

Digging into One-Call

ENERGY AND TELECOMMUNICATIONS INTERIM COMMITTEE

A review of Montana's underground facility damage prevention program

Prepared by Sonja Nowakowski

May 2012

A Report to
the 63rd
Montana
Legislature



*Legislative
Services
Division*

DRAFT

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May 2012

Energy and Telecommunications Interim Committee 2011-2012 Interim

Energy and Telecommunications Interim Committee Members

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This report is a summary of the work of the Energy and Telecommunications Interim Committee, specific to the ETIC's 2011-2012 one-call review as outlined in the ETIC's 2011-12 work plan. Members received additional information and public testimony on the subject, and this report is an effort to highlight key information and the processes followed by the ETIC in reaching its conclusions. To review additional information, including written minutes, exhibits, and audio minutes, visit the ETIC website:
www.leg.mt.gov/etic

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Introduction

As the federal government increases its oversight of natural gas and hazardous liquids pipelines, the effectiveness of Montana's underground facility damage prevention program has been called into question and cast in the spotlight. The damage prevention program, better known as "one-call" or "call-before-you-dig" is a simple concept requiring excavators to call a notification center before beginning a project and requiring utilities to appropriately mark underground utilities for excavators. While simple in concept, the policy matters tied to the topic raise complex questions about liability, perceived and mandatory federal requirements, and increased government oversight. With these difficult topics on the table, the Energy and Telecommunications Interim Committee of the Legislature (ETIC) agreed to dedicate a portion of their time during the 2011-12 interim to a one-call discussion.

ETIC members requested background information to better understand how Montana's one-call law works and aspects of the law that may be inadequate. The ETIC also asked one-call stakeholders to work toward a consensus on how to improve Montana's one-call law. A letter from ETIC Chairman Alan Olson was sent to stakeholders in July 2011 requesting their involvement. That letter is included in **Appendix A**.

In early 2012, the stakeholders brought forward draft legislation concerning Montana's one-call law. The stakeholders continue to work from the draft included in **Appendix B**. The draft, in general terms, establishes a two-track system in the Montana one-call law: keep the status quo for underground facilities but provide for enforcement for underground facilities that are natural gas or hazardous liquids pipelines. It is assumed that all underground facilities would abide by the existing law, but underground facilities that are natural gas or hazardous liquids pipelines would face a new level of fines and enforcement. A newly created board would enforce the law for incidents involving underground facilities that are natural gas or hazardous liquids pipelines.

The draft establishes a quasi-judicial underground pipeline protection board appointed by the Governor. It has five members and is administratively attached to the Department of Public Service Regulation (PSC). The board is funded by a fee paid by underground facility owners who own natural gas or hazardous liquids pipelines. The fee is kept in a special revenue account. It is not statutorily appropriated. The board's work would strictly be limited to matters related to underground facilities that are natural gas or hazardous liquids pipelines. Disputes about repair costs or fines would proceed directly to court, as they do now. Stakeholders also continue to discuss whether the board would collect incident reports for natural gas and hazardous liquids pipelines and keep track of those incidents.

In April 2012 the federal Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) published a Notice of Proposed

Rulemaking that provides federal authority for PHMSA to enforce one-call laws in states where the agency determines state laws for enforcement are inadequate. The rulemaking sets the conditions of potential federal intervention in state enforcement activities. The rulemaking notes that the intent is to establish "criteria and procedures for determining the adequacy of state pipeline excavation damage prevention law enforcement programs; establish an administrative process for making adequacy determinations; establish the Federal requirements PHMSA will enforce in states with inadequate excavation damage prevention law enforcement programs; and establish the adjudication process for administrative enforcement proceedings against excavators where Federal authority is exercised."¹

During the ETIC's May 2012 meeting, stakeholders shared their interpretation of the rulemaking with the committee members. Stakeholders indicated that PHMSA will evaluate if a state's damage prevention program includes:

- Enforcement of damage prevention laws and regulations;
- A designated state entity to enforce laws and regulations;
- Sufficient civil penalties in laws and regulations;
- Equitable and reliable investigation practices to determine fault;
- Respect of marks provided, required notification of excavation hits to the operator, and requirements to call 911 if flammable, toxic or corrosive releases occur; and
- Limitations on exemptions.

The stakeholders indicated they are building from these points and working toward revisions to the draft legislation presented to the ETIC in January to meet the requirements. An outline of the rulemaking and comparison to existing law was provided by stakeholders. It is included in **Appendix C**. The federal government is accepting public comment on the rulemaking until July. The public comment will be reviewed, and the federal government is expected to finalize its rulemaking by the end of the year or early next year.

ETIC Findings

✓ Because federal rulemaking likely will not be complete before the September 15, 2012, conclusion of the 2011-2012 interim, the ETIC is not advancing draft legislation to modify Montana's one-call law. The one-call stakeholders, including excavators, underground facility owners, local governments, and regulators, are encouraged to develop draft legislation to bring before the Legislature. Stakeholders are asked to monitor federal rulemaking activities and work toward a consensus on necessary updates to Montana's one-call law.

