifies nine elements that effective damage prevention programs should include. These are essentially identical to the nine elements noted in the DIMP Report discussed in the previous subsection.

The PIPES Act gave PHMSA 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.

Section 2 of the PIPES Act limited the Secretary's ability to take civil enforcement action against these excavators unless the Secretary determined that the State's enforcement of its damage prevention laws is inadequate to protect safety.

*E. Advance Notice of Proposed Rulemaking*

On October 29, 2009, PHMSA published an ANPRM (74 FR 55797) 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 comments received on the ANPRM were generally supportive of the need for this rulemaking.

*F. Notice of Proposed Rulemaking*

On April 2, 2012, PHMSA published a Notice of Proposed Rulemaking (NPRM) (77 FR 19800) that reflected the comments and input received in connection with the ANPRM. The NPRM proposed to respond to the congressional mandate specified in Section 2 of the PIPES Act and included proposed amendments to Title 49, Code of Federal Regulations (CFR) to establish the following:

1. Criteria and procedures PHMSA would use to determine the adequacy of State pipeline excavation damage prevention law enforcement programs. PHMSA would first need to determine that the State's enforcement program is inadequate before conducting an administrative enforcement proceeding against an excavator for violating Federal requirements;

2. An administrative process for States to contest notices of inadequacy from PHMSA should the States elect to do so;

3. The Federal requirements PHMSA would enforce in States with inadequate excavation damage prevention law enforcement programs; and

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

**III. Advisory Committees Meeting**

On December 12, 2012, the Gas Pipeline Advisory Committee [6] and the Liquids Pipeline Advisory Committee [7] met jointly in Alexandria, Virginia. The Committees are statutorily mandated advisory committees that advise PHMSA on proposed safety standards, risk assessments, and safety policies for natural gas and hazardous liquids pipelines. Both committees were established under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C. App. 1) and the pipeline safety laws (49 U.S.C. 60115). Each committee consists of 15 members, with membership evenly divided among the Federal and State governments, the regulated industry, and the public. The Committees advise PHMSA on the technical feasibility, practicability, and cost-effectiveness of each proposed pipeline safety standard.

During the meeting, the Committees considered the NPRM to establish excavation damage prevention enforcement actions applicable to third-party excavators. To assist the Committees in their deliberations, PHMSA presented a description and summary of the major issues for comment. These issues are (1) the criteria for evaluating State enforcement programs, (2) the Federal excavation standard, and (3) the incentives for States to implement adequate enforcement programs.

After discussion, both Committees separately voted to recommend that PHMSA implement the NPRM with certain changes. Specifically, the Committees recommended as follows:

(1) The Liquids Advisory Committee voted unanimously, and the gas advisory committee voted 10-to-1 that the Notice of Proposed Rulemaking as published in the **Federal Register**, in terms of the criteria for evaluating State enforcement programs, is technically feasible, reasonable, cost-effective, and practicable if the following changes are considered:

- PHMSA develops a policy, incorporated into the preamble of the final rule, that clarifies the scope and applicability of the State evaluation criteria. The policy will address the

[6] Officially designated as the Technical Pipeline Safety Standards Committee.

[7] Officially designated as the Technical Hazardous Liquid Pipeline Safety Standards Committee.

relative importance and intent of each of the criteria and the three items identified in paragraph 9 of a document provided by member Pierson.[8]

The three items of paragraph 9 are:

• PHMSA should look beyond enforcement actions in evaluating a State damage prevention program. PHMSA should consider using a broad range of factors, such as a State's investigation processes, standards for excavators, excavator education efforts, and commitment to continued improvement.

• The criteria to determine whether a State damage prevention program is deemed adequate should also include consideration of whether the State's one-call centers are required to provide a mandatory positive response to locate requests. A mandatory positive response will ensure that an excavator is aware of whether owners/operators have marked the requested area prior to the beginning of an excavation, consistent with Common Ground Alliance (CGA) Best Practice 4–9.

• To engage stakeholders in the process of determining the adequacy of a State's program, the administrative process for States should be amended to include public comment. PHMSA should accept public comment on the adequacy of a State's damage prevention program.

The Liquids Advisory Committee voted unanimously and the Gas Advisory Committee voted 10-to-1 to recommend that PHMSA implement the NPRM with the changes reflected.

(2) Both Committees unanimously voted that the NPRM as published in the **Federal Register**, in terms of the proposed Federal excavation standard, is technically feasible, reasonable, cost-effective, and practicable if the following changes are considered:

• Eliminate the homeowner exemption.

• PHMSA develops a policy, incorporated into the preamble of the final rule that clarifies the scope and applicability of the Federal excavation standard. The policy will address triggers for Federal enforcement, how PHMSA will consider State exemptions in enforcement decisions, and how the Federal excavation standard will be applied in States with inadequate enforcement programs.

• In addition, the items 2 through 5 and 7 as provided by member Pierson, should be considered for incorporation into the final rule (including the policy as appropriate).

The items are:

196.109—Discretion to Dispatch 911 Emergency Personnel

• PHMSA's proposed § 196.109 states that, ''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.'' PHMSA should eliminate the discretion of the excavator in determining whether emergency personnel should be dispatched.

196.103—Excavator Responsibilities

• To foreclose ignorance as a reason for noncompliance, PHMSA should edit § 196.103, which lists an excavator's obligations to protect underground pipelines from excavation-related damage. Section 196.103 should be revised to read ''Prior to commencing excavation activity the excavator must:''

196.107 & 196.109—Stop Work Provisions

• A ''stop work'' provision should be incorporated into the regulations, which would require excavators to stop work if a pipeline is damaged in any way by excavation activity until the operator of the pipeline has had an opportunity to assess the damage. Consistent with CGA Best Practice 5–25, PHMSA should also require the excavator to take reasonable measures to protect those in immediate danger, the general public, property, and the environment until the facility owner/operator or emergency responders have arrived and completed their assessment of the situation.

196.107—Backfilling Locations

• PHMSA should include a requirement that an excavator may not backfill a site where damage or a near miss has occurred until the operator has been provided an opportunity to inspect the site.

Reporting Time Frame

• PHSMA should not include an upper time frame for reporting emergency release of hazardous products to appropriate authorities by calling 911. Excavators should ''promptly'' report incidents.

(3) The liquids advisory committee voted 8-to-1, and the gas advisory committee voted 8-to-3, that the NPRM as published in the **Federal Register**, in terms of the incentives for States to implement adequate enforcement programs, is technically feasible, reasonable, cost-effective, and practicable if the following changes are considered:

• Retain the potential penalty to base grants but consider lowering the percentage that may be affected.

• Develop a policy, incorporated into the preamble of the final rule that clarifies how base grants will be calculated by including the State program evaluation criteria defined in the final rule.

• Reduce the grace period (§ 198.53) from 5 years to 3 years.

• Ensure the Governors of States with inadequate enforcement are directly informed of PHMSA's findings, including potential consequences to base grant funding.

*PHMSA's Response to the Committees' Recommendations*

With respect to Item 1, PHMSA has considered the Committees' recommended changes to the criteria for evaluating State enforcement programs. PHMSA has developed a policy, outlined below in this preamble, which clarifies the scope and applicability of the State evaluation criteria. The policy addresses the relative importance and intent of each of the criteria.

PHMSA has also considered the three items identified in paragraph 9 of the document provided by member Pierson. With regard to the first item, which addresses the factors PHMSA should consider when evaluating State enforcement programs, PHMSA believes that the seven criteria listed in section § 198.55 of this final rule are adequate for evaluating the effectiveness of a State damage prevention enforcement program. PHMSA recognizes that there are many factors, such as excavator education and continual improvement, which contribute to effective damage prevention programs; however, this final rule is intended to address damage prevention enforcement and not other program elements.

With regard to the second item offered by member Pierson, the term ''positive response'' refers to communication with the excavator prior to excavation to ensure that all contacted pipeline operators have located and marked their underground facilities. PHMSA agrees that positive response ensures that an excavator is aware of whether operators have marked an area prior to the beginning of excavation. PHMSA supports CGA Best Practice 4–9. However, PHMSA did not propose in the NPRM to review States' use of positive response in determining the adequacy of State enforcement programs, which means that the concept has not been subject to public or stakeholder review. In addition, PHMSA believes that positive response is outside the scope of this rulemaking,

[8] At the Advisory Committees' meeting, member Pierson representing the pipeline industry submitted a written recommendation for the members' consideration.

which is focused on evaluating State enforcement programs. Therefore, PHMSA has not included positive response in the criteria listed in § 198.55 of this final rule.

PHMSA also did not propose in the NPRM to engage stakeholders in the process of determining the adequacy of a State's enforcement program, as suggested in the third item from member Pierson. Like positive response, the concept of stakeholder review of State programs has not been subject to stakeholder and public review. Additionally, PHMSA believes that engaging stakeholders in determining the adequacy of State programs would be overly cumbersome for both PHMSA and the States and would result in significant delays in the determination process.

With respect to Item 2, PHMSA has considered the Committees' recommendation to consider changes to the proposed Federal excavation standard. In response to the Committees' recommendation, PHMSA has eliminated the homeowner exemption originally proposed in § 196.105. PHMSA eliminated the homeowner exemption because homeowners excavating on their own property without first calling 811 poses a significant risk of excavation damage to pipelines. PHMSA has also developed a policy, incorporated into the preamble of this final rule, which clarifies the scope and applicability of the Federal excavation standard. The policy addresses triggers for Federal enforcement, how PHMSA will consider State exemptions in enforcement decisions, and how the Federal excavation standard will be applied in States with inadequate enforcement programs. This policy document will be posted on the agency's Web site.

PHMSA also addressed the other items provided by member Pierson. PHMSA has eliminated the phrase, ''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'' from § 196.109 and the phrase, ''where an underground gas or hazardous liquid pipeline may be present'' from § 196.103. With regard to §§ 196.107 and 196.109, PHMSA has not incorporated a ''stop work'' provision into the regulation. This provision was not proposed in the NPRM and has not received review from stakeholders and the public. Likewise, PHMSA has not incorporated requirements consistent with CGA Best Practice 5–25 for the same reason. With regard to § 196.107, PHMSA has not included in the final rule a provision disallowing backfilling because the provision was not proposed in the NPRM and has not received review from stakeholders and the public. With regard to the Reporting Time Frame, PHMSA has modified the proposed § 196.109 to reflect the recommendations.

With regard to Item 3, PHMSA has considered the Committees' recommendation to consider changes to the proposed incentives for States to implement adequate enforcement programs. As suggested, PHMSA has retained the potential penalty to base grants and has lowered the percentage of base grants that may be affected from 10 percent to four percent. However, PHMSA has not reduced the grace period noted in § 198.53 from 5 years to 3 years. PHMSA believes that some States may need a full 5 years to successfully update their State damage prevention laws to implement an adequate enforcement program. PHMSA has also developed a policy, incorporated into this preamble, which clarifies how base grants will be calculated by including the State program evaluation criteria defined in § 198.55. The policy also addresses PHMSA's process for notifying Governors of States with inadequate programs, including potential consequences to base grant funding. PHMSA reserves the right to modify these policies in the future, if necessary.

*Policies*

PHMSA will prepare stand-alone documents and post them on the agency's Web site for the following two policies: State Enforcement Program Evaluation Criteria, and Federal Enforcement Policy.

State Enforcement Program Evaluation Criteria

The criteria PHMSA will use to evaluate the adequacy of State damage prevention law enforcement programs are listed in § 198.55 of this final rule. The criteria are:

- Does the State have the authority to enforce its State excavation damage prevention law using civil penalties and other appropriate sanctions for violations?
- Has the State designated a State agency or other body as the authority responsible for enforcement of the State excavation damage prevention law?
- 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?
- 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?
- 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?
- At a minimum, do the State's excavation damage prevention requirements include 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 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 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.

- 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.

The evaluation will involve all of the criteria, and the final determination will be based on the totality of the review. The following policy describes the manner in which PHMSA intends to apply the criteria. As experience with adequacy reviews is gained, PHMSA may modify this approach as necessary.

Criteria 1 and 2 guidance:

- Criteria 1 and 2 are pass/fail.
- If the answer to either of the questions posed in criteria 1 or 2 is ''no,'' the State excavation damage prevention law enforcement program will likely be deemed inadequate.

Criterion 3 guidance:

- PHMSA will seek records that demonstrate that the State enforcement agency is using its enforcement authority and imposing appropriate sanctions for violations. If a State cannot demonstrate use of its enforcement authority, the State enforcement

program will likely be deemed inadequate.

• PHMSA expects States to maintain records that demonstrate whether the rate of excavation damage incidents is being reduced as a result of enforcement. The result of PHMSA's review of a State's records in this regard will not, by itself, render a State enforcement program inadequate.

• PHMSA expects State enforcement programs to generally make damage prevention law enforcement information and statistics available to the public via a Web site. PHMSA does not expect States to violate any State laws, jeopardize any ongoing enforcement case, or post information that would violate the privacy of individuals as defined by State or Federal law. The result of PHMSA's review of the public availability of a State's information and statistics will not, by itself, render a State enforcement program inadequate.

Criterion 4 guidance:

• PHMSA will review how State enforcement programs learn about excavation damage to underground pipelines. In particular, PHMSA will be looking for reporting mechanisms that encourage parity in the application of enforcement resources. For example, does the reporting mechanism identify potential violations of law by both excavators and pipeline operators? If the State enforcement program learns of violations via road patrols that specifically target excavators without valid excavation tickets, how does the State also learn about violations of other provisions of State damage prevention laws, such as operators' failure to locate and mark pipelines? Also, PHMSA will review the State's methods for making stakeholders aware of the process and requirements for reporting damage incidents to the enforcement authority.

• The result of PHMSA's review of a State's program under criterion 4 will not, by itself, render a State enforcement program inadequate.

Criterion 5 guidance:

• PHMSA expects State enforcement programs to be balanced with regard to how they apply enforcement authority.

• PHMSA expects enforcement programs to be focused on the responsibilities of not only excavators, but also of utility owners and operators.

• PHMSA seeks patterns of enforcement activity that demonstrate that penalties are applied to the responsible party or parties in excavation damage incidents and not consistently to only one stakeholder group.

• The result of PHMSA's review of a State's program under criterion 5 will not, by itself, render a State enforcement program inadequate.

Criterion 6 guidance:

• PHMSA will review State requirements to ensure they address the basic Federal requirements in the PIPES Act for excavators, such as using an available one-call system.

• The result of PHMSA's review of a State's requirements will not, by itself, render the State's enforcement program inadequate.

Criterion 7 guidance:

• PHMSA expects States to document the exemptions provided in State damage prevention laws for excavators and one-call membership, and any such exemptions should not be too broad. Documentation should include the types of exemptions included in State law and any reason for the exemptions, such as data or other evidence that justifies the exemptions.

• The result of PHMSA's review of a State's program under criterion 7 will not, by itself, render a State enforcement program inadequate.

The criteria are listed in order of greatest to least importance. That is, criteria 1 and 2 and a portion of criterion 3 are pass/fail, while criteria 4 through 7 are not pass/fail. PHMSA may declare a State enforcement program inadequate if the State's program does not satisfy a combination of the criteria as described above. PHMSA will notify in writing the Governor's office or other appropriate State authority of a State deemed to have an inadequate enforcement program.

States that PHMSA deems to have inadequate enforcement programs may be subject to reductions in pipeline safety grant funding as described in § 198.53 of this final rule. PHMSA will use the existing process for calculating base grants but is considering a policy that would incorporate and/or substitute the evaluation criteria in § 198.55 for the criteria that are currently used for evaluating State damage prevention programs. PHMSA may modify its policies, as necessary, for determining how inadequate enforcement programs may impact pipeline safety grant funding.

Federal Enforcement Policy

PHMSA may enforce the Federal excavation standard defined in 49 CFR part 196, as established by this final rule, in States that PHMSA has deemed to have inadequate damage prevention law enforcement programs. The following policy describes the scope and applicability of the Federal excavation standard.

PHMSA may use its enforcement authority, as limited by the law and this final rule, in any excavation damage case involving a violation of this standard in a State where a finding of inadequacy has been made. PHMSA generally will focus its limited resources on serious violations that have the potential to directly impact safety.

PHMSA will determine if Federal enforcement action is warranted on a case-by-case basis. PHMSA will seek to use its enforcement authority in cases where PHMSA believes Federal enforcement against an excavator is appropriate and will deter future infractions (PHMSA already exercises its enforcement authority against pipeline operators who commit violations).

PHMSA is flexible with regard to how it learns about excavation damage incidents that may warrant Federal enforcement action. PHMSA may learn about incidents through complaints from stakeholders, incident reports, the media, and other mechanisms.

PHMSA acknowledges that most State damage prevention laws and regulations are more specific than the Federal excavation standard defined in this final rule. The Federal excavation standard forms the ''floor'' and sets forth the basic requirements for excavators so that its application can be fair and consistent even in States with very different requirements. When determining whether to take Federal enforcement action for an alleged violation of the Federal excavation standard, PHMSA will be cognizant of the damage prevention practices of the State in which the alleged violation occurred. For example, PHMSA will be sensitive to exemptions, waiting periods, tolerance zones, and other specific requirements that States could have applied to excavators in the State prior to the determination of inadequacy.

## IV. Summary and Response to Comments

PHMSA received 40 comments from pipeline trade associations, excavation and construction trade associations, the National Association of Pipeline Safety Representatives (NAPSR), PHMSA State partners, the CGA, State one-call organizations and one-call service providers, utility locating trade associations, the American Farm Bureau Federation (AFBF), the Association of American Railroads (AAR), the Gas Processors Association (GPA), pipeline operators, utility locating companies, pipeline safety consultants, and citizens.

