## Nowakowski, Sonja

**From:** Nowakowski, Sonja
**Sent:** Thursday, January 12, 2012 1:52 PM
**To:** Field, Dawn
**Subject:** ETIC information for Jan. 13 packets

ETIC members,
Below is an exchange of information between one-call stakeholders and the federal Department of Transportation. As you discuss the potential legislation being developed by stakeholders, it may be useful.
Sonja

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**From:** annmarie.robertson@dot.gov [mailto:annmarie.robertson@dot.gov]
**Sent:** Thursday, January 12, 2012 1:43 PM
**To:** Nowakowski, Sonja; Michelle.Slyder@chsinc.com
**Subject:** FW: Energy and Telecommunications Interim Committee Meeting

Hi Sonja and Michelle – I did some follow up from yesterday's conversation in an attempt to be responsive to some additional questions that were brought up. As I understand it, one item that has come to question is whether or not, by adopting PHMSA regulations, states automatically have the authority to conduct enforcement.
Even if a state adopts PHMSA regulations, a state must rely on its own authority, under state law, to enforce those regulations. So it really depends on how the state law is set up. States laws for pipeline safety in general do not extend to the enforcement of the one call law against excavators. So I think the answer to the question really lies in how the MT process works for setting up the authorities for enforcement. It's probably safe to say that without a change to the one call law clearly establishing the enforcement authority, the process could be very confusing.
I hope I haven't confused the issue even more…just food for thought.

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**From:** Robertson, Annmarie (PHMSA)
**Sent:** Tuesday, January 10, 2012 2:36 PM
**To:** 'Nowakowski, Sonja'
**Subject:** RE: Energy and Telecommunications Interim Committee Meeting

Hi Sonja – I've attempted to answer his questions as best I understand them. Couple of points that might be helpful:

- The Nine Elements cited in the PIPES Act are not mandatory. Congress cited the Nine Elements and established the grant program (Section 60134)
  to help states align with the Nine elements.
- Section 2 of the PIPES Act subjects excavators to federal civil penalties. Section 2 also gives DOT the authority to determine if a state has in place an enforcement process that is adequate to address safety. PHMSA began taking steps to act on this authority when we issued the ANPRM (attached). PHMSA has drafted the NPRM on this matter and expect to issue it soon.
- PHMSA will determine the criteria that will be used to evaluate the effectiveness of a state damage enforcement program. In states that are deemed to have inadequate enforcement, PHMSA will conduct federal enforcement against excavators who violate one call requirements and damage a pipeline.
- Please note that my responses are not official legal opinions, but hopefully provide some helpful information for answering Mr. Alke's questions.

Please feel free to contact me if you need anything else.
Annmarie

**From:** John Alke [mailto:jalke@hksalaw.com]
**Sent:** Tuesday, January 10, 2012 11:11 AM
**To:** Nowakowski, Sonja
**Cc:** Forrester, Gary
**Subject:** RE: Energy and Telecommunications Interim Committee Meeting

BACKGROUND

I advised the group who wrote the first bill draft that I did not think it was legally permissible to establish an administrative board to adjudicate liability for damages under a damage prevention program. The general advice I gave them was that a potential defendant had a right to a jury trial for any cause of action recognized under the common law (general tort law, such as negligence or trespass). I think any attempt to establish an administrative board to adjudicate liability for damages in a one call statute may violate the constitutional right to a jury trial.

A state one call statute must comply with 49 USC 60114, and the regulations issued by the Secretary under that part, to be compliant with federal law. No provision of 49 USC 60114, or the implementing regs, requires adjudication of fines and penalties at the administrative level. In fact, I could find no provision of in the federal pipeline safety act which requires such an adjudication. Indeed, it is inconsistent with the scheme for collecting fines and penalties at the federal level. DOT does not administratively assess fines and penalties, nor administratively enjoin violators of the federal pipeline safety act. Both enforcement actions, and the collection of fines and penalties, are federal district court actions initiated by the United States attorney general at the request of DOT. 49 USC 60120 and 49 USC 60122,

The nine elements of a desirable state damage prevention program are not the same as the nine elements of a state compliant one call statute. The latter, which are mandatory, are found in the 49 USC 60114. The former, which are not mandatory, are found in 49 USC 60134. I read that statute as establishing the criteria for a special federal grant program for improving damage prevention programs at the state level. It does not appear to be part of the mandatory requirements for either a federally compliant one call program, or a federally compliant state pipeline safety program. Quite frankly, I don't see how DOT could require a state to use an administrative procedure for establishing liability that Congress does not allow DOT itself to use.

THE QUESTIONS

1. Is DOT contending that a state one call statute, to be federally compliant, must allow an administrative board to determine liability for fines and penalties? If so provide cites to the federal statues and regulations which impose such a requirement. Response: Under Section 2 of the PIPES Act, PHMSA has the responsibility of determining whether states have in place adequate enforcement of their damage prevention laws. The criteria for determining the adequacy of a state program is being addressed through rulemaking (PHMSA–2009–0192).

2. Is DOT contending that a state pipeline safety program, to be federally compliant, must allow an administrative board to determine liability for fines and penalties? If so provide cites to the federal statues and regulations which impose such a requirement, and explain why DOT must resort to a federal district court action to collect fines and penalties for violations of the federal pipeline safety act. Response: I'm not sure I understand this question. DOT does enforce pipeline safety regulations. See 49 CFR Part 190.

Isn't the function of 49 USC 60134 merely to establish the criteria for a special federal grant program, separate and apart from the federal funding of a state pipeline safety program under 49 USC 60107? Response: 60134 establishes requirements for the State Damage Prevention grant program. 60134(b)(7) is also cited under Section 2 the PIPES Act (the new enforcement section) : *"(f) LIMITATION.--The Secretary may not conduct an enforcement proceeding under subsection (d) for a violation within the boundaries of a State that has the authority to impose penalties described in section 60134(b)(7) against persons who violate that State's damage prevention laws, unless the Secretary has determined that the State's en-forcement is inadequate to protect safety, consistent with this chapter, and until the Secretary issues, through a rule-making proceeding, the procedures for determining inadequate State enforcement of penalties." Also, the federal certification of state pipeline safety programs addresses this issue:*

As noted in 49 U.S.C.
60105(b*), each certification submitted*

*must state that the state authority "(4) is encouraging and promoting the establishment of a program designed to prevent damage by demolition, excavation, tunneling, or construction activity to the pipeline facilities to which the certification applies that subjects persons who violate the applicable requirements of that program to civil penalties and other enforcement actions that are substantially the same as are provided under this chapter.**