¹<http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Excavation%20Damage%20Prevention%20NPRM%202012.pdf>

Background

Federal officials are urging states to strengthen their one-call programs, paying particular attention to natural gas and hazardous liquid pipelines. With passage of the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006 (PIPES), the federal government was authorized to establish a process for potentially taking enforcement action in states that have laws that are lacking. Federal officials have indicated that Montana law is lacking and have provided the state with feedback on the improvements needed to make Montana's law more effective.

Although the PIPES Act is for natural gas and hazardous liquids pipelines, other underground utility owners have become involved in discussions about updating one-call laws. Stakeholders have indicated that at this time there is consensus for changing Montana's one-call law to address enforcement for pipelines, as opposed to changing the entire one-call law. For example, stakeholders have proposed a change in the current law to create an enforcement program for liquid and natural gas pipelines that would not include other underground utilities. "There are other states that have a separate enforcement process for events involving only pipeline facilities. Although we believe in consistent enforcement that holds ALL accountable, our authority is limited to events involving pipelines and we certainly understand that states must often compromise on this issue," according to the federal Department of Transportation.²

Federal minimum requirements for state damage prevention programs have been in place since 1990 when the Secretary of Transportation issued rules under 49 U.S.C 60114, "One-call notification systems". The law spells out requirements ranging from establishing a notification center to requirements for marking an underground facility's location. As a result of PIPES, PHMSA also has some "backstop" authority to conduct civil enforcement against excavators who violate one-call laws in the absence of enforcement action by the state where an incident occurs. The details of the potential "backstop" authority are still being developed in the form of a federal rulemaking. However, PHMSA has provided a great deal of feedback concerning parameters for enforcement.

The question contemplated by Montana's one-call stakeholders was whether there was a need for a state entity to enforce Montana's damage prevention law and what shape "enforcement" should take. PHMSA, as discussed in detail later in this report under "Federal Context", has indicated Montana's law is weak because it does not include a civil penalty that is assessed by a state authority.

The Montana Public Service Commission (PSC) has applied for and received a series of one-call grants to strengthen one-call laws and regulation in Montana. In 2007 the PSC received \$7,080 used for radio advertising and other efforts to promote Montana one-call programs. In 2008 Montana received a \$36,450 one-call grant.

²Email correspondence with U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, August 19, 2011.

The PSC used the 2008 grant to hire a consultant to begin discussing the need for one-call legislation in Montana.

In 2008, with the help of the grant mentioned above, the PSC accelerated work with stakeholders, including utilities, contractors, local governments, law enforcement, and regulators, to address problems with Montana's statutes. Those stakeholders continued to meet in 2009 and 2010 with the goal of developing a consensus on changes to the law to present to the Montana Legislature in 2011. While the group reached many areas of agreement, the stakeholders did not reach a consensus on a bill draft to bring before the Legislature.

The 2011 Legislature, however, discussed one-call reform when contemplating House Bill No. 503. The bill would have established an underground utility safety board to enforce Montana's one-call laws. The bill was opposed by rural electric cooperatives, contractors, independent telecommunications systems, county governments, the building industry association, and the Montana Farm Bureau. The bill was supported by NorthWestern Energy, Qwest, the Public Service Commission, the Montana Utility Coordinating Council, and the Montana Telecommunications Association. The bill was tabled by the House Federal Relations, Energy, and Telecommunications Committee. HB 503 is included in **Appendix D**.

A culmination of questions about previously contemplated legislation led to a decision by the ETIC to take another look at Montana's one-call effort and to encourage stakeholders to continue to work toward consensus.

Federal Context

To put Montana's damage prevention program in the federal context, it is important to make two distinctions. State involvement in underground utility safety is addressed in two ways:

- The federal natural gas and hazardous liquid pipeline safety program operated in conjunction with the PSC's Pipeline Safety and Engineering Unit; and
- Enforcement by excavators and underground facility owners for violations of Montana's underground utility damage prevention laws outlined in Title 69, chapter 4, part 5, MCA.

Responsibility for regulation, inspection, and enforcement of federal pipeline safety requirements is divided between the state and federal government. In Montana, the federal government inspects, regulates, and enforces interstate pipeline safety requirements. The federal government also inspects, regulates and enforces intrastate liquid pipeline safety requirements. The state of Montana regulates, inspects, and enforces intrastate gas pipeline safety requirements. In Montana, this is a task assigned to the Pipeline Safety and Engineering Unit of the PSC. The PSC inspects both natural gas distribution and transmission lines. The division is certified by PHMSA's Office of Pipeline Safety to have authority over these intrastate

pipelines.

Responsibility for safe excavation and demolition near underground utilities, including pipelines, falls to the excavators and utility operators themselves under Montana's existing damage prevention program. Montana law establishes no relationship between the Montana damage prevention program and any governmental entity other than the one-call members themselves.