List of Commenters:

1. American Farm Bureau Federation (AFBF)
2. American Gas Association (AGA)

3. American Public Gas Association (APGA)
4. Association of Oil Pipe Lines (AOPL) and American Petroleum Institute (API)
5. Associated General Contractors of America (AGC)
6. Association of American Railroads (AAR)
7. Black Hills Corporation
8. Bob Fenton
9. Center Point Energy (CenterPoint)
10. Common Ground Alliance (CGA)
11. Distribution Contractors Association (DCA)
12. Emily Krafjack (2 separate comments)
13. Emma K.
14. Gas Processors Association (GPA)
15. Industry Perspective (AGA, AGC, AOPL, API, DCA, NUCA, and NULCA)
16. Interstate natural Gas Association of America (INGAA)
17. Iowa Association of Municipal Utilities (IAMU)
18. Iowa One Call
19. Iowa Utilities Board (IUB)
20. Kansas Corporation Commission (KCC)
21. Kern River
22. MidAmerican Energy Company (MidAmerican)
23. Missouri Public Service Commission (Missouri PSC)
24. National Association of Pipeline Safety Representatives (NAPSR)
25. National Grid
26. National Utility Contractors Association of Ohio (NUCA of Ohio)
27. National Utility Contractors Association (NUCA)
28. National Utility Locating Contractors Association (NULCA)
29. New York State Department of Public Service (NPDPS)
30. Northern Natural Gas
31. National Utility Contractors Association of Pennsylvania (NUCA of Pennsylvania)
32. Ohio Gas Association (OGA)
33. Oleksa and Associates, Inc. (Oleksa)
34. Paiute Pipeline Company (Paiute)
35. Pennsylvania One Call System, Inc. (Pennsylvania One Call)
36. Qualified One Call Systems (Oleksa comments repeated)
37. Southwest Gas Corporation (Southwest)
38. Tennessee Regulatory Authority (TRA)
39. Texas Pipeline Association (TPA)
40. Texas Pipeline Safety Coalition

*General Comments*

Most of the comments were supportive of the NPRM. PHMSA's State partners have concerns regarding the potential reduction of State base grant funding to States with inadequate excavation damage prevention law enforcement programs. A few State partners questioned the authority given to PHMSA by the PIPES Act to take enforcement action in States with inadequate excavation damage prevention law enforcement programs. A few comments were out of the scope of this rulemaking, either because the comments were on a specific State's excavation damage program or because the comments were regarding pipeline safety more generally.

*Comments Requesting PHMSA To Include All Nine Elements*

Associated General Contractors of America (AGC), Distribution Contractors Association (DCA), National Utility Locating Contractors Association (NULCA), National Utility Contractors Association of Ohio (NUCA of Ohio), and Southwest Gas Corporation (Southwest) commented that not only enforcement but also all other elements should be considered when evaluating the effectiveness of State excavation damage prevention programs.

AGC and DCA suggested that PHMSA take into account all nine elements (as defined in the PIPES Act of 2006) when evaluating the effectiveness of State damage prevention programs and take a holistic and comprehensive approach to reviewing current State damage prevention measures. AGC stated that the proposed standards place too much emphasis on enforcement and the excavator, and too little emphasis on the owner/operator and locators' responsibilities for timely and accurate locates. The AGC is supportive of PHMSA taking a position to evaluate States' overall damage prevention programs but suggests that PHMSA make its intentions clearer in the final rule. NULCA and NUCA stated that because the nine elements are supported by a broad range of stakeholders, including the CGA, they should be the sole basis for the evaluation of State programs.

Response

PHMSA agrees that the overall effectiveness of State damage prevention programs can be assessed by evaluating States' commitment to and implementation of the nine elements. To that end, PHMSA has worked with State partners to conduct regular reviews of State damage prevention programs by characterizing States' level of implementation of the nine elements. The results of these reviews are available on PHMSA's Web site at *http://primis.phmsa.dot.gov/comm/SDPPCDiscussion.htm.* However, the scope of this rulemaking pertains to the enforcement of State excavation damage prevention laws. Section 2 of the PIPES Act states that PHMSA may not conduct an enforcement proceeding unless the State's enforcement program is determined to be inadequate to protect safety. While other aspects of State damage prevention programs are essential to the effectiveness of those programs, the scope of this rulemaking is limited to the enforcement of State damage prevention laws.

With regard to the comment from AGC pertaining to the proposed standards placing too much emphasis on enforcement and the excavator and too little on the owner/operator and locators' responsibilities for timely and accurate locates, PHMSA believes that the final rule appropriately addresses the intent of Congress. PHMSA and its State partners have long had the authority to enforce the existing damage prevention regulations that are applicable to pipeline operators. These existing regulations (49 CFR 192.614 and 195.442) require pipeline operators to develop and implement damage prevention programs and to locate their facilities in an accurate and timely manner when in receipt of an excavation notice. In the context of this final rule, if PHMSA conducts an enforcement proceeding in a State with an inadequate enforcement program, PHMSA will ensure that enforcement is applied to the responsible party, whether it is an excavator or a pipeline operator. PHMSA also actively encourages its State partners to enforce the existing damage prevention regulations that are applicable to pipeline operators.

*Comments Recommending That PHMSA Hold Public Meetings/Provide Education*

DCA, NUCA, and NUCA of Ohio suggested that PHMSA hold additional public meetings before the agency issues a final rule. DCA and NUCA of Ohio believe the proposed criteria for determining the adequacy of a State damage prevention enforcement program are sufficient, but recommend that, prior to moving forward with its enforcement authority in a given State, PHMSA should invite all government and industry stakeholders to a discussion about the alleged problems with the State's enforcement practices. They recommended that in order to meet Element 2 of the PIPES Act, which calls for participation by operators, excavators, and other stakeholders, PHMSA should ensure that all interested stakeholders are invited to

the table. NUCA stated that the final rule would result in significant impacts to PHMSA's regulated community; therefore, significant outreach and education is needed for stakeholders that will be impacted by this rulemaking action.

The Pennsylvania One Call System, Inc. (Pennsylvania One Call) stated that enforcement should be used as a means of modifying behavior. Pennsylvania One Call advised PHMSA to be mindful of States' different methods to achieve the same end of damage prevention. For example, Pennsylvania's Underground Utility Line Protection Act provides for a range of enforcement tools that include warning letters, administrative sanctions, fines, and criminal penalties to encourage proper behavior by covered parties.

Response

PHMSA gathered considerable stakeholder input that informed the development of the final rule and provided opportunity for public participation and comment. PHMSA published an ANPRM on this topic in 2009 to gather stakeholder input prior to publishing the NPRM. PHMSA also developed a video, made available on the PHMSA Web site, which summarized the NPRM and invited comments.

In the context of this final rule, PHMSA does not intend to invite all government and industry stakeholders to a discussion about the alleged problems with a State's enforcement practices prior to proceeding with enforcement action in a given State. However, PHMSA does welcome the opportunity to participate in those discussions as a matter of course. PHMSA agrees that this rulemaking will require considerable outreach and education for stakeholders impacted by this final rule.

PHMSA is mindful of States' various enforcement methods as described by Pennsylvania One Call. These enforcement methods are effective in many States. PHMSA believes that the ability of a State to enforce its damage prevention law, specifically with civil penalties, is essential to an effective enforcement program because it deters noncompliance and ensures a level playing field for businesses that adhere to the requirements.

*Comments Requesting Cost Recovery for Excavators' Downtime*

NUCA requested that PHMSA include cost consideration for excavators' downtime when excavation damage is due to pipeline operators' failure to locate and mark pipelines properly. NUCA stated that pipeline owners or operators are often not subject to the same types of penalties that excavators are, are not required to reimburse excavators for any of their expenses, and are often subject to significantly lower fines. NUCA stated that in some States, for example, excavators that damage pipelines must reimburse owners or operators up to three times the expenses, can be prevented from bidding on certain projects, and can be fined up to $10,000. NUCA suggested PHMSA include in the final rule that ''where a pipeline is hit because of the failure to locate and mark the pipeline accurately in a timely fashion and the excavator is not at fault, owners or operators and/or their contractors (including locators) should be required to reimburse excavators for their costs.'' NUCA stated that this should include any damages to the excavator's equipment or property and any downtime incurred by the excavator while the true location of the pipeline is determined. NUCA stated that because these losses could be significant when an excavator is required to shut down a project due to the pipeline being not marked or marked inaccurately, this problem must be addressed by PHMSA.

Response

This final rule does not infringe upon any party's right or ability to pursue cost recovery related to downtime. As NUCA itself pointed out, downtime is a compensatory liability matter and has nothing to do with damage prevention. It would be an inappropriate use of Federal regulations to entitle any specific group to downtime compensation. Since PHMSA did not propose in the NPRM to include the language suggested by NUCA, the language has not been made available for public comment and cannot be included in the final rule. PHMSA believes downtime is not within the scope of this rulemaking.

*Comments Supporting the Proposed Rule*

Association of Oil Pipe Lines (AOPL) and American Petroleum Institute (API) are in strong support of the final rule and urge PHMSA to issue and implement a final rule expeditiously to help advance the ultimate goal of zero pipeline incidents. AOPL and API support PHMSA's proposed criteria for evaluating State excavation damage prevention law enforcement programs for minimum adequacy. The Ohio Gas Association (OGA) stated that it endorses PHMSA's efforts to bring national uniformity to the enforcement of pipeline damage prevention laws. The Texas Pipeline Association (TPA) stated that it is supportive of the proposed Federal damage prevention and enforcement requirements as well as the proposed regulations on State program evaluation. TPA recommended that these regulations be adopted in order to encourage effective enforcement.

Ms. Emily Krafjack recommended that PHMSA adopt all proposed regulatory language and noted that all gathering line classes could benefit from the NPRM. Ms. Emma K. commented in general support of pipeline safety.

Response

PHMSA appreciates the comments in support of promulgating a final rule expeditiously.

*Comments Opposing the Proposed Rule*

The Iowa Utilities Board (IUB), the Kansas Corporation Commission (KCC), and the Tennessee Regulatory Authority (TRA) are not in support of the NPRM. The IUB believes the notification standards in the final rule would conflict with the law of the State in which excavation is to be performed if the State's law includes the definitions used to determine when notice of excavation is required. The IUB agrees with PHMSA that there is no authority for or expectation of PHMSA enforcement of any provision of State law that goes above and beyond what PHMSA is authorized to enforce in 49 U.S.C. 60114(d). The IUB stated that PHMSA must still recognize the system established by State law when considering enforcement of Part 196.

The IUB further indicated that PHMSA does not have authority over excavators except as provided in 49 U.S.C. 60114(d). Nor would 49 CFR part 196 apply to persons other than excavators. The IUB stated that the proposed language of this final rule exceeds the scope of the specific law on which it is based and asserts broader authority than Federal law permits. The IUB stated that if the intent of the proposed § 196.205 is to make the point that PHMSA can take civil penalty action against excavators who violate 49 CFR part 196 provided the conditions of 49 U.S.C. 60114(f) have been met, then the final rule should be clarified. The IUB stated that 49 U.S.C. 60114(f) says PHMSA may find State enforcement is inadequate only if it does not (in PHMSA's estimation) adequately enforce that State's damage prevention laws. The IUB believes that PHMSA does not have the power to challenge a State law due to perceived inadequacies in areas other than adequate enforcement of that State law.

KCC believes PHMSA taking direct enforcement action against excavators will likely cause confusion and uncertainty in the excavator community. State damage prevention laws regulate many types of underground utilities in addition to protecting underground pipelines subject to regulation by PHMSA and subject to the standards established by PHMSA under 49 U.S.C. 60114(d). KCC stated that currently, 49 CFR part 198 requires States to address underground utility damage prevention on their own terms, taking into account the State's demographics and political process to structure laws and regulations best suited for the operations of its regulated community. However, under PHMSA's proposal, KCC believes that the potential exists that on-going attempts to tweak the State law in order to meet PHMSA's evolving ''adequacy'' requirements may upset the delicate legislative balance established in the Kansas Underground Utility Damage Prevention Act and potentially lead to a double standard: One set of rules for excavators working in the vicinity of natural gas and hazardous liquid pipelines, and another set of rules for all other excavators.

KCC stated that PHMSA proposes to establish its own Federal standards in those States where PHMSA deems the State's enforcement efforts ''inadequate'' and questioned why PHMSA would not merely enforce the State standards. KCC stated that PHMSA's NPRM does not include any exemptions, whereas the State program includes State-specific exemptions from the requirements of the State program for certain categories of ''excavators.'' In doing so, PHMSA goes well beyond stepping in to enforce State standards where a determination has been made that the State's enforcement programs are inadequate. KCC stated its view that 49 U.S.C. 60114(f) does not authorize such action.

TRA stated that it is concerned that the approach PHMSA proposes in the NPRM to penalize States that implement and operate pipeline excavation damage prevention law enforcement programs that do not meet what the TRA considers to be potentially ambiguous Federal standards is not sound policy. Rather than using the penalty of withholding funding, the TRA advises PHMSA that an incentive, like increased funding or more flexibility in use of existing funding, is more appropriate for States that implement sufficient pipeline excavation damage prevention law enforcement programs. If PHMSA finds that a State pipeline excavation damage prevention law enforcement program is inadequate, the TRA is concerned that such a finding may be misinterpreted as a finding about a State's efforts to promote pipeline safety through inspections.

TRA commented that review of State excavation damage prevention law enforcement programs is part of PHMSA's annual review of a State's overall pipeline safety program. Therefore, to avoid such misunderstanding by the public, the TRA recommends that if PHMSA finds a State excavation damage prevention enforcement program deficient, PHMSA should clearly state that the finding does not imply that a State's pipeline safety program is inadequate in protecting the public. Also, Texas Pipeline Safety Coalition provided red line edits to the proposed regulatory language.

Response

PHMSA recognizes that the proposed Federal excavation standard is less specific than many existing State damage prevention laws. In particular, State laws are often more specific than the proposed Federal rule in the areas of what constitutes excavation, exemptions established by State laws, notification standards, and what specifically is enforceable. This final rule is intended, in part, to establish Federal ''backstop'' enforcement authority in States with inadequate damage prevention law enforcement programs. As has been explained at length in the ANPRM and the NPRM, the Federal authority will only be used when the State has not been adequately enforcing its law. This position is clarified in the enforcement policy in the preamble of this final rule. Additionally, in response to the TRA's comments, it is important to note that incentives and grant funding have been made available to build State damage prevention programs. It is only the States that truly fail at damage prevention enforcement where excavators will be subject to Federal authority. Finally, if PHMSA finds a State's damage prevention enforcement program inadequate, that is not the same as PHMSA finding the State's entire pipeline safety program inadequate.

PHMSA disagrees with the IUB's comment that the NPRM asserts broader authority than the law permits. One aspect of a State's damage prevention authority is the extent to which the appropriate State authority is able to execute and enforce it. Whether a given State's law does not provide enforcement mechanisms or a State has such enforcement mechanisms but is not exercising its enforcement authority, the PIPES Act provides authority for PHMSA to establish and exercise Federal authority to ensure effective enforcement.

A major goal of this final rule is to encourage States to adopt and sustain adequate damage prevention law enforcement programs. However, PHMSA has limited ability to encourage States to do so. In addition to incentivizing States with grant funds, one way PHMSA can encourage States is by making a portion of a State's base grant funding dependent upon that State having an adequate damage prevention law enforcement program. PHMSA currently makes base grant funding dependent upon the adequacy of some aspects of States' damage prevention programs. This position, which defines how the State program evaluation criteria will be applied, is clarified in the policy in the preamble of this final rule.

*On PHMSA's Request for Comment on Its View That State and Federal Requirements Will Not Be Enforced Simultaneously; the Existence of a Federal Requirement Should Not Present Any Conflicts With Existing State Requirements for Excavators*

KCC stated that it believes that the final rule could result in simultaneous Federal and State enforcement actions. KCC also stated its belief that PHMSA has not rejected the possibility of taking Federal enforcement action on an incident that occurred before the State program was ruled inadequate. KCC stated that it believes significant due process considerations exist that, if ignored by PHMSA, may later undermine PHMSA's own ability to take appropriate enforcement actions when PHMSA's enforcement actions are subject to judicial scrutiny. KCC seeks a definitive recognition from PHMSA on the limitations imposed on PHMSA's authority to take such an enforcement action.

New York State Department of Public Service (NYDPS) believes that PHMSA has not fully considered the potential for Federal regulations and State laws to be enforced at the same time. NYDPS stated that it needs to be fundamental to all State excavation damage prevention programs that a call to 811 will notify all utilities of the excavator's intent to excavate at a particular work site and that there is one set of rules that applies to the State damage prevention program. Even if PHMSA deems a State program inadequate, the State law will not be repealed by this action and would remain in effect. The regulations proposed contemplate this because they assume a one-call system is actively operating in the State. NYDPS is

concerned that the imposition of a Federal program may have the deleterious effect of causing confusion among one-call laws and systems. This may be particularly true in instances where a State's law goes beyond Federal regulations in its application or requirements. While there may only be 1 one-call center that takes notices of intent to excavate under both the Federal and State programs, it would be up to the excavators and operators to ensure that their employees understand the different requirements in States that have been deemed inadequate. NYDPS believes PHMSA should fully consider these impacts. Also Missouri Public Service Commission (Missouri PSC) stated that the proposed Federal regulations are the minimal standard. It is not clear, however, whether a determination that a State's damage prevention program is inadequate would preclude that State from pursuing violations of the State damage prevention laws.

Response

PHMSA can assure these commenters that it will not pursue Federal enforcement action if a State has an adequate enforcement program in accordance with this final rule. Likewise, PHMSA will not take enforcement action on incidents that occurred in a State before that State's enforcement program was deemed inadequate. Additionally, PHMSA will not enforce State standards, but will instead enforce the minimum Federal standards defined in this final rule. When conducting enforcement, PHMSA will be considerate of State practices and exemptions in the application of the minimal standard defined in this final rule.

As we have stated repeatedly in the ANPRM and the NPRM, PHMSA has no intention of taking over the damage prevention responsibilities of States. PHMSA's enforcement authority is intended to backstop State's enforcement authority. This final rule only impacts States deemed to have inadequate enforcement programs. If a State is exercising its damage prevention enforcement authority, there is no reason to believe there will be any need for Federal enforcement. If a State has not been exercising its authority, and PHMSA exercises Federal authority, PHMSA would not expect that State to suddenly start exercising its authority on the very same violation that was the subject of a Federal enforcement action. A State that decides to begin exercising its authority should petition to have the finding of inadequacy lifted and begin enforcement once it is lifted and should not ''overfile'' on a Federal case.

If PHMSA determines a State's excavation enforcement program is inadequate, it is unlikely that the State is conducting enforcement. Conversely, if a State is enforcing its damage prevention law, it is unlikely that PHMSA would deem that State's enforcement program inadequate. Therefore, it is unlikely that Federal and State enforcement would be applied simultaneously. If instances arise where Federal and State enforcement could potentially be applied simultaneously, PHMSA will work cooperatively with the State enforcement agency to ensure that enforcement is applied fairly and consistently. PHMSA strongly encourages States to enforce their own damage prevention laws.