The federal government monitors the performance of Montana's Pipeline Safety and Engineering Unit and is authorized to fund up to 80% of the program's costs. State programs are scored on an annual basis to determine eligibility for reimbursement. In the last calendar year, Montana's program was rated 92.5 points on a 100-point scale, and received \$54,390 or 74% of its total budget. The PSC has historically been marked down a half-point each year because of the lack of enforcement for damage prevention.³

Unlike the PSC's Pipeline Safety and Engineering Unit, which is a state agency that must comply with federal regulations, the damage prevention program is not regulated by any state or federal agency, and the current law imposes no particular requirements on it. If there is a problem, the excavators and utility owners are responsible. As discussed above, the PIPES Act of 2006 authorized PHMSA to take enforcement action against excavators for violations, even in a certified state, such as Montana, if the Secretary of Transportation determines that a state's enforcement of one-call provisions is inadequate.

PHMSA is developing new federal rules to encourage states to strengthen their one-call laws. PIPES authorized PHMSA to develop the new rules and to take action if it is determined that a state's enforcement of pipeline safety regulations is inadequate.⁴ The 2006 Act did not provide new federal resources for PHMSA to take over enforcement across the nation, but the act provided some "backstop" authority to conduct civil enforcement against one-call violators who damage pipelines, under certain conditions. PHMSA must develop rules and establish procedures for declaring a state's enforcement to be inadequate. Those rules are expected to be finalized later this year.

Federal regulators have indicated Montana's current one-call law fails to meet PHMSA standards, particularly in the areas of enforcement. As noted above, there is no enforcement authority in Montana.

As pressure from the federal government increases, there also is growing concern that PHMSA could reduce funding for Montana's Pipeline Safety and Engineering Unit if it is determined that Montana's one-call program is not in compliance with

³Information provided by PSC Pipeline Safety and Engineering Unit, February 2012.

⁴<http://www.gpo.gov/fdsys/pkg/PLAW-109publ468/pdf/PLAW-109publ468.pdf>

federal requirements as it relates to natural gas and hazardous liquid pipelines. The proposed federal rules note that states that fail to establish an adequate damage prevention program within 5 years may be subject to reduced grant funding, up to 10% of the prior year funding, for their pipeline safety program. Montana's eligibility for federal funding depends on federal certification that is predicated upon the adequacy of state programs. Currently the adequacy of Montana's damage prevention program is questionable.

The 2006 Act cited nine elements of effective damage prevention in an effort to assist stakeholders in determining the effectiveness of state programs. Montana is one of eight states that fails to address enforcement in two areas. In the in-depth review of the federal criteria, the majority of the remarks tie back to there being no enforcement authority defined in Montana law and no actual enforcement. Below is a rating, compiled by the federal Department of Transportation based on interviews with Montana's one-call representatives, of where Montana rates on the nine elements:

Table 1

Montana Damage Prevention Program		
1.	Enhanced Communications Between Operators and Excavators	Partially implemented. Marginally effective. Actions planned for improvement.
2.	Fostering Support and Partnership of all Stakeholders	Fully implemented. Effective.
3.	Operator's Use of Performance Measures for Locators	Fully implemented. Effective.
4.	Partnership in Employee Training	Partially implemented. Marginally effective. Actions planned for improvement.
5.	Partnership in Public Education	Fully implemented. Effective.
6.	Enforcement Agencies' Role to Help Resolve Issues	Not implemented. Needs to be addressed.
7.	Fair and Consistent Enforcement of the Law	Not implemented. Needs to be addressed.
8.	Use of Technology to Improve the Locating Process	Partially implemented. Marginally effective. Actions planned for improvement.
9.	Data Analysis to Continually Improve Program Effectiveness	Partially implemented. Marginally effective. Actions planned for improvement.

Source: PHMSA Pipeline Safety Program. Results of State Damage Prevention Program Characterizations

Below are the comments provided showing where Montana's law fails to meet the intent of the 2006 federal act (language italicized). The information was compiled in November 2009 and is largely based on the 54 counties represented by the Montana Utility Coordinating Council (MUCC).⁵ The Flathead Valley Utility Coordinating Council reports that the PHMSA analysis does not include information from Flathead or Lincoln counties.

①Enhanced Communications Between Operators and Excavators

"Participation by operators, excavators, and other stakeholders in the development and implementation of methods for establishing and maintaining effective communications between stakeholders from receipt of an excavation notification until successful completion of the excavation, as appropriate."

The analysis notes the following areas where Montana's law or implementation falls short:

- Montana law requires a minimum of 2 working days but does not address criteria that the call be made no more than 10 working days prior to beginning excavation.
- By calling 811, an excavator gets the Utilities Underground Location Center (UULC) call center in Washington or Oregon or UDIG, the one-call notification service that represents Flathead and Lincoln counties. Excavators must belong to both if they work in both areas.
- Montana law does not require that an excavator who makes a facility locate receive a positive "response". (Positive response can include markings, documentation at the job site, phone call, fax, or e-mail. It lets an excavator know that ALL facility owners have marked requested areas.) In Montana each operator handles a "response" differently. The law only requires marking within 2 working days.
- While the UULC and UDIG have written processes and define roles and responsibilities, Montana, itself, does not. The MUCC, which also has written processes, is not the official damage prevention lead recognized by state law. (Flathead Valley Utility Coordinating Council also is not recognized.)
- There is no formal process to support and encourage feedback from stakeholders on how communications should be improved.
- Because there is no enforcement mechanism, there are limited opportunities to encourage underground facility owners to respond to locate requests promptly or accurately.

⁵ PHMSA, Results of State Damage Prevention Program Characterizations, Herb Wilhite, U.S. Department of Transportation, November 6, 2009.

- Road name discrepancies identified by a locator are not updated online.
- An excavator is not required to notify a facility owner directly or through the one-call center if a facility is not found where it was marked or if an unmarked facility is found.
- An excavator who discovers damage to an underground facility is not required to notify the one-call center or the facility owner. Because there is no enforcement, damage also may not be reported. While "incident histories" are to be maintained, there is no enforcement.
- An excavator responsible for damage that results in the escape of flammable or toxic gas or liquid is not required to call 911. Utilities have been known to notify 911 after receiving a call from an excavator.

②Comprehensive Stakeholder Support

"A process for fostering and ensuring the support and partnership of stakeholders, including excavators, operators, locators, designers, and local government in all phases of the program."

The analysis notes the following areas where Montana's law or implementation falls short:

- Irrigation and landscaping operations are exempt. Because there is no enforcement, one gas gathering system operator also is not a member. The operator is installing unlocatable lines in Montana.
- The MUCC is not recognized in law, and some members believe the relationship with the Utilities Underground Location Center (UULC) is "strained".

③Operator Internal Performance Measurement

"A process for reviewing the adequacy of a pipeline operator's internal performance measures regarding persons performing locating services and quality assurance programs."

- The analysis did not note Montana compliance problems.

④Effective Employee Training

"Participation by operators, excavators, and other stakeholders in the development and implementation of effective employee training programs to ensure that operators, the one call center, the enforcing agency, and the excavators have partnered to design and implement training for the employees of operators, excavators, and locators."

The analysis notes the following areas where Montana's law or implementation falls

short:

- Employee programs aren't tailored to data trends relative to performance, complaints, or damages because there is no tracking or trending for damages in Montana.
- Training records for individuals aren't maintained, other than via signup sheets at meetings.

⑤Public Education

"A process for fostering and ensuring active participation by all stakeholders in public education for damage prevention activities."

The analysis notes the following areas where Montana's law or implementation falls short:

- While at least three stakeholder groups take part in education and awareness programs, there is no "single" entity that promotes comprehensive programs to educate all stakeholders.
- Money that Montana entities give to the UULC is not necessarily spent on programs in Montana.

⑥Dispute Resolution

"A process for resolving disputes that defines the state authority's role as a partner and facilitator to resolve issues."

The analysis notes the following areas where Montana's law or implementation falls short:

- There is no state authority designated as having a clearly defined role in resolving/mediating damage disputes.
- There is not due process for resolving disputes related to damage prevention issues.
- There is no state authority operating under transparent rules.
- There is not a balanced committee of stakeholders to handle dispute resolution.

⑦Enforcement

"Enforcement of state damage prevention laws and regulations for all aspects of the damage prevention process, including public education, and the use of civil penalties for violations assessable by the appropriate state authority."

The analysis notes the following areas where Montana's law or implementation falls short:

- State law fails to define a damage prevention enforcement authority.

- There is not a defined process for receiving reports of violations from stakeholders.
- Because there is no violation process, that process is not transparent.
- Because there is no enforcement, annual statistics about incidents, investigations, enforcement actions, proposed penalties, and collected penalties are not available.
- There is no "reasonable" enforcement. A "reasonable" process should not impose unnecessarily high costs on any participant and should not shield any class of violators from the consequences of a violation.
- Penalties are tiered in law, but there is no compliance program.
- Stakeholders aren't involved in a periodic review of enforcement activities.
- Because there is no enforcement, it can't be determined if enforcement actions are timely.
- There is not adequate investigation to determine the root cause of damage or the responsible party because there is no enforcement authority.
- There is no determination of whether state laws and regulations on location were followed because there is no law for enforcement.
- There is not a structured review process to impartially adjudicate violations.

⑧Technology

"A process for fostering and promoting the use, by all appropriate stakeholders, of improving technologies that may enhance communications, underground pipeline locating capability, and gathering and analyzing information about the accuracy and effectiveness of locating programs."

The analysis notes the following areas where Montana's law or implementation falls short:

- There isn't a statewide damage tracking tool, so new technology isn't being implemented or tailored to meet needs.

⑨Damage Prevention Program Review

"A process for review and analysis of the effectiveness of each program element, including a means for implementing improvements identified by such program reviews."

The analysis notes the following areas where Montana's law or implementation falls

short:

- While MUCC evaluates damage reported to them and uses the information to improve, there is no enforcement or compliance to ensure that the MUCC is being told of all the damages.
- Results of damage reports are not quantified against a standardized risk factor.
- Montana law requires incident reports to be public, but with no enforcement, damage or incident reports are not recorded.