*On PHMSA's Request for Comments on Ways or Mechanisms That PHMSA Can Utilize To Become Aware of Excavation Damage Incidents*

Missouri PSC stated that the lack of a mechanism to notify PHMSA of excavation damages to pipelines is an obvious weakness in the NPRM. Under Missouri statute, damages are required to be reported to the Missouri One Call System (MOCS). Operator data compiled by the Missouri PSC indicates, on average, operators are aware of about 200 excavation damages to intrastate natural gas pipelines each month; yet, the MOCS is not receiving nearly that many reports. If a State is found to have an inadequate damage prevention program, PHMSA would have to require operators to report damages to their facilities or institute a complaint-driven mechanism to become aware of damages.

Response

As stated in previous responses to other comments, PHMSA's goal is to act as a Federal backstop enforcement authority to States. PHMSA does not intend to conduct enforcement for all excavation damages in States with inadequate enforcement programs. On the contrary, PHMSA's limited Federal enforcement resources will likely only be applied in limited cases. To that end, PHMSA will learn about violations of this final rule through existing channels (*i.e.,* PHMSA-required incident reports, National Response Center reports, and the media), and the final rule does not require Federal reporting at this time.

*On Whether the Evaluation Criteria Should Be Weighted*

KCC believes the adequacy of State enforcement of State safety programs must be evaluated on a holistic basis that would necessarily include weighting the criteria. It is important to KCC to have a law in place and the ability to administer the law with appropriate performance metrics. How the laws are administered—and at what level fines are imposed—is less important to KCC if the desired results of damage prevention are being achieved. The KCC suggested that the seven proposed criteria should be ordered as follows in importance: 1, 2, 6, 4, 5, 7, and 3. The KCC asked PHMSA to note the additional criteria found in 49 CFR 198.55(b), which allow PHMSA to take unilateral action based on an individual State enforcement action, should not be considered in the evaluation of an effective program.

Missouri PSC agrees with PHMSA that weighting the criteria would be difficult. On the other hand, Missouri PSC recommends PHMSA provide clarification as to whether each of the criteria items in 6(a), 6(b), 6(c)(i), and 6(c)(ii) carry the same ''weight'' as the other criteria items—*i.e.,* whether there are seven items in the criteria or 10—including the four issues in item 6. In giving a ''weight'' or point value to each of the criteria, the Missouri PSC recommends PHMSA provide additional clarification as to whether there is an expectation or quantification of the criteria a State would have to achieve to be considered ''adequate.'' Finally, the Missouri PSC recommends PHMSA provide additional clarification as to whether certain criteria are considered critical and/or essential for a program to be evaluated as adequate.

Response

PHMSA believes that some of the criteria for evaluating State enforcement programs, as proposed in the NPRM, should be considered more important than others because some criteria are more critical and/or essential than others. For example, if a State does not have enforcement authority provided by State law, then that State's enforcement program should be automatically considered inadequate. However, the matter of exemptions, while important, is less critical. PHMSA has included a policy in the preamble of this final rule that defines how the criteria will be applied when evaluating State enforcement programs. In addition, PHMSA will post a policy document on the agency's Web site. The adequacy determination involves a complex judgment based on multiple factors, and we will not attempt to discuss definitive or deterministic outcomes in all possible scenarios here.

In order to use Federal enforcement authority in a State, PHMSA must first

declare the State's damage prevention law enforcement program inadequate. PHMSA will not take unilateral Federal enforcement action in a State that has an adequate enforcement program. However, PHMSA may evaluate individual State enforcement actions in assessing the adequacy of enforcement programs. No determination of State enforcement program adequacy will be based solely upon a single State enforcement action. Instead, PHMSA may evaluate the overall program, including past enforcement cases, to gain a better understanding of the adequacy of the State enforcement program within the context of the criteria listed in § 198.55 of this final rule.

*On PHMSA's Request for Comment on Whether the Criteria for Evaluating the Adequacy of State Excavation Damage Prevention Law Enforcement Programs Are Clear, Well-Defined, Consistent, and as Simple as Possible*

KCC responded that consistent application of the criteria would be difficult, at best, because of what it considers to be the lack of well-defined terms, phrases, and procedures on how the criteria will be applied. KCC suggested that PHMSA include additional guidance in the final rule on how the agency will define and apply such phrases as ''sufficient levels,'' ''demonstrates effectiveness,'' and ''consider individual enforcement actions.''

Response

PHMSA agrees that additional guidance is necessary regarding the application of the criteria that will be used to evaluate the adequacy of State damage prevention law enforcement programs. PHMSA has included a policy that defines this guidance in the preamble of this final rule and will post a policy document on the agency's Web site.

*On PHMSA's Request for Comments Regarding Using a Determination of State Enforcement Program Adequacy To Be a Factor in Determining State Pipeline Safety Grant Funding Levels*

Missouri PSC stated it recognizes that the only incentive or disincentive that PHMSA has to make States comply with the damage prevention criteria is to reduce grant funding if the State does not have and/or enforce what are deemed by PHMSA to be adequate damage prevention laws. However, legislative action is required to make changes to Missouri's excavation damage prevention statute, and the legislative actions are outside the control of the Missouri PSC. An adequate damage prevention program is only a portion of a State's overall pipeline safety program. Not having adequate funding for the entire pipeline safety program reduces the effectiveness of Missouri's overall pipeline safety program. The result would be that Missouri could have an inadequate damage prevention program and an inadequate pipeline safety program.

Response

PHMSA does not intend to render State pipeline safety programs inadequate through the reduction of base grant funding. The reduction of base grant funding for States with inadequate enforcement programs is one tool available to PHMSA to incentivize States to implement effective enforcement programs. However, base grant funding is not the only incentive PHMSA can use. PHMSA will provide other incentives for States to implement adequate enforcement programs, including notification to the Governor explaining PHMSA's findings of enforcement program inadequacy and the potential safety and financial consequences for the State, publishing PHMSA's findings of inadequacy on PHMSA's public Web sites, giving grant funding to States for building stakeholder support for improved enforcement programs, and giving ongoing support to stakeholders in their efforts to improve enforcement programs. PHMSA may be able to provide additional support and incentives.

*On 911 Notification by the Excavator*

Missouri PSC stated that the PIPES Act of 2006 requires excavators to promptly call the 911 emergency telephone number if damage results in specific circumstances; however, the Missouri PSC asserts PHMSA's position in the NPRM is unreasonable. The Commission stated that discretion should be allowed as to when a call to 911 is warranted subject to whether (1) there is an emergency and 911 is called to dispatch emergency personnel; or (2) there is not an emergency and emergency personnel are not required. The Missouri PSC stated that the 911 operator should not be notified of damage to a pipeline unless emergency services are needed. The Federal Communications Commission and many communications companies have adopted ''311'' as the non-emergency number. Calling 911 to report damage in a non-emergency situation may obligate the 911 operator to dispatch even though the caller indicates emergency response personnel are not required at the damage site.

Response

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. PHMSA believes that a call to 911 in such circumstances is fundamental to public safety.

*Federal One-Call System*

Oleksa suggested that PHMSA review the various one-call systems, determine whether or not they are ''qualified,'' and publish a list of ''qualified'' one-call systems on the PHMSA Web site.

Response

By simply dialing 811, the national call-before-you-dig telephone number, damage prevention stakeholders will be connected to a qualified one-call system as defined in 49 CFR 192.614 and 195.442.

*Comments on the Proposed Regulatory Language*

## PART 196—PROTECTION OF UNDERGROUND PIPELINES FROM EXCAVATION ACTIVITY

### Subpart A—General

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

AGA suggested that the new part 196 should include requirements for excavators to follow a tolerance zone, which explicitly states the forms of ''softer excavation'' that are allowed in the immediate area of the marked location of the pipeline that would include hand-digging and vacuum excavation. AGA stated that these concepts are consistent with the excavation best practices in Chapter 5 of the Common Ground Alliance Best Practices 9.0. Part 196 should include language about the excavator having to take steps to protect and even expose the pipeline using soft excavation methods to confirm accuracy of the markings. Also, AGA recommended a maximum of a 1-hour time limit for excavators to report damage to the pipeline operator. In addition, AGA requested that proposed § 196.107 be amended to state that an excavator may not backfill a site where damage has occurred until the operator has been provided an opportunity to inspect the pipeline at the excavation site.

AOPL and API stated that the minimum threshold requirements for a State damage prevention program should include an incident notification requirement. They believe, however,

that a 2-hour notification ceiling, as suggested in the NPRM, appears unnecessarily prescriptive. They recommended that the standard for excavators to ''promptly'' report incidents to operators should remain effective without a mandated notification period. On the other hand, Missouri PSC stated that its regulations require notification of 2 hours following discovery by the operator, or as soon as practical if emergency efforts to protect life and property would be hindered. Missouri PCS stated that no issues have been identified with this time frame and recommended a 2-hour time limit for excavators to report damages.

Paiute and Southwest recommended that PHMSA require immediate notification of any damage to the pipeline operator. They stated that an excavator does not have the knowledge to determine the severity of a dent or gouge and/or whether or not the damage requires immediate repair.

PHMSA affirms the Common Ground Alliance Best Practices regarding soft excavation methods. However, PHMSA has not included tolerance zone and/or soft excavation requirements in this final rule. Tolerance zone and soft excavation requirements are very specific requirements and should be left to the States. Federal imposition of these requirements would establish double standards in States with similar requirements. PHMSA reiterates that one of the purposes of this final rule is to provide backstop damage prevention law enforcement authority in States with inadequate enforcement programs; the purpose is not to dictate overly specific requirements of safe excavation. PHMSA believes that the purpose of the Federal enforcement program is to provide a minimum standard. Further, as stated in the enforcement policy in the preamble of this final rule, PHMSA intends to consider the requirements of State damage prevention laws when conducting Federal enforcement proceedings, including State requirements regarding tolerance zones and soft excavation practices.

PHMSA agrees with API and AOPL regarding the requirements that excavators ''promptly'' report excavation damages to pipeline operators. PHMSA does not intend to create more specific standards than States that already define damage reporting timeframes. PHMSA will consider State requirements for reporting timeframes in instances of Federal enforcement.

**§ 196.3 Definitions.**

*Excavation/Exemptions*

The AFBF believes that, based on the current definition in the NPRM, normal agricultural and farm tillage practices would be considered excavation. AFBF believes the failure to exempt farmers and ranchers from the requirements of one-call laws prior to ''excavation'' is impractical and not workable for today's agricultural producers. AFBF requested that an explicit exemption for normal agricultural practices be given.

AAR believes that the NPRM's definition of ''excavation'' is unclear from the perspective of railroad maintenance-of-way activities. AAR stated that if railroads were subject to one-call requirements for their maintenance-of-way activities, there would be hundreds, if not thousands, of calls daily. AAR believes routine maintenance-of-way activities should not be subject to one-call notification requirements.

The Interstate Natural Gas Association of America (INGAA) stated that it opposes the last sentence of the proposed definition of excavation because it excludes homeowners excavating on their own property with hand tools. However, INGAA stated that it has no objection to the homeowner exemption to homeowners or occupants using only hand tools, rather than mechanized excavating equipment, including power augers, on their own property and digging no deeper than 12 inches below natural grade.

TPA stated that, with the growing use of plastic pipe in distribution, transmission, and gathering pipelines, the risk to pipeline infrastructure from hand digging increases. Plastic pipe can be punctured or severed by common digging tools used by homeowners. Beyond the damage to the pipeline infrastructure, excavation damage to plastic pipes would pose a risk to the homeowner. Rather than granting a blanket exemption to homeowners, TPA recommends that PHMSA limit the exemption to homeowner excavations by hand digging to depths of no more than 16 inches. TPA stated that, while the homeowner exemption should be limited, PHMSA should add an exclusion to the definition that would permit probing by an operator.

TPA also stated that the proposed definition of ''Excavation,'' in § 196.3 introduces ambiguity by the phrase ''below existing grade.'' It is not uncommon for the grade of the land above a pipeline to vary at different points along the pipeline. TPA stated that because the proposed regulations do not contain any further guidance on these matters, it would, at least initially, fall to individual excavators to determine if they are engaging in ''excavation'' and whether they are subject to the regulations. TPA also stated that once a pipeline is installed, erosion and prior land grading would impact the amount of cover for the pipeline. TPA stated that there is no reason to take these risks when the alternative is to make a phone call and wait a couple of days for a pipeline to be marked. Therefore, TPA urges PHMSA to remove the phrase ''below existing grade'' from the definition of excavation.

AGC stated that the term ''excavator,'' and thus the focus of Federal enforcement proceedings where the excavator is at fault, should refer to all parties doing digging work including, but not limited to, State agencies, municipal entities, agricultural entities, and railroads. State excavation damage prevention laws and enforcement should also apply equally to pipeline operators and their contract excavators and locators. However, AGC agrees that some exemptions can be justified with data, and these exemptions can only be determined at the State level, while many of the existing ones should be carefully scrutinized by PHMSA and eliminated if they present a danger to buried facilities.

The Black Hills Corporation opposes the exemption to homeowners using hand tools from requiring the use of a ''Call Before You Dig'' one-call system as well as from any Federal administrative enforcement action because it goes against the public safety educational drive for ''Call Before You Dig'' messages. Also, the Iowa Association of Municipal Utilities (IAMU) stated that exemptions to homeowners using hand tools are in direct conflict with most one-call laws across the country.

Iowa One Call believes that the proposed excavation definition would specifically exclude homeowners excavating on their own property with hand tools. The Iowa One Call stated that this exclusion is inconsistent with Iowa law and directly conflicts with the State's damage prevention public awareness and outreach communications campaign and program initiatives; however, Iowa One Call believes that some Iowa exceptions, such as opening a grave in a cemetery, normal residential gardening, operations in a solid waste disposal site which has planned for underground facilities, and normal farming operations, are judicious. To exclude these types of well-developed State exceptions would be impractical and possibly unrealistic.

NAPSR stated that the proposed definition of excavation only covers operations performed below existing grades, which may lead to confusion, especially in cases where excavation activities are performed, backfilled, and graded on multiple occasions over a period of time. The proposed definition of excavation specifically excludes homeowners excavating on their own property with hand tools and would directly conflict with many State laws and with State and national awareness initiatives. NAPSR stated that any person performing excavation activities, including homeowners, should be encouraged to call for utility locates and wait the required time allowed for marking before excavation begins, pursuant to State regulations and requirements. Therefore, NAPSR stated that the definition of excavation should not exclude hand digging by homeowners, and the sentence ''This does not include homeowners excavating on their own property with hand tools'' should be removed from the definition of ''excavation'' in § 196.3.

The IUB stated that 49 U.S.C. 60114(d)(1) requires excavators to use the one-call notification system of the State; therefore, the definition of excavation in the NPRM should defer to the definition of the State in which the excavation is proposed. The IUB stated the homeowner exclusion would directly conflict with many State laws and with State and national awareness initiatives to encourage landowners to call for utility locates before digging, and therefore, hand digging by homeowners should not be excluded. However, the IUB stated that excluding farm operations is impractical and unrealistic. Also, NUCA requested that the ''excavator'' definition should include examples such as excavator, contractor excavator, in-house excavators, municipalities, etc.

Northern Natural Gas supports the reduction of exemptions to one-call damage prevention laws. Northern suggested no exemptions. As for farming operations, Northern recommended a requirement for one-call notification whenever the farming operation penetrates the soil to a depth of 12 inches or greater. Northern stated that examples requiring a one-call notification for farm work would include mechanical soil sampling, drain tiling, chisel plowing, sub-soiling, ripping, terracing, and waterway or post installation. Also, OGA stated that there should not be a homeowner exemption because there must be the universal acceptance of the requirement to ''Call Before You Dig.''

Response

Most of the comments regarding the definition of excavation are focused on how the definition of the term will be interpreted in light of existing exemptions from the requirements of State damage prevention laws. The definition of excavation in this final rule is intentionally broad and inclusive. However, PHMSA recognizes that the definition of excavation in this final rule is broader and more generic than many of the definitions of excavation in State damage prevention laws. State laws are specific about which classes of excavators and/or which types of excavation are or are not exempt from State law. In conducting Federal enforcement, PHMSA will be considerate of the definitions of excavation, including exemptions applicable to excavators, in State damage prevention laws. However, PHMSA may choose to pursue Federal enforcement actions against excavators who egregiously and/or negligently damage pipelines in disregard of safety, regardless of whether those excavators are exempt from State law. PHMSA's enforcement policy is defined in the preamble to this final rule.

PHMSA agrees with the comments from INGAA, TPA, IAMU, the Black Hills Corporation, Iowa One Call, and NAPSR that oppose an exemption for homeowners excavating on their own property with hand tools. The exemption for homeowners has been removed from this final rule. PHMSA has not included any exemptions for excavations in this final rule. Exemptions in this final rule could create confusion regarding the applicability of State and Federal standards. Instead, PHMSA will be considerate of State exemptions in exercising Federal enforcement authority.

PHMSA has not clarified the types of excavators to whom the final rule applies, as suggested by NUCA. The definition of the term ''excavation'' is broad enough to encompass all types of excavators regardless of their relationships to other entities.

PHMSA agrees with TPA regarding the need to eliminate the phrase ''below existing grade'' from the definition of ''excavation.'' The definition of ''excavation'' has been updated accordingly.

*Damage/Excavation Damage*

AOPL and API believe revising the definition of damage or excavation damage in this section would provide greater clarity. They requested that because nicks, coating scrapes, and damage to cathodic protection wiring or appurtenances could affect the integrity of the pipeline, the word ''impact'' in the definition should be replaced with the term ''excavation activity.'' They stated that damage can be caused without physical impact: coating can be worn while pulling up trees or digging out roots in close proximity to a pipe; cathodic protection wiring can be cut, broken, or disconnected as a result of stresses created by heavy loading due to improper backfilling; or external loading itself can create undue stress on the pipe, creating an unsafe condition. Damage can also be caused when the support under the pipeline is taken away. Therefore, they requested a broader definition that would encompass a broad range of activities that impact safety.

*Response*

PHMSA agrees with AOPL and API regarding the need for greater clarity in the definition of damage or excavation damage. The definition of these terms has been modified to address these concerns.

*Pipeline*

NAPSR stated that the proposed definition of ''pipeline'' does not cover all appurtenances of a pipeline structure, only those ''attached or connected to pipe . . .'' This would exclude tracer wire systems or other devices, such as radio frequency identification or other electronic marking system (EMS) devices, used to facilitate proper locating and marking of the operator's infrastructure. NAPSR recommended that the definition of ''pipeline'' be written to include tracer wire and other devices used to facilitate proper locating and marking of the operator's infrastructure. NUCA requested that the pipeline definition should clearly describe the types of pipelines to which the final rule will apply, such as gathering, transmission, and distribution (including gas mains and service lines), as defined in existing laws and regulations, so everyone understands exactly what types of lines are included.

Response

PHMSA agrees with NAPSR about the need for the definition of ''pipeline'' to be expanded to include tracer wire and other devices used to facilitate proper locating and marking of the operator's infrastructure. PHMSA also agrees with NUCA regarding the need to clearly describe the types of pipelines to which the final rule will apply. The definition of ''pipeline'' has been modified accordingly.

*Tolerance Zone*

TPA suggests that PHMSA add a definition of ''tolerance zone'' to § 196.3. TPA stated that such a definition is critical to determining the accuracy of the locate markings and the area where ''proper regard'' must be used by an excavator as required by proposed § 196.103(c). Without the addition of this definition, PHMSA will be repeatedly placed in a difficult enforcement situation if a dispute arises between the excavator and the operator about the accuracy of the marking or the type of excavation practices used near the pipeline. Although the States have many different standards for a tolerance zone, the least controversial standard to use for a Federal standard would be CGA's Best Practice 5–19, which defines the tolerance zone as the width of the facility plus 18 inches on either side of the outside edge of the underground facility on a horizontal plane. TPA suggested that this definition or a similar definition would facilitate enforcement and enhance the protection of pipeline infrastructure and public safety.

Response

PHMSA has not included a definition of ''tolerance zone'' in this final rule. State laws are often specific about tolerance zones, and PHMSA does not wish to create confusion by establishing an excavation standard that is more specific or more restrictive than some State standards. Instead, when conducting Federal enforcement, PHMSA will be mindful of tolerance zones as defined by the law in the State where PHMSA is conducting enforcement.

## Subpart B—One-Call Damage Prevention Requirements

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

TPA suggested that the title of this Subchapter should be revised by deleting the word ''One-Call'' because the proposed Subpart B includes most of the excavation practice requirements, operator locating requirements, and One-Call process. TPA also urges PHMSA to add a provision to Subpart B requiring excavators and operators to report any damage to pipeline facilities using the CGA Damage Information Reporting Tool (DIRT). TPA stated that this provision should also impose a time limit for reporting so that the relevant data is captured as soon as possible after the damage event occurs.

Response

PHMSA agrees with TPA's suggestion to remove the word ''One-Call'' from the title of this subpart. The title has been changed from ''One-Call Damage Prevention Requirements'' to ''Damage Prevention Requirements.'' PHMSA disagrees with TPA's suggestion to require excavators and operators to report damages to the CGA DIRT database. The CGA DIRT database was developed as a voluntary system. Further, PHMSA does not own or control the CGA DIRT database, and PHMSA believes it would be inappropriate to require the use of CGA DIRT database through regulation.

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

NAPSR, NYDPS, AGA, INGAA, DCA, NUCA of Ohio, AOPL and API stated that in § 196.103, the language ''where an underground gas or hazardous liquid pipeline may be present'' would directly conflict with many State laws and with State and national awareness initiatives. They stated that the excavator should always call for staking prior to excavating. They stated that there is no way for an excavator to determine if a pipeline may be present without a staking request. Therefore, they recommended that the language ''where an underground gas or hazardous liquid pipeline may be present'' be removed or modified from § 196.103.

NAPSR stated that the language in § 196.103(b), which reads, ''If the 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,'' fails to define what is meant by ''in the area'' and does not specify the amount of time in which the operator is expected to ''wait for the pipeline operator to arrive'' and ''mark the location.'' NAPSR recommended that the term ''area'' should be better defined, the time between calling for locates and the beginning of excavation should be specified, and actions an excavator is to take when an operator fails to establish and mark the location of its underground facilities should be specified.

TPA stated that to increase the clarity of § 196.103, PHMSA should restructure the section by creating two major subsections, with one addressing activities prior to excavation and the other addressing activities during excavation. Also, TPA suggested that at least 2 business days should be required for the line locate request through a notification center before the planned beginning of an excavation. TRA stated that such a standard is consistent with the CGA Best Practices. TPA suggests revisions similar to CGA Best Practices 5–17 and 5–19 and believes these revisions should not be controversial. TPA provided recommended language to modify the proposed language in § 196.103. TPA stated that if PHMSA does not adopt TPA's recommendations, it suggests that the introductory language to § 196.103 be revised to read, ''Prior to and during excavation activity. . .'' to clarify the complete time period when the requirements of proposed § 196.103 apply.

Pennsylvania One Call suggested that § 196.103(a) should be amended to provide that an excavator must furnish the one-call center with specific location information consistent with State law, regulation, or practice because it believes that the current language does not address this matter.

NUCA suggested that the language in § 196.103(b) should require excavators to wait a prescribed time period (established by State law) for pipeline operators to arrive at the excavation site and mark the location of underground pipeline facilities. AOPL and API requested that the language in § 196.103(b) stating that an excavator shall ''. . . wait for the pipeline operator to arrive at the excavation site and establish and mark the location of its underground pipeline facilities before excavating,'' be rephrased to read ''Wait for 48 hours from the time of placing a one-call notification prior to excavation, to permit the pipeline operator to arrive at the excavation site and establish and mark the location of its underground pipeline facilities.'' They suggested that if the call is placed on a weekend, the 48-hour notification period would commence the next business morning, and excavation may proceed if the excavator has received an affirmative response from all underground utility operators as marked or cleared.

NAPSR stated that § 196.103(c) is vague and does not adequately address what ''proper regard'' or ''respecting the marks'' means. NAPSR stated that to clarify the section, PHMSA should add a reference to the CGA best practices for safe excavation around an underground facility.

AGA stated that § 196.103(d) seems unnecessary because a marking request is understood to be required at ''other'' locations. DCA questions the need for § 196.103(d) that would require excavators to ''. . . make additional use of one-call as necessary to obtain locating and marking before excavating if additional excavations will be

conducted at other locations.'' DCA stated that the requirement seems redundant. Excavators would have to comply with the requirements set forth in § 196.103(a), (b) and (c) for ''additional excavations'' that would be conducted at other locations.

AOPL and API recommended that § 196.103(d) state that, prior to commencing excavation activity where an underground gas or hazardous liquid pipeline may be present, the excavator must ''make additional use of one-call as necessary to obtain locating and marking before excavating if additional excavations will be conducted at other locations.'' They stated that the language appears to only require the use of one-call for excavations that are to be conducted at other locations. Since some State laws require the additional use of one-call for excavations that continue at the same location, AOPL and API recommended that the clause ''. . . if additional excavations will be conducted at other locations,'' be deleted, and that PHMSA replace the phrase with the language ''. . . or a locate request or markings have expired and a new one-call notification is required per applicable state law'' in its place.

Response

PHMSA agrees with the comments of NAPSR, NYDPS, AGA, INGAA, DCA, NUCA of Ohio, AOPL, and API regarding the need to remove the language ''where an underground gas or hazardous liquid pipeline may be present'' from § 196.103. The section has been updated to reflect the change. In addition, PHMSA has not adopted the recommendation from NAPSR concerning wait times and actions to be taken when an operator fails to mark its facilities. These issues are typically well-defined in State law. PHMSA intends to be considerate of State law when conducting Federal enforcement proceedings.

PHMSA has not restructured the section by creating two major subsections, as suggested by TPA. However, PHMSA has revised the introductory language for the section to read, ''Prior to and during excavation activity . . .'' to clarify the time period when the requirements of the section apply.

PHMSA has not adopted the suggestions from Pennsylvania One Call and NUCA regarding amending the section to require that excavators furnish the one-call center with information and wait the prescribed time required by State law. The enforcement policy in the preamble of this final rule provides that PHMSA will be considerate of State requirements when conducting Federal enforcement proceedings.

PHMSA has not adopted the recommendations of AOPL and API regarding including specific language pertaining to wait times in § 196.103(b). PHMSA does not wish to create Federal requirements that differ vastly from State requirements. Excavators in each State should already be familiar with the wait time requirements of State damage prevention laws. A different Federal wait time requirement may create confusion. PHMSA will be considerate of the requirements of State laws in instances of Federal enforcement.

PHMSA agrees with NAPSR that the proposed § 196.103(c) is generic. PHMSA has clarified the section in the final rule, but the section is left intentionally generic to allow for the variability in State damage prevention laws, which PHMSA will consider in any Federal enforcement case. PHMSA has not made any references to CGA Best Practices in the section.

PHMSA disagrees with the comments of AGA and DCA regarding the redundant nature of the proposed § 196.103(d). PHMSA has not removed this section from the final regulatory language. This language is taken directly from the PIPES Act, and PHMSA considers it essential to preventing excavation damage to pipelines.

PHMSA agrees with the comments from AOPL and API regarding § 196.103(d). However, PHMSA has not replaced the current language with the language they recommended. The language AOPL and API recommended refers specifically to State law, which PHMSA has no authority to enforce. Therefore, the phrase ''. . . if additional excavations will be conducted at other locations'' has been deleted and replaced with the phrase ''. . . to ensure that underground pipelines are not damaged by excavation.''

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

NAPSR stated that, in § 196.105, the exemption for homeowners conflicts with many State laws and with State and national awareness initiatives. However, NAPSR commented that State laws may include reasonable exemptions to the requirement to use one-call before digging such as opening a grave in a cemetery, landfill operations, and tilling for agricultural purposes. Therefore, NAPSR believes that any requirements or exceptions on when to use the one-call system before digging should be deferred to the State law.

MidAmerican Energy Company (MidAmerican) stated that it is concerned with the homeowner exemption language in § 196.105, and it believes that it would be safer and more appropriate to always require the homeowner to call for a locate than leaving it to the homeowner's discretion.

AGA stated that the exception from Federal enforcement for homeowners using hand tools on their own property under § 196.105 is to simply attempt to establish a reasonable boundary around the excavation damages PHMSA would be considering for enforcement action in those States with inadequate programs. Therefore, AGA recommended that hand digging to shallow depths be allowed for any party since digging with hand tools to shallow depths (less than 12 inches in depth) is typically not one of the highest risks among third party excavations in States with an inadequate program. AGA suggested that PHMSA delete the sentence ''This does not include homeowners excavating on their own property with hand tools'' since it is likely to cause confusion and is unnecessary if the language in § 196.105 is amended. AGA also stated that it agrees with PHMSA's use of the word ''exception'' under § 196.105 since its incorporation into a Federal excavation standard is very different from the one-call exemptions that exist at the State level. AGA stated that consideration should also be given to whether or not a farmer is a ''homeowner'' and if so, whether their exception would be for their entire property or just for their farm. AGA pointed out that Page 25 of CGA's 2010 DIRT Report shows that ''occupant/farmer'' is the excavator involved in 10 percent to 17 percent of the events collected for six of the eight One-Call System International Regions, and AGA believes this is a significant issue.

INGAA stated that homeowners using hand tools to dig more than 12 inches deep should not be exempt from contacting one-call and opposes the § 196.105 language that would exempt homeowners from contacting one-call before digging with hand tools.

TPA stated that § 196.105 should be revised to read as follows: ''. . . provided that the homeowner does not dig deeper than 16 inches.''

NUCA stated that in § 196.107 homeowners should not be exempted from calling one-call before excavation activity.

Response

PHMSA agrees with the comments regarding the need to eliminate the proposed exemption for homeowners.

This exemption has been removed from the regulatory language. The final regulatory language is silent on the subject of exemptions/exceptions.

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

AOPL and API requested that § 196.107 be amended to state that an excavator may not backfill a site where damage or a near miss has occurred until the operator has been provided an opportunity to inspect the site. In addition, AOPL and API suggested that a stop work requirement be included in § 196.107 as, ''If a pipeline is damaged in any way by excavation activity, the excavator must immediately stop work at that location and report such damage to the pipeline operator, whether or not a leak occurs. Work may not resume at the location until the pipeline operator determines it is safe to do so.''

CenterPoint stated that in § 196.107 the excavator should not backfill a pipeline if it is damaged by the excavator, and the excavator should remain on site and leave the damaged area accessible to the operator unless it would be unsafe or impractical to do so. If the damaged area is not left accessible, the excavator should leave clear markings to assist the operator with finding the damage.

Kern River stated that § 196.107 should first require that work be stopped immediately and the pipeline operator be contacted immediately since the excavator is not qualified to make a determination of the extent of the damage caused to a pipeline.

NAPSR recommended that § 196.107 state ''. . . if a pipeline is damaged in any way by excavation activity, the excavator must report such damage to the pipeline operator.'' NAPSR stated that consideration should be given to requiring the excavator to also notify the one-call center in the event of damage to an underground facility and/or a release of product to make sure there is a centralized location for the reporting of damages and a method of proper documentation of pipeline damages due to excavation.

NYDPS stated that § 196.107 requires excavators to notify the pipeline operator if the facility is damaged in any way by the excavation activities. The NPRM would require notification at the ''earliest practicable moment,'' but the NPRM indicates that PHMSA is considering requiring notification in no less than 2 hours. NYDPS stated that, instead of requiring a specific notification time, it believes that the language in the NPRM is preferable. NYDPS recommended that the regulation require, after the evacuation of employees and any other endangered persons, ''immediate notification'' by the excavator to the operator of any contact or damage to the pipeline, since this language is somewhat less open to interpretation and less subjective than the ''earliest practicable moment.''

On the other hand, TPA stated that § 196.107 should be revised to include a time limit by which an excavator must notify the operator of damage to a pipeline. TPA stated that even if there is no release of product, an operator needs to get to the damage site as soon as possible to assess the situation and take any necessary remedial action. TPA suggested that the time limit be 2 hours following discovery of the damage. TPA also suggested that § 196.107 should be revised to include a requirement that an excavator not backfill any portion of a damaged pipeline without the operator's approval.

Pennsylvania One Call stated that § 196.107 be amended to cover not only damage to a pipeline but also physical contact with a pipeline because this would prevent an excavator from exercising discretion to determine whether contact did or did not result in damage, and mere contact could create damage to pipeline coating.

Response

While PHMSA understands the comments from AOPL, API, CenterPoint, and Kern River regarding stop work and backfill requirements, PHMSA has not included these requirements in the final rule. These requirements would be very difficult to communicate in States with inadequate enforcement programs. The requirements would also be different from the requirements of State damage prevention laws in most cases. PHMSA does not wish to create confusion or create a scenario under which excavators would be subject to Federal enforcement of a requirement of which they would likely not be aware.

PHMSA has considered requiring excavators to notify the one-call center, in addition to the pipeline operator, in the event of excavation damage to a pipeline. PHMSA does not believe this requirement should be included in the final rule. One-call centers are not necessarily equipped to accept damage reports in every State. NAPSR's recommendation, therefore, could create an undue burden on both excavators and one-call centers and could lead to confusion among damage prevention stakeholders.

In response to the comments from NYDPS and TPA regarding the time limit for notice of damage to pipeline operators, PHMSA believes that the language proposed in the NPRM is practical and enforceable. Establishing a specific timeline may create confusion among stakeholders in States where PHMSA has Federal enforcement authority.

In response to the Pennsylvania One Call, PHMSA believes the definition of the terms ''damage/excavation damage'' in § 196.3 is broad enough to encompass all of the types of excavation damage that may have an impact on pipeline integrity and safety.

**§ 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?**

AGA suggested in § 196.109, PHMSA add a requirement that an excavator responsible for damage that results in the escape of dangerous fluids or gasses must take actions to protect the public until the arrival of the operator or public safety personnel in a manner consistent with the second half of CGA Best Practice 5–25: ''The excavator takes reasonable measures to protect everyone in immediate danger, the general public, property, and the environment until the facility owner/operator or emergency responders arrive and complete their assessment.'' AGA suggested that in § 196.109, PHMSA delete ''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,'' because this type of decision should rest with the 911 operator not the excavator.

NAPSR commented that in § 196.109, if the incident is such that it ''may endanger life or cause serious bodily harm,'' then emergency personnel should always respond to the site; the excavator should not be making a ''judgment call'' at this point. NAPSR recommended that the sentence ''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'' be removed from the proposed language in this section.

AOPL and API and INGAA suggested that § 196.109 should specify that if damage to a pipeline from excavation activity causes the release of any material, either gas or liquid, from the pipeline, the excavator must immediately stop work at that location and report the release to appropriate emergency response authorities by calling 911. Excavators should be required to contact the pipeline operator to notify them of the release after contacting the appropriate emergency

response authorities. Work should not resume at the location until the pipeline operator determines the work can be resumed.

Kern River stated that § 196.109 should first require that work be stopped immediately, next that the damage be reported to appropriate emergency response authorities, and finally that the pipeline operator be promptly notified.

MidAmerican commented that § 196.109 requires excavators to immediately report the release of hazardous products to the appropriate emergency response authorities by calling 911. Once the 911 emergency telephone number is called, § 196.109 would allow excavators the discretion of whether to request that emergency response personnel be dispatched to the damage site. MidAmerican stated that it believes that an exception should be made to the requirement to call 911 for pipeline operators who damage their own pipelines. Pipeline operators' personnel are directly on-site and can see that the necessary repairs can be made safely and expeditiously without the need to first contact emergency response personnel.

NUCA, NUCA of Ohio, DCA, and Pennsylvania One Call stated that the ''911 requirement'' in § 196.109 presents a ''Pandora's box'' to the excavation community. They stated that professional excavators are not first responders. Expecting a contract excavator to accurately determine if the product released following excavation damage is one that can ''cause serious bodily harm or damage property or the environment'' is outside their responsibilities. They stated that the decision as to whether a 911 call ought to result in a dispatch of emergency responders is a matter to be decided by the 911 center, not the excavator. They encourage PHMSA to revise or delete this provision in the final rule. NUCA agrees with PHMSA's proposal for calling 911 except for the excavator needing to maintain the option to exercise discretion on whether it is necessary for the 911 dispatcher to send emergency response personnel. NUCA stated that in many situations, all the excavator may need to do is inform the owner/operator that the pipeline was damaged so the pipeline operator can respond with the personnel who are best educated and equipped to handle the situation.