After the initial characterization in 2009-2010, PHMSA updated the characterizations for each state and worked to streamline and clarify the information PHMSA is examining. PHMSA also compiled information about individual state one-call programs. "PHMSA's goal in this effort is to gain a better understanding of the variability in state damage prevention programs across the United States at a level of detail that can assist PHMSA with making decisions regarding where and how to apply available resources to support state damage prevention efforts."⁶

The updated 2011 characterization listed the majority of concerns outlined above in Montana. Some concerns, like a lack of reporting road name discrepancies and more tailoring of employee training, were eliminated from the review. Montana's damage prevention program, however, was still shown as lacking any sort of enforcement mechanism. The updated analysis also noted, "The Montana Utility Coordinating Council members have been working to strengthen the one-call law to address these deficiencies since 2009. In 2011 the Energy and Telecommunications Interim Committee of the Montana Legislature commissioned a study to evaluate the issues. As a result of that study, the ETIC has asked stakeholders to work together to draft a consensus bill for committee review. The major stakeholders are presently working on the draft and anticipate further action with a desired outcome of passing a revised bill in 2013."⁷

⁶<http://primis.phmsa.dot.gov/comm/publications/SDPPC-FormUpdate2012.pdf>

⁷"Statewide Damage Prevention Programs and the Nine Elements 2011," provided by Annmarie Robertson, federal Department of Transportation, February 2012.

Defining "Stakeholders"

There are a multitude of stakeholders in one-call programs, ranging from local governments and contractors to rural telecommunications companies to international oil giants. In an oversimplification of stakeholders, there are two broad categories outlined in Montana law: excavators and underground facility owners.

An excavator is an operation that moves or otherwise displaces earth, rock, or other material in the ground using tools, equipment, or explosives. The term includes but is not limited to grading, trenching, digging, ditching, drilling, augering, tunneling, scraping, and cable or pipe plowing and driving. It does not include surface road grading maintenance or road or ditch maintenance that does not change the original road or ditch grade or flow line.

An underground facility is a facility buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic, or telegraphic communications, cablevision, fiber optics, electrical energy, oil, gas, or other substances. The term includes but is not limited to pipes, sewers, conduits, cables, valves, lines, wires, manholes, and attachments to the listed items. It does not include shallow underground water systems designed to irrigate lawns, gardens, or other landscaping.

The federal government establishes minimum pipeline safety standards.⁸ The PHMSA houses the Office of Pipeline Safety and has overall regulatory responsibility for hazardous liquid and gas pipelines under its jurisdiction. The PIPES Act of 2006, the Pipeline Safety Improvement Act of 2002, the 1968 Natural Gas Pipeline Safety Act, and the 1979 Hazardous Liquids Pipeline Safety Act outline the duties and powers of the Office of Pipeline Safety.

As discussed previously in this report, the PSC's Pipeline Safety and Engineering Unit and the federal government share regulatory duties related to Montana's underground natural gas and hazardous liquids pipelines.

There also is a MUCC that is not the official damage prevention lead recognized in state law, but it represents the majority of Montana's one-call stakeholders and underground facility owners, including those who own natural gas and hazardous liquids pipelines. The MUCC represents the one-call stakeholders in 54 of Montana's counties. The Flathead Valley Utility Coordinating Council (FVUCC) represents those entities with buried facilities in Flathead and Lincoln counties. The two councils have not seen a need to coordinate on issues in the past; however, they do have shared members including NorthWestern Energy and Glacier Electric Cooperative.

One-call centers are required by federal law. Individual states have damage prevention laws that outline how excavators and underground utility owners and

⁸ U.S. Code of Federal Regulations (CFR), Title 49 "Transportation", Parts 190 - 199.

operators utilize the center to promote public safety. While there are minimum requirements for damage prevention, there are not uniform federal requirements or other federal regulations covering how one-call centers need to operate.⁹ States have enacted a variety of damage prevention laws that establish notification centers and establish procedures for stakeholders. The laws vary greatly from state to state.

Montana's one-call law, Title 69, chapter 4, part 5, establishes the responsibilities of excavators and underground facility owners and establishes damage fees. The damage fees were enacted by the Montana Legislature in 2005 (Senate Bill No. 326). The one-call law also underwent a revision in 1997 (House Bill No. 375). In 1997 requirements that facility owners file information with the county clerk and recorder were eliminated, primarily because the information was not being filed. Companies would instead file information with a one-call center, and the law was amended to reflect that. In 1997 time requirements for locates were clarified, and provisions for emergency excavations were also established.

Pipeline releases and leaks have been a hot-button topic in Montana over the last 3 years. Releases can be the result of excavation, mechanical failure, operator error, and corrosion. In addition, natural forces, like frost, flooding, and earthquakes, can damage underground facilities. Pipes can have damage including hairline cracks, pinhole leaks, and corrosion. Most catastrophic failures are the result of unexpected and sudden stress that acts on an existing weak point in a pipe, like a hairline crack or even a simple bend. However, it should be noted that "third-party excavation damage is the single greatest cause of accidents among natural gas distribution pipelines."¹⁰ The focus of the ETIC's review was on third-party excavation damage. The discussion did not include a review of overall pipeline safety.