TPA stated that § 196.109 should be revised in three ways. First, to prevent the excavators using their discretion to call 911, the phrase, ''that may endanger life or cause serious bodily harm or damage to property or the environment'' should be deleted. Second, to eliminate any ambiguity in the final rule concerning when 911 should be contacted, the phrase, ''of hazardous products,'' which occurs immediately following the second occurrence of the word, ''release,'' in the first sentence of the Section, should be deleted. Third, the phrase, ''in addition to contacting the operator,'' should be added to the end of the first sentence of the Subsection to clarify that the operator needs to be contacted first.

Response

PHMSA disagrees with AGA's suggestion of requiring compliance with CGA Best Practice 5–25. While PHMSA supports CGA Best Practices (including Best Practice 5–25), PHMSA does not intend to require compliance with the Best Practices through this regulation. PHMSA agrees with AGA's and NAPSR's suggestion of removing the phrase, ''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'' from § 196.109. The phrase has been removed from the final regulatory language. PHMSA agrees with the suggestions from AOPL, API, INGAA, and NUCA regarding the need for excavators to contact 911 and the pipeline operator if excavation damage causes a release. PHMSA has removed from the final rule the proposed option for excavators to exercise discretion as to whether emergency response personnel be dispatched to a damage site. For reasons already noted in previous responses to comments, PHMSA disagrees with the idea of requiring excavators to stop work because of challenges related to communication and enforcement of the requirement.

PHMSA disagrees with MidAmerican's belief that an exception to the 911 requirement be made for operators who damage their own pipelines. The PIPES Act of 2006 requires the call to 911 in cases of excavation damage that result in releases, regardless of who is conducting the excavation.

PHMSA has made the changes to § 196.109 as recommended by TPA, with one exception. PHMSA has not included the phrase, ''in addition to contacting the operator,'' as recommended by TPA because contacting the operator after excavation damage occurs is already required under § 196.107.

PHMSA has also modified § 196.109 from the originally proposed ''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'' to ''any PHMSA regulated natural and other gas or hazardous liquid as defined in parts 192, 193 or 195.'' PHMSA made this change to ensure consistency with existing PHMSA regulations.

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

NAPSR stated that § 196.111 states that ''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 . . .'' However, most State regulations are more stringent than §§ 192.614, 195.442, and 60114, which generally cover only the broad basics and do not include as detailed compliance requirements as State law. NAPSR stated that PHMSA would not have a way of knowing if the pipeline operator fails to respond. In addition, it is not clear to NAPSR whether additional reporting requirements on pipeline operators or excavators, or both, would be established. NAPSR stated that State laws, regulations, and rules usually provide specific and detailed requirements for when an operator fails to respond to a locate request or fails to accurately locate and mark its pipelines. Therefore, NAPSR stated that any requirements concerning failure to respond or accurately locate needs to defer to the State law in the State where the event occurred.

Pennsylvania One Call requested that § 196.111 be amended to make it clear that PHMSA's direct role in State enforcement normally will be limited to those situations where (a) the State lacks enforcement authority, or (b) the State systematically refuses (by action or inaction) to utilize the authority it has.

NUCA stated that § 196.111 should include action against the owner/operator that results in reimbursement to the contractor for financial losses due to the owner/operators' failure to locate and/or accurately mark the pipeline. NUCA stated that this requirement would encourage pipeline owner/operators to respond to a request for ''a locate'' in a timely manner.

TPA stated that § 196.111 requires enforcement for the failure of an operator to accurately locate and mark its pipeline, but there is no standard in part 196 establishing the requirements for accurate locating and marking. TRA suggested that, to make sure pipeline operators accurately locate and mark their pipelines under the Federal damage prevention requirements,

§ 196.111 should be revised by adding a sentence that reads as follows: ''A locate mark will be considered accurate if it is located anywhere within the tolerance zone.''

Response

In response to the comments from NAPSR, PHMSA will be considerate of State laws and regulations when conducting Federal enforcement. The policy in this preamble further clarifies PHMSA's position. States often do not enforce 49 CFR 192.614 and 195.442. PHMSA believes that enforcement of these regulations, applicable to pipeline operators, ensures fairness in the damage prevention process and that pipeline operators take their damage prevention responsibilities seriously.

In response to the comments from Pennsylvania One Call, § 196.111 will only be enforced in States with damage prevention law enforcement programs that PHMSA deems inadequate.

For reasons stated in response to another comment above, PHMSA disagrees with NUCA's recommendation that § 196.111 should include action against the owner/operator requiring reimbursement to the excavator for financial losses due to an owner/operators' failure to locate and/or accurately mark a pipeline.

PHMSA disagrees with TPA's recommendation to include in § 196.111 a sentence that reads as follows: ''A locate mark will be considered accurate if it is located anywhere within the tolerance zone.'' PHMSA has not defined a tolerance zone in this final rule. In conducting Federal enforcement, PHMSA will be considerate of State requirements for accurate marking, consistent with the enforcement policy included in the preamble to this final rule.

## Subpart C—Enforcement

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

and

### § 196.205 Can PHMSA assess administrative civil penalties for violations?

AOPL and API requested that PHMSA clarify whether civil penalties in § 196.205 are intended to be used for failure to report a near-miss, or whether civil penalties will only be issued for damage and release events. They suggested that PHMSA should clarify that civil penalties may be imposed pursuant to the enforcement authority granted in subpart C, even if an excavator violates the subpart but does not cause damage. They support a case-by-case approach to imposing penalties, support weighing the facts and circumstances in each case, and support PHMSA's discretion to assess civil penalties regarding near-misses based on its investigation as to the excavator's efforts at communicating near-miss information. On the other hand, CenterPoint and the IUB were skeptical of the effectiveness of near-miss reporting. CenterPoint stated that the most difficult aspect of reporting near misses may be defining exactly what one is and stated that investigating possible near misses to determine if they are reportable would also tie up limited resources. IUB questioned if meaningful or accurate data would be collected by such a requirement. IUB stated that excavators would have little incentive to report near-misses that would otherwise likely go unnoticed, and the reports would bring potential penalties and shame. More rigorous (and expensive) monitoring of excavators by operators would also be of little benefit, as near misses would most likely occur during excavations where one-call was not notified, and the operator would be unaware that an excavation, let alone a near miss, had occurred. IUB suggested no rule on near-miss reporting be adopted on the basis that it is unlikely to provide worthwhile information.

AOPL and API stated that they support PHMSA's recommendations for establishing administrative procedures for a State wishing to challenge a finding of inadequacy. They also supported PHMSA's proposed adjudication process to be used by excavators for pipeline safety violations. Although no prescriptive timeframe is recommended, they suggested that PHMSA ensures that these processes be completed expeditiously. AOPL and API also suggested that the right to request the Attorney General to bring an action for relief, as necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, civil penalties, and punitive damages, be retained by the Administrator of PHMSA, or a designated authority, as authorized in 49 CFR 190.25.

AGC supported the administrative process outlined in the NPRM. AGC suggested, however, that in the process of the paper hearing that happens after the initial finding of inadequacy, PHMSA should request input from all stakeholders in the State with the inadequacy rating. AGC also suggested that in the penalty phase, PHMSA should consider education as an alternative or supplement to civil or other penalties and in cases where financial penalties are assessed, and/or that revenues generated must be reserved to finance damage prevention education and technologies used in support of damage prevention activities.

CenterPoint suggested that PHMSA should adopt a complaint-based administrative procedure as the primary trigger of the enforcement process provided in proposed §§ 196.205 and 196.207. CenterPoint commented that State and, if necessary, Federal criminal and civil penalties should be imposed to repeat excavation damage offenders who do not respond to any amount of monetary fines.

Paiute and Southwest stated that the process outlined within the NPRM is lengthy and potentially ineffective in dealing with an at-fault excavator. The administrative process defined in the NPRM could develop into 12-to-24 month interplay between the defending State and PHMSA before any enforcement action is taken with the excavator. An excavator should not be penalized for the inadequacy of a State's enforcement program by receiving a second fine from PHMSA upon the finding that a State's enforcement activities are inadequate. Additionally, they stated that an excavator would not be given credit for any improvements they may have made immediately following the infraction. Paiute and Southwest encourage the development of a process for determining the adequacy of a State's enforcement program in advance of an infraction and prior to invoking Federal administrative enforcement. They stated that PHMSA should first determine if the State's program is effective, notify the State of the inadequacies, and allow time for the State to take the steps necessary to improve their program. Then, PHMSA should initiate Federal enforcement immediately following an infraction should the State fail to improve its program.

DCA and NUCA of Ohio stated that PHMSA proposes to apply the same adjudication process for these new regulations as is used for other pipeline safety violations included in 49 CFR part 190. They suggested that improvements could be made to the logistical provisions in the final rule for excavators to address alleged violations of the Federal excavation standard. They stated that it is overly burdensome to expect professional excavators to travel to PHMSA regional offices that have jurisdiction over several States. Also, NULCA stated that PHMSA proposes to use the same adjudication process for these new regulations as is used for other pipeline safety violations

included in 49 CFR part 190. It believes that the process described in the NPRM is fair and consistent with current Federal law.

Paiute and Southwest commented that licensed, professional excavators should be aware of the damage prevention laws in the State(s) in which they do business and thus be held accountable for following the excavation law within those State(s). They stated that excavators should be required to follow the same adjudication process as pipeline operators as set forth in 49 CFR part 190. They also stated that the proposed adjudication process for homeowners would be unfair.

Response

PHMSA does not intend to require reporting of near misses. A more detailed explanation of PHMSA's enforcement policy is included in the preamble to this final rule.

PHMSA agrees with the comments from AOPL and API regarding the proposed administrative procedures for a State wishing to challenge a finding of inadequacy as well as the process to be used by excavators for pipeline safety violations. PHMSA intends to ensure that the processes are completed expeditiously. PHMSA also agrees with AOPL and API regarding the need for PHMSA to retain the right to request the Attorney General to bring an action for relief as authorized in 49 CFR 190.25.

PHMSA does not intend to request input from all stakeholders in determining the adequacy of a State's damage prevention law enforcement program as suggested by AGC. The adequacy of enforcement programs will be assessed using the criteria listed in § 198.55. Further, PHMSA does not intend to impose education requirements or other alternative or supplemental enforcement actions in addition to civil penalties in cases where financial penalties are assessed. Alternative enforcement actions would be overly cumbersome for PHMSA to administer.

PHMSA will consider complaints as a trigger for the enforcement process proposed in §§ 196.205 and 196.207. However, PHMSA will not consider complaints to be the only trigger for enforcement action. Additional information is available in the enforcement policy in the preamble to this final rule.

As originally proposed and as described in this final rule, and as recommended by Paiute and Southwest, PHMSA intends to determine the adequacy of State enforcement programs before exercising any Federal enforcement authority in States with inadequate programs.

PHMSA recognizes that the adjudication process in 49 CFR part 190 for violators of pipeline safety regulations could be burdensome for excavators if excavators are expected to travel to PHMSA regional offices. PHMSA regularly conducts these hearings via teleconference, which should relieve alleged violators of any requirement to travel.

PHMSA disagrees with the comments from Paiute and Southwest regarding the fairness of the proposed adjudication process for homeowners. PHMSA does not intend to make special accommodations for homeowners who violate pipeline safety regulations.

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

AGA stated that it is concerned that the civil penalty should always be restricted to the State's maximum penalty. AGA stated that excessive Federal penalties would actually serve as a deterrent for an excavator in reporting damage or perhaps even tempt individuals to make their own unauthorized repairs to a pipeline rather than notifying the operator. AGA stated that either way, this issue is a legitimate concern that could lead to unsafe conditions.

Response

PHMSA recognizes AGA's concern about the potential for excessive penalties to create an unsafe condition. However, PHMSA cannot restrict Federal civil penalties to maximum State penalties in States with no civil penalty authority. PHMSA will assess penalties pursuant to 49 CFR 190.225.

**§ 196.209 May other civil enforcement actions be taken?**

IUB commented that § 196.209 proposes additional types of civil enforcement actions against any person believed to have violated any provision of 49 U.S.C. 60101 *et seq.* or any regulation issued there under. IUB stated that this language would include any person, not just excavators, for any alleged violation of any Federal pipeline safety law or rule instead of just those related to damage prevention. IUB believes that this language far exceeds the scope of Part 196 and the law on which it is based.

Response

In response to the comment from IUB, § 196.209 is consistent with 49 CFR 190.235.

**§ 196.211 May criminal penalties be imposed for violations?**

NUCA recommended that, to ensure all parties are aware of potential penalty amounts, § 196.211 should include the penalties specified in 49 U.S.C. 60122.

Response

PHMSA has chosen to reference 49 U.S.C. 60122 with regard to civil penalties instead of noting the penalty amounts listed in 49 U.S.C. 60122. The maximum civil penalties in 49 U.S.C. 60122 are subject to change.

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

### Subpart D—State Damage Prevention Enforcement Programs

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

Missouri PSC stated that it understands PHMSA's incentive to make States comply with the damage prevention criteria is to reduce grant funding; however, Missouri's pipeline safety legislative actions are outside the control of the Missouri PSC. An adequate damage prevention program is only a portion of a State's overall pipeline safety program and, therefore, reducing the grant for an inadequate damage prevention program would mean not having adequate funding for the entire pipeline safety program, which would reduce the effectiveness of Missouri's overall pipeline safety program.

The IUB recommended that this portion of the NPRM be deleted in its entirety. The IUB stated that the section was not required or contemplated by Congress, the proposed penalty to State base grants is disproportionate and excessive, and it has the potential to drive States out of the Federal/State pipeline safety partnership. The IUB believes that this NPRM requires a public meeting for PHMSA to take evidence on the impact of such an onerous provision on State programs, and suggested that if public meetings are not possible, PHMSA should enter discussion with NAPSR on what a reasonable level of penalty on States might be.

IUB stated, with regard to § 198.53, that Congress directed PHMSA to develop ''through a rulemaking proceeding, procedures for determining inadequate State enforcement of penalties.'' PHMSA was not directed to take punitive action against States whose enforcement was deemed inadequate. IUB argued that the proposed grant penalties for States with

inadequate enforcement programs are unsupported by the law, unwarranted and unnecessary, and beyond the scope of this rulemaking; in addition, the amount of penalty proposed is disproportionate, excessive, and the deductions are cumulative.

IUB commented that a State pipeline safety program that is dependent on the PHMSA base grant would soon be unable to conduct a pipeline safety program and would be forced to withdraw or would be decertified from the program. IUB stated that the Federal grant reduction would likely drive States out of the pipeline safety program. IUB stated that even if a State would adopt new one-call enforcement provisions that PHMSA would find adequate, under the grant payment limitations of 49 U.S.C. 60107(b), it could take years for a State to recover from the loss of funding. IUB believes that no other single provision of PHMSA State program oversight could have an impact this devastating on the Federal/State pipeline safety partnership or the contributions of States to pipeline safety.

NAPSR stated that § 198.53 proposes that ''PHMSA will also conduct annual reviews of state excavation damage prevention law enforcement programs'' and ''if PHMSA finds a state's enforcement program inadequate, PHMSA may take immediate enforcement against excavators in that state'' and that ''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.'' NAPSR stated that the proposed language further states that ''the amount of the reduction in 49 U.S.C. 60107 grant funding shall not exceed 10% of prior year funding.'' NAPSR stated that a 10% reduction in a State's pipeline safety program base grant is disproportionate and excessive, especially when compared with the point allocations of the other parts of the annual evaluation scoring (*i.e.,* incident investigations, field inspections), and penalizing a State that is in need of additional resources to implement an ''adequate'' program does nothing but increase the difficulty of making the necessary changes, which may require legislative action that is beyond the control of the State agency. NAPSR stated that it believes the proposed penalty for States that are deemed by PHMSA to have inadequate excavation damage prevention law enforcement programs is unnecessary, unjustified, and excessive, and this provision should be removed from the proposed language, or at a minimum, should be reevaluated to determine a more equitable and reasonable level of penalty.

American Public Gas Association (APGA) stated that it believes that any grant funding cuts should be limited to State Damage Prevention grants, and the general pipeline safety funding (base grants) for the State should not be reduced. APGA stated that in many States, the pipeline safety agency is not the agency responsible for enforcing damage prevention laws. In most States, the legislature must act to enact effective damage prevention, and the pipeline safety agency is under the legislature. Therefore, neither the damage prevention grants program nor the general pipeline safety grants program is sufficiently large enough to overcome legislative resistance, but cutting pipeline safety grants would negatively affect the resources available for pipeline safety in a particular State.

AGA suggested a 5-year grace period after the initial determination of inadequacy is too long and suggested a 3-year grace period during which PHMSA should consider any incremental improvements to a State's damage prevention program before reducing base grant funding. Also, AOPL and API suggested a 2-year grace period. However, DCA supported the administrative process and believes that allowing State authorities 5 years to make program improvements to meet PHMSA's criteria is appropriate. TPA is fully supportive of the use of PHMSA's annual program evaluations and certification reviews as the vehicle under which to conduct evaluations of State damage prevention programs as proposed in § 198.53. However, TPA considers the proposed 5-year grace period too long for the improvement of a State damage prevention program that is found to be inadequate. TPA recommended a grace period be limited to 3 years. Also, TPA recommended that a fixed time limit be placed on the temporary waiver period of no more than 2 years. In addition, TPA recommended that if a State program is found to be inadequate, PHMSA not begin enforcement during the 3-year grace period.

AOPL and API supported PHMSA's proposal that a State's base grant funding can be impacted due to a determination that the State's excavation damage prevention program is inadequate. They stated that funding reductions may serve as an appropriate incentive for States to reform inadequate programs expeditiously, but should be coupled with other incentives to remedy inadequate programs. They commented that States are granted ample opportunity to address program deficiencies prior to such a determination and are similarly provided opportunities to demonstrate improvements within programs following this determination. The 10 percent cap on funding reductions would ensure that significant fluctuations in funding do not occur. AOPL and API suggested that those States that demonstrate reductions in damage rates as a result of effective enforcement should qualify to receive additional grant money, serving as a positive incentive to continually improve programs.