In the wake of the July 1, 2011, oil spill into the Yellowstone River, believed to be the result of a pipeline rupture caused by flooding, Governor Brian Schweitzer created an Oil Pipeline Safety Review Council. That council consists of the directors of the Department of Environmental Quality, the Department of Natural Resources and Conservation, and the Department of Transportation. The council is advising the Governor on the status of all existing oil pipelines running underneath Montana's rivers and streams. The council is charged with making recommendations to prevent future pipeline failures. Additional information on the work of the Council is available through the Department of Environmental Quality.¹¹

⁹Transportation Equity Act of 1998 (PL 105-178, June 9, 1998, 112 Statute 107)

¹⁰ "Pipeline Safety and Security: Federal Programs", CRS Report for Congress, Paul Parfomak, October 2008, page 13.

¹¹http://deq.mt.gov/adv_councils/oilpipelinesafetycouncil.mcpx

Montana One-Call Requirements

In Montana, a public utility, municipal corporation, underground facility owner, or person having the right to bury underground facilities must be a member of a one-call notification center covering the service area in which the entity or person has underground facilities.¹² This does not apply to an owner or occupant of real property where underground facilities are buried if the facilities are used solely to furnish services or commodities to that property and no part of the facility is located in a public street, alley, or right-of-way dedicated to the public use.

There are two one-call notification centers serving Montana. The MUCC is part of the UULC. The UULC contracts with One Call Concepts in Oregon. This center serves 54 of Montana's 56 counties. UDIG, also known as the Montana One Call Center, is the one-call notification service that represents Flathead and Lincoln counties and portions of Lake and Sanders counties. By calling 811, excavators reach the appropriate call center.

Excavators must contact a one-call notification center and locate underground lines before beginning an excavation. All owners of underground utilities have 2 days to respond to a request to locate their underground facilities.

If an underground facility is damaged by an excavator who fails to use the one-call center, the excavator is liable to the owner of the underground facility for the actual cost of the repair of the facility. An additional "damage fee" is imposed. For the first incident the fee can't exceed \$125. The second incident carries a fee of no more than \$500 and no more than \$1,000 for additional incidents. The owner of the facility collects the fee and distributes it to the one-call center.

In 2011, three entities (NorthWestern Energy, Montana-Dakota Utilities, and Energy West) collected about \$8,755 in damage fees, according to data collected by MUCC. In 2010, about \$12,494 was collected from the same three entities. The fees are used for public education and outreach, like the "call before you dig" advertisements. The fees are to be given to the MUCC or FVUCC. But again, there are no safeguards in place to ensure the councils are receiving all the fees they are due for damages. Each member identifies, invoices, and collects a fee on its own. There also is much difficulty in tracking how much in fees is collected because there is no central accounting of what is being billed or collected. No such accounting is required in Montana law.

¹² Section 69-4-502, Montana Code Annotated.

Table 2

Cities with the most damage				
City	Number of reports¹³	Percentage of reported damage	Repair costs	Percentage of repair costs
Billings	73	29.3%	\$40,218.33	19.6%
Missoula	24	9.6%	\$25,208.44	12.3%
Helena	23	9.2%	\$15,655.52	7.6%
Kalispell	17	6.8%	\$13,247.44	6.5%
Butte	7	2.8%	\$5,776.6	2.8%
Bozeman	5	2%	\$3,823.16	1.9%
Total for 6 cities	149	59.8%	\$103,929.49	50.8%
All other areas	100	40.2%	\$100,793.63	49.2%

* Information compiled by Clint Kalfell, Montana811

The MUCC notes that it struggles to track the number of actual incidents. Very few facility owners in Montana provide damage records, despite the fact that the law requires the owners of underground facilities to report incidents. Prior to February 2010, there is little if any data. Some companies collect and maintain their own damage data and have agreed to share that information with the MUCC. The council reports that NorthWestern Energy, Montana-Dakota Utilities, and Nemont Telephone have provided reports. MUCC goes on to note, "This is not to say that other members would not or are not providing data. It may simply be they just have nothing to report."

Between 2010 and 2011 there was a 5% increase in locate requests. Reported damage costs to underground facilities caused by excavation was also down by 15% compared to 2010, with incidents reported also down by 28%. "This is a significant compliment to the one-call system and excavators using the system," according to MUCC. The information is based on reports provided by five companies.

There is only a penalty for damage that is reported. There are incidents where a facility is damaged, but there isn't a "reportable incident". Those incidents are not always recorded, and no fee is collected. MUCC is pursuing options, like a web-based reporting system discussed later in this report, to encourage more reporting

¹³Study includes reports received as of February 7, 2011. Only 5 companies provided usable information. The cause of an incident also was not included in information provided.

by members. A 2010 damage study found that 52% of the incidents were cases where a locate had not been requested.¹⁴

There were 182 damage reports received in 2011 and repair costs totaled \$182,175. This is a drop compared to 2010 when repair costs for 253 damage reports received was \$213,168. MUCC provided the damage information it has in **Table 2** based on 2010 information. Additional analysis of homeowner versus contractor damage is included in **Table 3**. The table also includes a category called "Locate" which represents damage resulting from locates being incorrect or lines not located. In terms of incidents, the most damage that occurs without locates is done by homeowners; however, most of the cost of reported damages is caused by contractors. As noted in the examples above, Montana's one-call law has no enforcement authority. It is up to a utility owner to collect the penalty and turn that penalty over to the one-call center. Utilities that fail to report an underground facility's location to the one-call center face no penalties, even if an excavator incurs damage after accidentally striking a facility that wasn't marked.

Table 3

Damage by contractor or homeowner							
	Number of reports	Percent of reports	Repair cost	Percent of repair cost	Had Locates	Did not have locates	% of no locate
Contractor	124	68.1%	\$142,033	77.9%	83	38	30.6%
Home owner	51	28%	\$35,596	19.5%	8	43	84.3%
Locate	7	3.8%	\$4,775	2.6%	N/A	N/A	N/A

* Information compiled by Clint Kalfell, Montana811

Other States

As discussed previously, in late 2009 and early 2010 PHMSA reviewed damage prevention programs in each state. The review was done by conducting interviews with state pipeline safety office officials and one-call center representatives. The state representatives were invited to describe their statewide programs and how they correspond with the nine requirements of the PIPES Act of 2006.

PHMSA notes that many representatives were candid in their discussions about potential problems in existing state laws, while others may not have provided the most complete picture. "Thus, the results should not be construed to be a conclusive reflection of the status of the damage prevention program for any state." The results of the state damage prevention program characterization initiative are

¹⁴Information provided by Clint Kalfell, Montana811, August 2011 and March 2012.

included in **Appendix E**. PHMSA states that the results are intended to promote discussions within states about strengthening one-call programs.¹⁵ Only eight states (Arizona, Georgia, Louisiana, Maine, Minnesota, New Hampshire, Vermont, and Virginia) were rated as having implemented all nine elements of the federal recommendations.

Minnesota: Gold star

Gopher State One Call, a nonprofit organization, is often held up as being a model for underground utility damage prevention programs. The program was developed following a serious pipeline accident in the Twin Cities in 1986. Government leaders responded by creating a Minnesota Commission on Pipeline Safety to recommend improvements to the existing one-call laws. The 1987 Minnesota Legislature responded by developing a centralized, statewide information processing center that relays excavation information to excavators and underground facility operators.

The Minnesota One-Call Excavation Notification System is codified in Minnesota Statute, chapter 216D. Gopher State One Call was separately incorporated by the Minnesota damage prevention industry. It is managed by a volunteer board of directors. The Minnesota Department of Public Safety's Office of Pipeline Safety enforces the laws related to the excavation notification system. Gopher State One Call is funded by the 1,400 underground facility members who are members. It does not receive money from the Minnesota Legislature. In 2009, Gopher State One Call reported a budget of about \$5 million.

Under Minnesota law "underground facility" means an underground line, facility, system, and its appurtenances used to produce, store, convey, transmit, or distribute communications, data, electricity, power, heat, gas, oil, petroleum products, water including storm water, steam, sewage, and other similar substances.

In establishing operating procedures and technology for the statewide notification center, a board of directors also works with the League of Minnesota Cities, the Association of Minnesota Counties, and the township officers' associations to maximize the participation of local government units that issue permits for activities involving excavation to ensure that excavators receive notice of and comply with state requirements. The Minnesota Office of Pipeline Safety, Gopher State One Call, and utility coordinating councils provide annual excavation damage prevention seminars. The agency reports that excavation-related damages in Minnesota have declined by more than 70% since 1994.¹⁶

A number of excavators and utility owners in Minnesota and other states track damage-related information through a system called Data Information Reporting

¹⁵<http://primis.phmsa.dot.gov/comm/sdppcdiscussion.htm?nocache=5083>

¹⁶<https://dps.mn.gov/divisions/ops/Pages/training.aspx>

Tool (DIRT). The program was launched by the Common Ground Alliance, which grew out of a U.S. Department of Transportation study completed in 1999. The "Common Ground" best practices is referred to in Title 49, Chapter 61, of the United States Code. It identifies best practices for reducing damage to underground facilities. The Common Ground Alliance is governed by a 20-member board of directors.

Using DIRT, states report information to the Common Ground Alliance. The data, however, is voluntarily reported. But with PHMSA and the Common Ground Alliance's focus on data collection, voluntary reports are increasing. In 2008, 63% of estimated damages were submitted to DIRT.¹⁷ Montana stakeholders report that they have sought financial support from PHMSA to better utilize the DIRT program.

Washington and Nevada: Legislative changes

The PHMSA analysis showed Washington state, like Montana, did not have an adequate enforcement mechanism in state law. Enforcement is often viewed as the key to dealing with noncompliance and improving damage prevention programs. However, enforcement can be seen as a big step. There are arguments about increasing the size of government, naming an enforcement agency, and overall impact to stakeholders.