TPA urged PHMSA to limit its funding reductions proposed in § 198.53 to 10 percent of the Federal excavation damage prevention funds allocated to a State. TPA stated that while reducing overall funding levels by 10 percent might provide PHMSA with a bigger stick, it would adversely impact a State's ability to maintain an adequate pipeline safety program in all other respects. Such a result is contrary to the overall goal of PHMSA to promote and support all aspects of pipeline safety.

Response

In response to Missouri PSC's comments regarding incentives, PHMSA understands that the State's legislative actions are outside the complete control of the Missouri PSC. The same holds true for most States. Accordingly, PHMSA does not intend to arbitrarily reduce State base grant funding. Base grant funding levels are currently determined, in part, through an evaluation of State damage prevention programs. This final rule simply refines the criteria by which State damage prevention programs are evaluated. It is not PHMSA's goal to weaken State pipeline safety programs by reducing base grant funding. However, PHMSA, as a granting Federal agency, must use the financial incentives at its disposal to encourage States to adopt adequate excavation damage prevention enforcement programs. In addition to base grant incentives, PHMSA also intends to directly notify the Governors of States that PHMSA has determined to have inadequate enforcement programs. This notification to Governors may help encourage positive legislative action. Finally, PHMSA offers two grants—the State Damage Prevention grants and the one-call grants—that are available to States for improving damage prevention programs, including enforcement programs.

In response to the IUB, PHMSA has not removed the proposed penalty to State base grants for failure to

implement adequate enforcement programs. PHMSA currently calculates State base grant funding levels based upon a variety of factors, including damage prevention programs. This rulemaking simply changes the criteria upon which damage prevention programs are assessed. PHMSA has opted not to hold public meetings to discuss this provision. It is not PHMSA's intent to drive States out the Federal/State pipeline safety partnership. Instead, it is PHMSA's intent to provide incentives to States with inadequate enforcement programs to adopt adequate enforcement programs. PHMSA has reduced the proposed penalty from a maximum of 10 percent of prior year funding to a maximum of four percent of prior year funding.

As a granting agency under 49 U.S.C. 60107, PHMSA has the ability to use base grant funding levels as an incentive for improvements to State pipeline safety programs. The deductions are not intended to be cumulative.

PHMSA recognizes the IUB's concerns regarding potential reductions in base grant funding. PHMSA will take these concerns into consideration when determining the amount of potential reductions. States that are deemed to have inadequate enforcement programs will have a grace period of 5 years before any penalties take place. PHMSA will also notify Governors of determinations of inadequacy. PHMSA believes that adequate enforcement of State damage prevention laws is important enough to warrant the base grant incentive. PHMSA believes that States should enforce their own damage prevention laws and that enforcement is an essential part of a strong pipeline safety program.

In response to the comments from NAPSR regarding the proposed base grant penalty amount, PHMSA has reduced the maximum penalty to four percent. PHMSA does recognize that implementing an adequate State program may take legislative action that is beyond the complete control of PHMSA's State partners.

In response to the comments from AGA and APGA, PHMSA believes that limiting the discretionary State Damage Prevention grants would provide no incentive for States to implement adequate enforcement programs. On the contrary, the State Damage Prevention grants are made to improve damage prevention programs, including enforcement programs, and are a positive incentive for improvement.

PHMSA believes that given that some of PHMSA's State partners have limited influence over legislative processes, States should have a generous 5-year grace period after a finding of enforcement program inadequacy before base grant funding is reduced.

PHMSA recognizes AOPL's and API's comments about the need for additional incentives for State enforcement program improvement. PHMSA intends to work with State stakeholders to encourage improvement in States with inadequate enforcement programs. However, PHMSA cannot increase State base grant funding for good performance due to the way base grant levels are calculated. PHMSA may only reduce base grant funding for ineffective State pipeline safety programs, including inadequate State damage prevention enforcement programs.

PHMSA agrees with TPA's comments regarding exercising caution when determining reductions to State base grants.

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

*General Comments on § 198.55*

KCC stated that PHMSA's approach toward providing a transparent evaluation process using the seven criteria listed in paragraph (a) of § 198.55 appears to be trumped by paragraph (b) of that section. Paragraph (b) would allow PHMSA to deem a State program inadequate if PHMSA did not agree with an enforcement action taken by the State. What is not clear in the NPRM is whether PHMSA could find a State program inadequate based only on a single, individual State enforcement action, assume jurisdiction over the same excavator, and initiate Federal charges. If a State program is deemed inadequate based on a single State enforcement action, KCC asked, how does a State rectify that situation without putting the excavator in double jeopardy? KCC believes that due process and 49 U.S.C. 60114(f) requires that any Federal determination of inadequacy of a State's enforcement efforts must be made before PHMSA initiates Federal enforcement activities, and then the applicable Federal standards may be given only prospective effect. KCC also believes that 49 U.S.C. 60114(f) prohibits PHMSA from determining a State's enforcement of its damage prevention laws is inadequate until PHMSA establishes the procedures for making such a determination. KCC believes that while some of PHMSA's criteria in the proposed § 198.55(a) are well defined, others can best be described as concepts. KCC believes that PHMSA has not offered sufficient guidance (procedures) on how it will carry out the proposals found in the NPRM.

Missouri PSC commented that PHMSA stated ''PHMSA's primary interest with regard to state civil penalties [for violations of excavation damage prevention law] 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.'' Missouri PSC would like clarification as to whether those two criteria are more important than the other criteria, and if they are, they should be identified as mandatory requirements.

AGA stated that PHMSA's ultimate goal should be to ensure there is effective and consistent enforcement of excavation damage prevention laws and regulations at the State level. AGA and its members are supportive of the NPRM and are encouraged by the possibilities of stronger enforcement in States determined to have inadequate enforcement programs. However, AGA stated that before a State's damage prevention program is evaluated, PHMSA should consider what circumstances will actually trigger Federal enforcement action in States that have been evaluated and found to have inadequate damage prevention programs. AGA also stated that there should be a mechanism to proactively address repeat offenders who have a history of damaging pipelines due to risky behaviors or who have failed to report damages to the pipeline operator.

AGA stated that because enforcement of pipeline safety regulations is often assigned to State public utility commissions that only have jurisdiction over pipeline operators and the enforcement of excavation laws, related violations may rest with other State agencies having broader jurisdiction over excavators. AGA cautioned PHMSA not to create perverse incentives that spur excessive enforcement actions against pipeline operators alone. In AGA's opinion, pipeline operators are often the victims of excavation law violations. AGA suggests that PHMSA should create incentive for State agencies assigned the task of enforcing one-call violations against third-party excavators or underground utilities that fail to properly locate and mark their lines in a timely fashion.

AGA suggested that PHMSA examine State damage prevention performance metrics (damages per 1,000 locate requests) to determine if the State is performing adequately or is improving. The Association suggested that damages per 1,000 requests should only be used

to gauge an individual State's improvement over time without comparing the metric to other States or determine adequate performance. AGA suggested that PHMSA collect data on the number of enforcement actions taken against excavators and operators by the State authority in order to determine overall enforcement effectiveness. In addition, AGA suggested that PHMSA have an annual evaluation of excavation programs in States that are close to being inadequate (or are found to be inadequate) and a more general evaluation of excavation programs in those States that are far above the threshold.

CenterPoint asked that PHMSA provide enough time for a State program to be deemed adequate or better before the agency takes actions against a State so that PHMSA will never have to assume jurisdiction.

AGC stated that PHMSA should 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. Without accurate locating and marking, contractors are put in harm's way. APGA supports the efforts of PHMSA to encourage States to adopt and enforce effective excavation damage prevention programs. Pennsylvania One Call stated that State 811 centers have an audience that is larger than the pipelines covered by Federal statute. Pipelines are only one part of the facilities and parties covered by State one-call statutes, and PHMSA should avoid creating a situation where it places itself in conflict with enforcement policies mandated under State law that apply to all other covered parties, or creates a dual enforcement system at the State level.

NUCA stated that it opposes a permanent Federal role in State enforcement activities. NUCA suggested that the same enforcement requirements should be applied equally to all excavators, no matter their relationship to pipeline owners or operators. When an incident occurs, excavators working in-house for a pipeline owner or operator, and third-party contractors working under contract for pipeline owners or operators, should be treated as any other excavator. NUCA also suggested PHMSA consider adding one more element to the nine already-listed requirements for a comprehensive damage prevention program: The item should require all excavators and pipeline operators or owners to report near misses and/or mismarks to the State one-call (dig safe) system and/or Damage Information Reporting Tool (DIRT) that is sponsored by the Common Ground Alliance.

NUCA of Ohio stated that PHMSA's jurisdiction is limited to the natural gas and hazardous liquid pipelines; however, State policymakers will inevitably look at this regulation when adjusting their laws and enforcement practices subject to water, sewer, electric, telecommunications, and other underground infrastructure. To ensure the largest impact on damage prevention, PHMSA must encourage States to consider protection of all underground facilities when adjusting their safe digging programs and the enforcement of damage prevention requirements. Also, Southwest stated that an effective damage prevention program should lead to an overall reduction in damages to all underground facilities, not just natural gas and hazardous liquid pipelines, and PHMSA should take this into account when determining the adequacy of a State's program.

On PHMSA's request for comments concerning the issue of evaluating State programs on an incident-by-incident basis, KCC stated that it agrees with PHMSA that an annual review of the adequacy of enforcement of the State program would be less burdensome for the State. KCC stated that incident-by-incident evaluation is impractical given PHMSA's budgetary constraints. In addition, consistent with due process considerations, Federal enforcement actions could only be implemented prospectively and, therefore, incident-specific review would do little to rectify even glaring omissions or deficiencies in the State enforcement program. KCC, however, stated that the NPRM does not prohibit PHMSA from evaluating a State program based on a single incident. KCC suggested that PHMSA state in the rulemaking that the ''adequacy'' of State enforcement programs will be determined on the basis of an annual review.

Paiute and Southwest stated that they believe mandating adherence to specific criteria without consideration of alternate methodologies may be challenging for States due to staffing levels and varying legislative environments. Therefore, they believe that an effective damage prevention program should lead to an overall reduction in damages to all underground facilities, and not just natural gas and hazardous liquids pipelines. They suggested that PHMSA take this into account when determining the adequacy of a State's program. They suggested the States utilize data from the CGA's DIRT. They stated that this existing mechanism provides comprehensive data essential for learning about damages to all underground facilities statewide, not only those to natural gas and hazardous liquids pipelines. They stated that all stakeholders have a shared responsibility in damage prevention, and States should have knowledge of all underground damages when determining the effectiveness and/or necessary enhancements to their enforcement program.

AGA suggested that PHMSA should define an evaluation system using the criteria listed in the NPRM and make it transparent so that the public can see exactly which actions must be taken in order for a particular State's excavation program to become adequate. AGA suggested that there be a multi-stakeholder advisory council to flesh out the evaluation process after the regulation has been finalized. PHMSA would still conduct the evaluation, but the advisory council would provide guidance on how to perform that evaluation such as the following: What considerations should be made in evaluating each of the criteria listed; what data/information would be used in making the evaluation (and where to obtain the data/information); how to conduct the overall evaluation with respect to the various criteria reviewed and evaluated; how to address criteria where data/information is missing or non-existent; how to determine whether or not a State's grant funding should be reduced; if the State is taking some actions to improve its damage prevention program under a waiver submission; and, the advisory council could be comprised of anyone with experience in damage prevention. AGA stated that implementing an advisory council will help PHMSA gain support for the evaluations performed for each State.

CenterPoint Energy stated that it supports using the listed criteria, but the level of acceptability for each one needs to be set as pass/fail. If the criteria are properly established, absence of any one should be a basis for a finding of inadequacy. Any fine structure should be tied to a fund used to develop and execute a program to raise public awareness.

KCC stated that in the Commission's opinion, before subjective requirements, such as those presented in the NPRM, are enforceable, PHMSA should have the burden of proof to demonstrate how a State's program is ineffective by showing performance metrics that compare to other States of similar demographics.

On whether the proposed criteria strikes the right balance between establishing standards for minimum adequacy of State enforcement programs without being overly prescriptive, TRA stated that it appreciates PHMSA's acknowledgement that it is a State's prerogative to craft its own laws and regulations. TRA recommended that States should be granted maximum flexibility to implement excavation damage prevention law enforcement programs with the only provision that it meet minimum Federal standards, and those minimum standards should, however, be clear. TRA suggested that as an alternative, PHMSA could comment on State legislative efforts, prior to passage, to provide guidance as to whether they comply with PHMSA standards. Input by PHMSA in the form of explicit minimum standards or comment on legislation is the only way that a State can know it would not meet PHMSA's standards for excavation damage prevention law enforcement program.

KCC asked if a State program could be determined ''inadequate'' if only one criterion is not met to PHMSA's satisfaction, whether PHMSA provides guidance on the more subjective terms, and whether PHMSA's State partners be offered the opportunity to provide feedback on the guidance. KCC stated that without an opportunity to comment on any guidance that would be the true framework of the regulation, KCC believes that the rulemaking would lack due process and fail to satisfy the procedural requirements of the Administrative Procedure Act.

Response

In response to the comments from KCC, paragraph (b) in the proposal was not intended to trump paragraph (a) in the proposed § 198.55. Paragraph (b) is intended to allow PHMSA to consider individual enforcement actions taken by a State in the overall evaluation of a State's enforcement program. PHMSA will not make an adequacy determination based on a single enforcement action taken by a State but will evaluate enforcement actions taken by a State in the context of the evaluation criteria. PHMSA agrees that any Federal determination of inadequacy of a State's enforcement efforts must be made before PHMSA initiates Federal enforcement proceedings, and that the applicable Federal standards may be given only prospective effect. PHMSA has offered guidance regarding the scope and applicability of the evaluation criteria in the preamble to this final rule.

In response to Missouri PSC, PHMSA has clarified the scope and applicability of the evaluation criteria in the policy included in the preamble to this final rule.

PHMSA agrees with AGA's comments regarding PHMSA's ultimate goal to encourage effective and consistent enforcement of State excavation damage prevention laws and regulations. PHMSA has considered what circumstances will trigger Federal enforcement, as described in the enforcement policy in the preamble to this final rule. PHMSA has not developed a mechanism to proactively address repeat offenders who have a history of damaging pipelines because PHMSA is concerned primarily with enforcing future violations of regulations and not addressing past behavior.

PHMSA understands AGA's concerns regarding creating the wrong incentives that may spur unfair or inequitable enforcement programs. PHMSA does not believe the final rule, as written, will create these kinds of incentives. However, PHMSA will monitor the implementation of this final rule with consideration provided to AGA's concerns.

PHMSA acknowledges AGA's suggestion to examine State damage prevention performance metrics. However, State and Federal data that would enable this type of analysis are limited. PHMSA will review any data made available by the States in making a determination of enforcement program adequacy. PHMSA also acknowledges AGA's suggestion to evaluate marginal State programs on a more frequent basis. However, PHMSA does not intend to make determinations of marginal adequacy; rather, PHMSA will deem a State enforcement program either adequate or inadequate.

PHMSA agrees with CenterPoint's comment regarding providing enough time for State programs to be deemed adequate before PHMSA contemplates reducing State base grant funding. PHMSA will provide a 5-year grace period after the first determination of inadequacy to ensure States have time to improve their enforcement programs before base grants are affected. However, in States deemed to have inadequate enforcement programs, PHMSA will have the authority to take immediate enforcement actions against excavators if necessary and appropriate.

PHMSA agrees with AGC's comments regarding the need to equally enforce damage prevention requirements applicable to operators. To that end, PHMSA will work to ensure that enforcement is applied to the responsible parties in a damage incident. Fair and equitable enforcement will require thorough investigation of incidents and enforcement of applicable Federal regulations. PHMSA acknowledges the comments from Pennsylvania One Call and believes the final rule and the accompanying policies in the preamble to the final rule largely avoid the creation of dual enforcement systems at the State level.

PHMSA agrees with NUCA and opposes a permanent Federal role in State enforcement activities. Enforcement of State damage prevention laws is a State responsibility. PHMSA also agrees that this final rule should be applied equally to all excavators, regardless of their relationship to pipeline operators. PHMSA disagrees with NUCA's recommendation to require reporting of near misses and/or mismarks to State one-call systems and/or the Damage Information Reporting Tool. PHMSA believes this requirement would be out of the scope this rulemaking. PHMSA strongly encourages the use of data to analyze State damage prevention programs and encourages the States to collect damage and near-miss information for such purposes.

PHMSA acknowledges the comments from NUCA of Ohio and Southwest regarding the potential impact of this final rule. However, PHMSA regulatory authority extends only to specific pipelines, and PHMSA has attempted to be cautious in not unduly influencing other aspects of damage prevention. PHMSA believes that implementing adequate enforcement programs specifically for improving pipeline safety could lead to other changes in State enforcement programs that may result in reductions in the rate of excavation damage to all underground facilities.

With regard to the comments from KCC regarding incident-by-incident analysis, PHMSA agrees. PHMSA will not evaluate a State program based on its handling of a single incident, but instead will evaluate a State program based on the criteria stated in § 198.55.

PHMSA agrees with the comments from Paiute and Southwest regarding the holistic nature of damage prevention programs, but PHMSA must also be cognizant of PHMSA's mission and scope of regulatory authority, which is limited to pipelines. PHMSA is in favor of using DIRT for a variety of analytical purposes, but PHMSA will not use DIRT for evaluating State enforcement programs. DIRT data is consolidated at the regional level, and PHMSA has no access to State-specific data. In addition,

information in DIRT is submitted on a voluntary, anonymous basis by damage prevention stakeholders.

PHMSA agrees with AGA's suggestion to define a transparent evaluation system using the criteria listed in the final rule. PHMSA has developed a policy in the preamble of this final rule that clarifies the evaluation system. At this time, PHMSA does not intend to implement AGA's recommendation to convene a multi-stakeholder advisory council to further refine the evaluation process. PHMSA may consider the idea in the future.

PHMSA acknowledges CenterPoint Energy's recommendation to route civil penalties to a fund that could be used to develop a public awareness program. However, PHMSA is limited by law with regard to how civil penalties are collected. Civil penalties collected by PHMSA go directly to the U.S. Treasury.

PHMSA acknowledges KCC's comments regarding the comparison of States. However, past efforts by many damage prevention stakeholders to compare the performance of States to one another has proven impossible for a variety of reasons. PHMSA will not compare State enforcement programs to one another but will review available records that demonstrate performance trends within States.

In response to the suggestion from TRA regarding influencing State legislative efforts, PHMSA does not generally attempt to directly influence the State legislative process. However, if requested, PHMSA does work with States to provide information and guidance regarding PHMSA enforcement policies and other programs.

In response to the comments from KCC regarding how the evaluation criteria will be applied, PHMSA has developed a policy that addresses the scope and applicability of the evaluation criteria in the preamble of this final rule. This policy is not equivalent to regulation and is subject to change as PHMSA implements this regulation over time.

*Comments on § 198.55(a)(2)*

Kern River stated that § 198.55(a)(2) should require designation of a State agency, such as the State's Attorney General's Office, to enforce local damage prevention laws in a fair and effective manner. Kern River stated that it is important that enforcement remains a responsibility of the State and not be relinquished to local authorities where mechanisms, such as penalties or fines for violators, may not provide sufficient incentive for excavators to utilize the local one-call system.

Response

PHMSA agrees with Kern River that States should be responsible for enforcing damage prevention laws. However, PHMSA is not requiring that enforcement be conducted solely by a State agency. The proposed criterion at § 198.55(a)(2) focuses on enforcement at the State level but does not preclude enforcement by designated bodies other than State agencies. PHMSA does not wish to be overly prescriptive about who conducts enforcement within the State.

*Comments on § 198.55(a)(3)*

KCC stated that this criterion is vague and does not provide any guidance on how PHMSA would define sufficient levels or how the State would demonstrate effectiveness. Therefore, KCC seeks clarification on whether open records act requests are sufficient means of making information available to demonstrate effectiveness. Also, the KCC asks if PHMSA envisions each State preparing and filing a report on the State's enforcement program in order to demonstrate effectiveness and, if so, what would the report entail.

Paiute and Southwest stated that States can achieve effective enforcement by imposing remedial actions in lieu of civil penalties, such as through program awareness and/or mandated damage prevention training. As an example, Nevada has effectively enforced its damage prevention program through mandated damage prevention training for at-fault excavators. Other States may have established additional actions that have also been effective. Paiute and Southwest agree when civil penalties are warranted, they should be at levels sufficient to ensure compliance; however, they believe PHMSA should regard all effective actions taken by a State as part of its damage prevention program just as important as civil penalties. They believe that any publicly available damage and enforcement data should be comprehensive enough to demonstrate the effectiveness of the enforcement program while maintaining the confidentiality of the parties involved.

AOPL and API commented that where States use alternative enforcement mechanisms in addition to civil penalties in § 198.55(a)(3), PHMSA should consider effective alternatives to civil penalties when assessing whether States have undertaken actions to ensure compliance.

The IUB and NAPSR stated that § 198.55(a)(3) contains two separate and unrelated provisions: One about assessment of civil penalties, and another about publicizing information on the enforcement program. They stated that if both provisions were adopted, these should be separated into two sections. However, they recommended that the second part should not be adopted. They stated that publicizing enforcement actions is not of itself an act of enforcement and should not be used to judge if State enforcement is effective.

On whether State excavation damage prevention enforcement records should be made available to the public to the extent practicable, KCC believes the phrase ''to the extent practicable'' is vague. KCC suggested that PHMSA modify the NPRM to allow an open records act requirement similar to the Federal Freedom of Information Act requirements as an effective means of meeting this criterion.

Pennsylvania One Call recommended that § 198.55(a)(3) be amended to clarify that the size of the fine would be relative to the damage caused and the frequency of damage. Participation in a remedial education program may be a substitute for all or part of a fine where appropriate for the first offense. They also recommended that language should be inserted to reflect that transparency, while desirable as a general matter, may not always be possible under State law or may not be useful in settlement negotiations.

TRA suggested that in § 198.55(a)(3), the word ''ensure'' be replaced with the word ''promote,'' because no amount of civil penalties can ever ensure compliance.

Southwest stated that any publicly available damage and enforcement data should be comprehensive enough to demonstrate the effectiveness of the enforcement program while maintaining the confidentiality of the parties involved.

Response

In response to the comments from the KCC, PHMSA has developed a policy in the preamble to this final rule that clarifies how the evaluation criteria will be applied. In addition, PHMSA will post a policy document on the agency's Web site. PHMSA does not envision each State preparing and filing a report on the State's enforcement program. PHMSA staff will evaluate State damage prevention enforcement programs as part of the annual certification of State pipeline safety partners. PHMSA does not believe open records acts—or Freedom of Information Act (FOIA) requests—constitute a sufficient means of making enforcement information available to the public. PHMSA prefers to see enforcement records proactively

shared (via a Web site, for example), assuming the records can be shared legally and with regard to the rights of involved parties.

PHMSA acknowledges the comments from Paiute and Southwest regarding the use of alternative enforcement actions, in lieu of civil penalties, to promote compliance with damage prevention laws. PHMSA will consider the adequacy of all enforcement actions taken by a State. PHMSA will also evaluate whether State law provides civil penalty authority to the enforcement agency and will evaluate past enforcement actions with the goal of determining if those actions have promoted compliance with State damage prevention laws. The policy in the preamble of this document further clarifies how the State program evaluation criteria will be applied.

In response to the comments from AOPL and API, PHMSA believes that States can and do use alternative enforcement mechanisms (such as required training) to effectively encourage compliance with State damage prevention laws. However, PHMSA believes that civil penalties are the most effective deterrent to violation of the law.

In response to IUB and NAPSR, PHMSA believes that civil penalty authority and publicizing enforcement actions are important components of adequate damage prevention law enforcement programs. However, a State having civil penalty authority is relatively more important to an adequate enforcement program than publicizing enforcement actions. PHMSA has developed a policy in the preamble to this final rule that describes how the evaluation criteria will be applied, including how the criteria will be weighted.

In response to the KCC's comments about public records, PHMSA believes that transparency is an important component of an adequate enforcement program. PHMSA makes every effort to proactively make those records that are subject to Freedom of Information Act requirements public. PHMSA does this by posting records, to the extent practicable, to PHMSA's Web sites. PHMSA believes that State damage prevention law enforcement authorities should do the same in an effort to demonstrate the State's commitment to deterring excavation damage to pipelines through law enforcement. Additional clarification is made in the policies included in this preamble.

In response to the comments from Pennsylvania One Call regarding § 198.55(a)(3), PHMSA recognizes that States use alternatives to civil penalties, such as education requirements, for enforcement of State damage prevention laws. PHMSA believes that, under appropriate circumstances, using civil penalties is essential to adequate enforcement. PHMSA will be considerate of States' use of alternative enforcement actions when evaluating enforcement programs. In addition, PHMSA recognizes that transparency in enforcement actions may not always be possible under State law in every circumstance.

PHMSA agrees with TRA's suggestion to replace the word ''ensure'' with the word ''promote'' in § 198.55(a)(3). The regulatory language has been modified accordingly.

PHMSA agrees with Southwest's comments regarding confidentiality concerns pertaining to enforcement records. PHMSA does not intend for States to violate the confidentiality of any party, and PHMSA only seeks for States to make publicly available records that demonstrate the effectiveness of the enforcement program as permitted by State law and as practicable with regard to the rights of all involved parties.

*Comments on § 198.55(a)(5)*

KCC stated that the phrase ''investigation practices that are adequate'' in this criterion is a vague phrase and one that requires additional guidance from PHMSA. KCC believes that this guidance, and an opportunity to comment on the guidance, should be part of the rulemaking process.

Paiute and Southwest stated that investigation practices should be employed fairly and consistently to effectively determine the at-fault party. They suggested State investigators be trained in effective and consistent investigation practices.

TRA stated that because excavation damage often is the result of partial failures of the excavator and the operator, it is difficult to always determine a single party who would qualify as the ''at-fault'' party in any specific situation. Therefore, TRA recommended that the language in § 198.55(a)(5) be revised by replacing the phrase ''at-fault party'' with the phrase ''responsible party or parties.''

Response

PHMSA acknowledges KCC's request for clarification of how the State program evaluation criteria will be applied. This clarification is provided in the policy in the preamble to this final rule. PHMSA does not intend to subject this guidance to stakeholder comment as part of this rulemaking process. However, PHMSA did take into consideration comments from the NPRM in the development of this guidance.

PHMSA agrees with Paiute and Southwest. State damage investigation practices should be fair and consistent to effectively determine the responsible party. PHMSA also agrees that State investigators should be trained in investigation practices. However, those issues are not within the scope of this final rule.

PHMSA also agrees with TRA's suggestion to replace the phrase ''at-fault party'' with the phrase, ''responsible party or parties'' in § 198.55(a)(5). The regulatory language has been updated accordingly.

*Comments on § 198.55(a)(6) and (7)*

The IUB and NAPSR stated that § 198.55(a)(6) and (7) would include in the evaluation of the effectiveness of a State damage prevention program whether the State's law contains provisions that have nothing to do with enforcement. They stated that 49 U.S.C. 60114(f) does not authorize PHMSA to find State enforcement is inadequate due to unrelated deficiencies in the State law, and that only the adequacy of enforcement can be considered. Therefore, they recommended § 198.55(a)(6) and (7) be deleted.

The IUB stated that Congress directed PHMSA to conduct a study of the potential safety benefits and adverse consequences of other State exemptions; therefore, until that study is completed, the significance of State exemptions is undetermined. Attempting to link State exemptions to damage prevention enforcement, where it does not belong anyway, is contrary to the direction given by Congress regarding exemptions.

AOPL and API suggested that a stop work requirement be added in § 198.55(a)(6)(c). They suggested language that reads, ''An excavator who causes damage to a pipeline facility must immediately stop work at that location and report the damage to the owner or operator of the facility; and if the damage results in the escape of any material, gas or liquid, the excavator must immediately stop work at that location and promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.'' AOPL and API also suggested that the stop work requirement be added to § 198.55(a)(6)(d) (new section). They suggested language that reads, ''Work stopped under subparagraph (c) may not resume until the pipeline operator determines it is safe to do so.'' Also, AOPL and API stated that they do not

oppose the AGA's recommendation that PHMSA adopt the full Common Ground Alliance best practices on actions an excavator must practice following a strike and release in this section. Kern River stated that the proposed criteria in § 198.55(a)(6)(c)(i) and (ii) should first clarify that work must be stopped immediately when an excavator causes damage or suspected damage to a pipeline, whether there is a substance released or not.

DCA and NUCA of Ohio stated that the criteria to determine the adequacy of the State law itself provided in § 198.55(a)(6) are incomplete. They stated that PHMSA should restate the operator's responsibilities related to one-call participation and accurate locating and marking of their facilities in the criteria to determine the adequacy of a State damage prevention law described in the NPRM.

NUCA of Ohio stated that while consideration of exemptions to damage prevention requirements is important, it is one-sided as currently written. Section 198.55(a)(7) asks: ''Does the state limit exemptions for excavators from its excavation damage prevention law?'' And answers: ''A state must provide to PHMSA a written justification for any exemptions for excavators from state damage prevention requirements.'' NUCA of Ohio stated the NPRM neglects to include consideration of exemptions to one-call membership requirements as well as from locating and marking responsibilities. As written, PHMSA would only consider enforcement of requirements subject to excavators in its criteria but not pipeline operator requirements.

TPA stated that in § 198.55(a)(6)(i), the words ''but no later than two hours following discovery of the damage'' should be added immediately following the word ''damage'' at the end of the subsection because of the need to provide clear guidance on the outer limit of time for a damage notification to occur. In this same subsection, TPA recommended that the phrase ''owner or'' be deleted because the pipeline safety regulations are directed towards operators of pipeline facilities, and the most effective communication to address damage is with the person who operates the pipeline. In § 198.55(a)(6)(c)(ii), TRA suggested that the language should be revised in the same manner as what TPA proposed for the language of § 196.109 to eliminate ambiguity in the provision and promote timely contact of the operator as well as 911.

The Missouri PSC stated that the Missouri damage prevention statute requires that damages to underground facilities must be reported to MOCS by the excavator. MOCS then immediately notifies the facility owner or operator of the damage. This is a method that works well in Missouri. Further, the excavator may not have contact information for the underground facility owner/operator but can readily contact MOCS by dialing ''811.'' The Missouri PSC requested clarification from PHMSA that this notification process (the excavator reporting damage to MOCS) is acceptable (meets the criteria) and that damages do not have to be reported directly to the owner or operator of the pipeline facility.

Response

In response to the comments from the IUB and NAPSR, PHMSA does have the authority to evaluate State damage prevention laws in order to determine the adequacy of enforcement of the laws. PHMSA believes that an adequate law enforcement program is dependent upon an adequate law that, at a minimum, contains the requirements of § 195.55(a)(6) and does not excessively exempt parties from damage prevention responsibilities.

In response to the IUB, Congress did direct PHMSA to conduct a study of State exemptions in the PHMSA reauthorization bill of 2011 (Public Law 112–90). This final rule is an extension of the PIPES Act of 2006. PHMSA agrees that more information about the safety implications of exemptions is required, but, in general, PHMSA opposes exemptions in State damage prevention laws. However, some exemptions may be warranted, especially when justified by data, which is why PHMSA is requiring a written justification of exemptions in State damage prevention laws. In addition, as described in the policies included in this preamble, PHMSA does not intend to determine the adequacy of a State enforcement program based solely on the existence of exemptions.

PHMSA acknowledges the recommendation from AOPL, API, and Kern River to include a ''stop work'' requirement to § 198.55(a)(6)(c), which is now § 198.55(a)(6)(iii), and § 198.55(a)(6)(d), which is now § 198.55(a)(6)(iv). However, PHMSA has not added this requirement to the final regulatory language. The requirement was not proposed in the NPRM and has therefore not been subject to public review and comment. In addition, PHMSA believes that communicating a Federal stop work requirement to excavators would be very difficult, thereby making the provision challenging to enforce. PHMSA has also not adopted the recommendation from AGA to require compliance with CGA best practices on actions an excavator must practice following a pipeline damage and product release. PHMSA strongly supports the CGA best practices but does not intend to implement the best practices through this regulation.

PHMSA recognizes the concerns of DCA and NUCA of Ohio regarding the need to enforce operators' responsibilities in the damage prevention process. These responsibilities are codified at 49 CFR 192.614 and 195.442 and 49 U.S.C. 60114. Therefore, using these requirements as a criterion for determining the adequacy of enforcement programs is redundant. However, PHMSA recognizes the need for States to more vigorously enforce these existing requirements on pipeline operators. PHMSA believes that to ensure fair and consistent enforcement of damage prevention requirements, States should consistently enforce 49 CFR 192.614 and 195.442 and 49 U.S.C. 60114.

In response to the comments from NUCA of Ohio regarding § 198.55(a)(7), PHMSA deliberately omitted exemptions for one-call membership. While exemptions regarding one-call membership may have the potential to impact pipeline safety, especially with regard to sewer cross-bores, PHMSA believes that notification exemptions likely have the greatest potential for negative impact on pipeline safety. Pipeline operators are required by existing regulations to be members of one-calls in the States in which they operate, which is the fundamental membership requirement that has the greatest positive impact on excavation damage prevention for pipelines.

PHMSA acknowledges TPA's and TRA's suggestion regarding the 2-hour time limit in § 198.55(a)(6)(i), but PHMSA has opted not to set a specific time limit on notification to the operator. PHMSA believes that the regulatory language, as written, is enforceable. PHMSA agrees with TPA's recommendation to eliminate the phrase ''owner or'' from this same section; the regulatory language has been updated accordingly.

PHMSA affirms that the notification process described by Missouri PSC is acceptable and meets the intent of this criterion, provided the notification from the excavator to the MOCS and from MOCS to the pipeline operator is prompt.

*Comments on § 198.55(a)(7)*

KCC stated that the Kansas damage prevention laws contain negotiated

exemptions for various categories of excavators, such as tillage for agricultural purposes. KCC stated that most tillage occurs during a very small time period over millions of acres in the State. Requiring all farmers to request locates, and for the operators to provide such locates each year during the very narrow planting season window, would be a logistical nightmare with little to no benefit if pipeline depth of cover is regularly monitored and maintained by the operator. KCC stated that Federal enforcement of a standard applied to pipeline rights-of-way, which differs from the statewide standard, would lead to confusion and possibly an increase in accidents. The KCC objected to the proposed requirement that States provide PHMSA a written justification for any exemptions for excavators from State damage prevention requirements. KCC believes that PHMSA has no authority to require States to provide such justifications.

The Missouri PSC stated that some exemptions may be reasonable. The Missouri PSC requested clarification as to what exemptions, if any (beyond a homeowner hand-digging on their private property), may be acceptable. Also, the Missouri PSC stated that a written justification for any exemptions would lead to PHMSA approving or allowing that exemption to remain in the State damage prevention law.

NYDPS commented that exemptions from State excavation damage prevention programs should be limited to ensure public safety, but States and PHMSA must appropriately balance the risks and costs of such exemptions. NYDPS stated that exempting excavators that are only using hand tools from providing notice of intent to excavate to the State one-call system may make sense in individual States, particularly in States with significant urban areas, since most excavation would require powered equipment to remove pavement in those States. NYDPS stated that requiring anyone (except a homeowner excavating on his or her own property) to provide notice of intent to excavate when only employing hand tools would impose significant costs on facility members to respond to requests for mark-outs, and these costs would, in the case of regulated utilities, be passed on to customers. Therefore, NYDPS stated that PHMSA should consider such exemptions on a case-by-case basis in light of the particular attributes of the State and its excavation damage prevention program.

GPA stated that to promote the message of pipeline damage prevention, it is necessary to include references to the nationwide 811 one-call number in the final rule, and any exemptions to the requirements to use the one-call system should be severely limited.

National Grid stated that PHMSA should consider where exemptions from membership in one-call centers and/or exemptions from compliance with one-call regulations exist—those exemptions may be a matter of law in some States, and they are likely beyond the influence of a regulatory commission. Also, National Grid stated that, as a penalty, the reduction in State damage prevention program funding will prove counterproductive in cases where the State commission has no authority to eliminate exemptions. Instead, National Grid suggested providing incentives to States to eliminate exemptions.

Response

PHMSA has clarified the scope and applicability of the evaluation criteria, including criterion number 7, in the policy in the preamble of this final rule. PHMSA's purpose in requiring States to address exemptions is to raise awareness of the potential impact of exemptions on pipeline safety. In general, PHMSA believes that all excavators should be required to make notification to a one-call before engaging in excavation activity. However, PHMSA acknowledges that the subject of exemptions is complex. Some exemptions to State damage prevention laws are justifiable with data that demonstrates that the exemptions have no appreciable effect on pipeline safety. By focusing on exemptions in State laws, PHMSA intends to encourage States to investigate the impact of exemptions on pipeline safety and, whenever possible, justify the exemptions with data.

*General Comments Regarding State Damage Prevention Enforcement Programs*

NUCA of Ohio stated that excavators are commonly determined to be at fault for failing to notify the one-call center prior to excavation, but what is significantly lacking is enforcement of requirements that pipeline operators accurately mark their facilities as prescribed by State law. The enforcement authorities could impose civil penalties or other appropriate measures regardless of the stakeholder involved.

NYDPS agrees with PHMSA's proposed case-by-case determination of program adequacy. NYDPS stated that while the proposed penalties will likely have the effect of deterring willful violations, NYDPS believes that a State excavation damage prevention program with substantially less in civil penalties can also achieve the same result. NYDPS stated that this is especially true when one considers that most excavating companies are small, closely held corporations or proprietorships, and penalties in the range of five figures are generally enough to put these entities out of business or cause severe economic hardship.

NYDPS said it is concerned with PHMSA's proposal to evaluate program adequacy with regard to penalty levels by determining whether they are sufficient to deter violations. It is unclear to NYDPS how PHMSA would make determinations of ''sufficient to deter violations.'' NYDPS stated that the standard is subjective and may imply some level of forecasting and/or assumptions. NYDPS suggested that with regard to penalty levels, PHMSA should review a State's excavation damage prevention program in terms of the annual decrease in underground facility damages and the magnitude of tickets processed by the State's damage prevention program. NYDPS stated that if a State can show a favorable rate over a period of years in underground facility damages per 1000 ''one-call tickets'' and a general downward trend, PHMSA should determine that the penalty levels under that particular State program are sufficient to deter noncompliance among the regulated community. NYDPS recommended that PHMSA take into account the level of compliance and maturity of the State's damage prevention program because these factors will have a significant impact on a State's annual data. NYDPS recommended, in addition, that the magnitude of excavation work within a State should be considered in PHMSA's review since the amount of excavation work varies depending on the particular characteristics of each State (*e.g.,* population, the mix of urban and rural areas, the size of its urban centers). NYDPS recommended that when reviewing State programs, PHMSA should take into account other important aspects of damage prevention programs, including but not limited to outreach and education, damage prevention meetings among facility owners and excavators, and training programs.

NYDPS stated that PHMSA should also take into account the deterrent effect of metrics in rate plans for regulated utilities that impose negative rate adjustments on a company for failure to meet certain metrics related to their performance of required duties and responsibilities under the State excavation damage prevention program law. NYDPS stated that these

performance metrics are generally part of most large gas utilities' rate plans in New York, with negative rate adjustments imposed for failure to meet applicable standards. NYDPS stated that PHMSA should take into account the effect of requiring training for those who violate the requirements of a State excavation damage prevention program. Such non-monetary sanctions have a positive effect on future compliance, particularly with regard to small excavating companies and their employees, and tend to prevent or deter future willful or unintentional noncompliance.

Pennsylvania One Call suggests that where PHMSA determines that a State program's effectiveness is compromised by the lack of adequate resources, PHMSA should comment on the problem and consider establishing a mechanism to assist the State in making up such a revenue shortfall; fines should be earmarked for enforcement activities and educational efforts related to damage prevention.

NYDPS supports PHMSA's evaluation of whether the State employs investigation practices that are adequate to determine the at-fault party when excavation damage occurs. NYDPS agrees with PHMSA that State programs must be capable of determining fault, since investigative practices are critical to the success and adequacy of State excavation damage prevention programs. However, NYDPS believes that the NPRM is too narrowly focused on determining the person or entity at fault for pipeline damages. Violations may occur without any damage to facilities; therefore, citations for violations of damage prevention program rules where no damage occurred should be important to correct behavior that could result in damages in future excavations.

Response

PHMSA acknowledges the concerns of NUCA of Ohio regarding the need to emphasize the responsibilities of all stakeholders, including pipeline operators, in the damage prevention process. Federal regulations at 49 CFR 192.614 and 195.442 address the damage prevention responsibilities of pipeline operators. PHMSA will enforce these regulations in any Federal enforcement case related to this final rule; PHMSA will also work with relevant States to ensure these regulations are enforced with operators under State jurisdiction.

PHMSA understands that many excavators are unable to pay excessive fines. PHMSA encourages States to enforce their own damage prevention regulations and assess fines and other penalties accordingly. PHMSA intends to enforce this final rule with civil penalties in accordance with 49 U.S.C. 190.225.

PHMSA acknowledges the comments from NYDPS. PHMSA will use the criteria in § 198.55 to assess the adequacy of State damage prevention law enforcement programs. The applicability of the criteria is clarified in the policy statement in the preamble to this final rule. PHMSA believes that the criteria and the accompanying policy take into account the concerns raised by NYDPS. PHMSA understands that State damage prevention programs are highly variable and PHMSA intends to give consideration to the unique aspects of State enforcement programs during annual evaluations.

PHMSA acknowledges Pennsylvania One Call's recommendation to clearly explain the reasons for any findings of State enforcement program inadequacy. PHMSA intends to make these explanations public by making all of PHMSA's findings pertaining to State enforcement program evaluations available on PHMSA's Web sites. However, PHMSA is limited by law with regard to how civil penalties are collected. PHMSA may not use civil penalties to create funds for specific purposes. Civil penalties assessed by PHMSA are paid directly to the U.S. Treasury.

PHMSA acknowledges the comments from NYDPS regarding the narrow focus of § 198.55(a)(5). However, this final rule is intentionally constructed to be narrowly focused in this regard. PHMSA will likely only conduct enforcement proceedings in cases of actual excavation damage to pipelines and, most likely, only in cases of egregious violations of the Federal excavation standard set forth in this final rule. PHMSA encourages States to implement adequate enforcement programs that can address the variety of potential violations to State laws and regulations.

*Comments on the Regulatory Analysis and Notices*

AAR stated that the Preliminary Regulatory Evaluation errs in stating that the NPRM would not impose any new costs on excavators. The AAR stated that railroads do not routinely contact one-call centers for the constant maintenance-of-way work undertaken along their 140,000 miles of right-of-way; therefore, there would be a significant cost to the railroads, the call centers, and utilities if such calls were required. AAR stated that PHMSA has not shown a safety benefit from requiring railroads to participate in one-call systems for activities that pose no threat to underground pipelines. AAR stated that from a cost-benefit perspective, it makes no sense to require railroads to notify one-call centers for routine maintenance-of-way activities.

CenterPoint stated that one cost that PHMSA has not adequately addressed is the cost to administer a damage prevention program. Whether the State incurs the expense to meet the proposed criteria, or PHMSA takes over the enforcement, these costs are significant and would vary depending on the reporting system adopted. Therefore, CenterPoint requested that PHMSA predict the number of States expected to be held inadequate to determine the cost of this rulemaking action.

IUB stated that the evaluation for cost analysis states the proposed Federal excavation requirement mimics the excavation requirement in each State and does not impose any additional costs on regulators, but the proposed definitions of ''excavation'' and ''excavator'' in the NPRM would not mimic State law and would set different standards for when a notice of excavation is required than a State may require. IUB stated that the costs to excavators of contending with two sets of notice requirements are not reflected in this evaluation. IUB stated that the cost evaluation states that PHMSA believes the NPRM does not mandate States to have adequate excavation damage prevention enforcement programs. IUB stated that perhaps it does not do so explicitly, but it certainly attempts to do so implicitly, as grant penalties are proposed for States without adequate enforcement in § 198.53. In addition, IUB stated that PHMSA's data stated that an effective rate for Federal enforcement of even 50 percent of the State success rate is over-optimistic; that the 63 percent excavation damage incident reduction rate the evaluation attributes solely to state enforcement, with no consideration of other factors, is exaggerated; and that certain costs were omitted. IUB believes that whether proper consideration of these issues would cause the benefit/cost ratio to become unfavorable is unclear, but the 19-to-1 ratio stated in the rulemaking preamble is certainly highly inflated.

The KCC questions the accuracy of PHMSA's cost estimates as unrealistic and that they are based upon flawed assumptions. KCC stated that the NPRM states, ''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.'' KCC stated that this assumption is demonstrably not true and may even conceal the full scope of PHMSA's NPRM. KCC stated that the cost-benefit analysis makes it sound like PHMSA is proposing only to enforce State standards when the state's enforcement efforts are deemed inadequate. KCC stated that if the rulemaking were confined in that manner, then the KCC's views might be different.

NAPSR stated that PHMSA conducted a study that reviewed three States before and after they had enforcement programs and concluded that excavation enforcement programs might decrease pipeline excavation damages over time, and therefore, decrease fatalities, injuries, and property damage. NAPSR stated that for the States without enforcement programs, the NPRM does not indicate that PHMSA reviewed whether these States have experienced damage reduction on a year-to-year basis as the result of non-enforcement damage prevention initiatives—PHMSA only documents total damages and incidents over a 22-year period. In order to show the true advantages of a damage prevention enforcement program versus non-enforcement initiatives, NAPSR stated that it would be beneficial to show the damage trending rates of the States without enforcement programs. Also, NAPSR stated that PHMSA states that they intend to investigate all incidents in States without pipeline excavation damage enforcement programs. In the NPRM, PHMSA suggests that the 63 percent reduction is a helpful starting point on which to estimate the benefits of this final rule. NAPSR stated that PHMSA utilized three separate rates to conservatively evaluate the benefits of this final rule, but any significant reduction in pipeline damages would depend upon implementation of not just occasional incident enforcement, but all nine elements.

Response

As stated in responses to other comments throughout this preamble, PHMSA will be considerate of existing exemptions in State damage prevention laws. This includes exemptions for railroads. PHMSA's position is further clarified in the policy in the preamble of this final rule.

As of 2012, PHMSA already identified nine States without excavation damage prevention enforcement programs. Therefore, unless these States are able to begin enforcing their excavation damage prevention laws before the effective date of this final rule, PHMSA would likely deem those State programs inadequate. PHMSA's preliminary cost/benefit estimates were based on assumptions that PHMSA would be enforcing its rules in States without excavation enforcement programs. With regard to the States already enforcing their excavation damage enforcement programs, this rulemaking action has no effect.

PHMSA is modifying some definitions to address the IUB's concerns. Also, as stated in the regulatory analysis document (same docket number), PHMSA agrees and has noted that all nine elements do contribute to the reduction of excavation incidents.

It appears to PHMSA that KCC has misunderstood the NPRM because PHMSA has no intention of enforcing the Federal excavation standard in States where the States exercise their enforcement authorities and their excavation damage enforcement programs have not been determined to be inadequate.

PHMSA agrees with NAPSR's assessment that all nine elements are very important in reducing pipeline excavation damage. However, this action is limited to enforcement. Therefore, available enforcement data was used to determine the effects of excavation damage enforcement prevention programs, and the results show that enforcement may be a major tool in decreasing underground pipeline excavation damages.

*Existing Requirements Applicable to Owners and Operators of Pipeline Facilities*

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.

*Federal Pipeline Damage Prevention Regulations*

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.

## V. Regulatory Analysis and Notices

This final rule amends 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 programs.

*Statutory/Legal Authority for This Rulemaking*

PHMSA's general authority to publish this final rule 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 final rule is a non-significant regulatory action under section 3(f) of Executive Order 12866 (58 FR 51735) and 13563, and therefore was not reviewed by the Office of Management and Budget (OMB). This final rule is non-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.'' PHMSA analyzed the costs and benefits of this final rule. PHMSA expects the total cost of this final rule to be $1.8 million, and the benefits to be $31 million.[9]

PHMSA compared the overall costs of this final rule to the average costs associated with a single excavation damage incident. PHMSA found that this final rule has three separate potential cost impacts: (1) The costs to excavators to comply with the Federal excavation standard; (2) the cost to States to have their enforcement programs reviewed, to appeal a determination of ineffectiveness, and to ask for reconsideration; and (3) the cost impact on the Federal Government to enforce the Federal excavation standard.

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

With 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, is a minimum standard. Since it is a minimum standard, all States already have excavation standards that are more stringent than the Federal standard. Therefore, this minimum standard imposes no additional costs on excavators. The cost impacts on States are those costs associated with having the State enforcement programs reviewed (estimated to be $20,000 per year), appealing a determination of ineffectiveness (estimated to be a one-time cost of $125,000), asking for reconsideration (estimated to be a one-time cost of $350,000 (14 × $25,000)). Therefore, assuming 14 States would be deemed to have inadequate enforcement programs, 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 $163,145. Therefore, the total first-year cost of this final rule is estimated to be $658,145 ($495,000 + $163,145). In the following years, the costs are estimated to be approximately $183,145 ($20,000 + $163,145) per year. The total cost over 10 years, with a 3 percent discount rate, is $2,084,132, and at a 7 percent discount rate is $1,720,214. PHMSA specifically asked for comments on whether it had adequately captured the scope and size of the costs of this final rule but, other than general comments, PHMSA did not receive any identified costs.

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, the data from these States was useful in helping to estimate the benefits of this final rule. PHMSA utilized three separate effectiveness rates to conservatively evaluate the benefits of this final rule. 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 that of the three States PHMSA analyzed. One expected unquantifiable benefit is that this rulemaking action will provide an increased deterrent to violate one-call requirements (although requirements vary by State, a one-call system allows excavators to call one number in a given State to ascertain the presence of underground utilities) 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.

The average annual benefits range from $4,642,829 to $14,739,141. Evaluating just the lower range of benefits over 10 years results in a total benefit of over $40,790,000 with a 3 percent discount rate, and over $31,150,000 with a 7 percent discount rate. In addition, over the past 24 years, the average reportable incident caused $282,930 in property damage alone. Therefore, if this regulatory action prevents just one average reportable incident per year, this final rule would be cost beneficial.

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 a determination that this final 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, this final rule is procedural in nature, and its purpose is to set forth an administrative enforcement process for actions that are already required. This final rule has no material effect on the costs or burdens of compliance for regulated entities, regardless of size. Thus, the marginal cost, if any, that is imposed by the final rule on regulated entities, including small entities, is not significant. Based on the facts available about the expected impact of this final rule, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

Since the Regulatory Flexibility Act does not require a 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 final rule.

*Executive Order 13175*

PHMSA has analyzed this final rule according to the principles and criteria in Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Because this final rule will 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 this final rule 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 OMB Control Number 2137–0584. Based on this final rule, PHMSA estimates a 20 percent reporting time 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 hours (12 hours * 51 respondents). As a result, PHMSA has submitted an information collection revision request to OMB for approval based on the requirements in this final 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:* October 31, 2017.

*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 State's discretion.

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

*Unfunded Mandates Reform Act of 1995*

This final rule will not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It will not result in costs of $153 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 this final rule.

*National Environmental Policy Act*

PHMSA analyzed this final 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 determined that this action, which is designed to reduce pipeline accidents and spills, will not significantly affect the quality of the human environment. An environmental assessment of this final rule is available in the docket.

*Executive Order 13132*

PHMSA has analyzed this final 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 final rule. For example, at the ANPRM stage, PHMSA sought advice from 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 had taken these concerns into account in developing the NPRM and asked for comments from State and local governments on any other Federalism issues. PHMSA received no additional comments on any impacts to the State and local governments.

Under this final rule, Federal administrative enforcement action against an excavator that violates damage prevention requirements will be taken only in the demonstrable absence of enforcement by a State authority. Additionally, the final rule will 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 final rule will not preempt State law in the State where the violation occurred, or any other State, but will 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 this final 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 final 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 final 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 final 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://www.regulations.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 amends 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—Damage Prevention Requirements**

**Authority:** 49 U.S.C. 60101 *et seq.;* and 49 CFR 1.97.

## 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 excavation activity 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, appurtenances to the pipe, protective coatings, support, cathodic protection or the housing for the line device or facility.

*Excavation* refers to excavation activities as defined in § 192.614, and covers all excavation activity involving both mechanized and non-mechanized equipment, including 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 appurtenances attached or connected to pipe (including, but not limited to, tracer wire, radio frequency identification or other electronic marking system devices), pumping units, compressor units, metering stations, regulator stations, delivery stations, holders, fabricated assemblies, and breakout tanks.

## Subpart B—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 pipelines subject to PHMSA or State pipeline safety regulations from excavation-related damage.

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

Prior to and during excavation activity, 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 taking all practicable steps to prevent excavation damage to the pipeline;

(d) Make additional use of one-call as necessary to obtain locating and marking before excavating to ensure that underground pipelines are not damaged by excavation.

### § 196.105 [Reserved]

### § 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 promptly 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 PHMSA regulated natural and other gas or hazardous liquid as defined in part 192, 193, or 195 of this chapter from the pipeline, the excavator must promptly report the release to appropriate emergency response authorities by calling the 911 emergency telephone number.

### § 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 properly respond to a locate request or fails to accurately locate and mark its pipeline. The limitation in 49 U.S.C. 60114(f) does not apply to enforcement taken against pipeline operators and excavators working for pipeline operators.

## Subpart C—Administrative Enforcement Process

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

This subpart describes the enforcement authority and sanctions exercised by the Associate Administrator for Pipeline Safety 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 administrative 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 for Pipeline Safety 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 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?**

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 revised to read as follows:

**Authority:** 49 U.S.C. 60101 *et seq.;* 49 CFR 1.97.

■ 3. Part 198 is amended by adding subpart D to read as follows:

**Subpart D—State Damage Prevention Enforcement Programs**



## 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 damage prevention 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 enforcement program 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 § 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 will determine the amount of the reduction using the same process it 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 will not exceed four percent (4%) of prior year funding (not cumulative). 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 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?

(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.

**§ 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 who 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 damage prevention 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, under authority delegated in 49 CFR part 1.97.

**Stacy Cummings,**

*Interim Executive Director.*

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