In 2009, the Washington State Utilities and Transportation Commission formed a "Dig Law Group" that was a group of stakeholders charged with working together on a solution. In May 2011 House Bill No. 1634 was passed and approved. The "Underground Utilities Damage Prevention Act of 2011" was the result of three years of stakeholder input, two substitute bills, and substantive amendments. Because the bill substantially changes the state's one-call laws, it will not take effect until January 2013, allowing stakeholders and state agencies to adapt to the new procedures. Highlights of House Bill No. 1634 include:

- Failure by an underground facility operator to subscribe to a one-call service constitutes a willful intent to avoid compliance with underground utilities damage prevention laws.
- Damage to underground utilities must be reported to the Utilities and Transportation Commission (UTC) for evaluation.
- Establishment of a Damage Prevention Account for the UTC to be used to educate excavators and operators.
- Creation of a 13-member Safety Committee of stakeholder representatives to advise on underground utility safety and to review complaints of alleged underground utility violations.
- Establishment of enforcement procedures for the UTC to address violations for UTC-regulated entities or facilities and for the Attorney General to address

¹⁷http://www.commongroundalliance.com/Template.cfm?Section=DIRT_Overview&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=39&ContentID=2206

violations by entities not regulated by the UTC.¹⁸

In Washington, excavators face civil penalties of no more than \$10,000 for each incident that involves a hazardous liquids or natural gas facility or a fine of not more than \$1,000 for an initial violation involving another underground utility and not more than \$5,000 for subsequent violations.¹⁹

Nevada provides a case study in examining the enforcement issue in phases. The Pipeline Safety Program of the Public Utilities Commission of Nevada (PUCN) met with various stakeholders over a number of years to see how best to improve Nevada's one-call program. The first phase was a complaint-driven process. Rather than PUCN staff acting as a police officer and issuing citations, staff responded to complaints brought by those affected.

In 2003, the PUCN looked at revising state statutes (Chapter 455 of the Nevada Revised Statutes) to establish administrative proceedings to deal with complaints. Those regulations took effect in 2004. The change did not result in a significant reduction in incidents. However, in looking again at the enforcement issue, stakeholders identified the following "hot buttons":

- Excavators felt the existing law was skewed to their disadvantage. They wanted a level playing field and did not want utility operators acting as judge and jury when it came to damage.
- All stakeholders were concerned about penalties being assessed by a third party and whether or not they would be fair and level.
- Some utility operators were happy with the existing system and preferred the latitude the law provided.²⁰

A group called the Nevada Regional Common Ground Alliance started to discuss the enforcement issue in 2006. The PUCN worked closely with the alliance, which developed into an advisory group with statutorily defined functions. In 2007 the stakeholders brought forward legislation (Senate Bill No. 396) that granted the PUCN staff direct enforcement. In June 2007 the bill became law. The law itself does not establish enforcement criteria; the PUCN staff was not granted explicit authority to directly issue citations. Rather, complaints were submitted to the PUCN.

PUCN staff performed random one-call inspections on what was termed a "go-slow" approach. The approach allowed PUCN staff time to adjust to the new role and time for enforcement criteria and protocols to be developed. By the fall of 2007,

¹⁸<http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1634>

¹⁹ Revised Codes of Washington, 19.122.055 and 19.122.070.

²⁰"Damage Prevention Professional", Winter 2011, Ken Jones, Gas Pipeline Engineer with Public Utilities Commission of Nevada.

stakeholders began discussing potential enforcement criteria. A three-stage enforcement process and various "violation tiers" were recommended. The three phases included:

- Verbal warnings issued in the field
- Written warning letters from PUCN attorneys
- Civil penalty assessments by the PUCN

To begin the transition, the number of PUCN inspectors was increased from one to four. Only verbal warnings were issued. "From mid-2009 to mid-2010, the enforcement process reached maturity, with dozens of verbal warnings issued, 11 written warning letters issued, and four civil penalty cases pursued. As of late 2010, a total of 27 written warning letters have been issued (three to utility operators and 24 to excavators, including the state highway department) and 15 civil penalty cases have been pursued (four against utility operators and 11 against excavators)."²¹

The PUCN reports inspections increasing from none in 2006 to 400 in 2009. PUCN staff report 11 show cause proceedings and "damages to underground infrastructures are down approximately 50%."²²

Indiana: Limited enforcement

The Indiana Legislature in 2009 revised its damage prevention program in response to the PIPES Act of 2006. Indiana established an "underground plant protection advisory committee" that includes seven members appointed by the Governor. The membership is made up of oil and gas interests, excavators, and one-call representatives. The committee oversees penalties--which are only applied if there is oil or gas pipeline damage. The committee, for administrative purposes, is affiliated with the Indiana Utility Regulatory Commission. Committee members are volunteers and are not compensated. The advisory committee is taking shape and has been meeting monthly.²³ By mid-2011, it had not yet issued any penalties.

The commission's Pipeline Safety Division is charged with investigating pipeline violations and reporting its findings to the committee. With respect to penalties, the Pipeline Safety Division reports violations, and the committee can issue warning letters, provide education, and levy fines. Fines are restricted to only violations of the law when a pipeline or gas distribution company's lines are involved. Most fines have a maximum of \$10,000 per occurrence. The money collected goes into an account to pay for training and public awareness.

²¹ Ibid.

²² Public Utilities Commission of Nevada 2011 Biennial Report, page 30.

²³ Indiana Pipeline Safety Director Bill Boyd, phone interview, August 19, 2011.

Before levying a fine, a violator can appear before the committee. If the committee determines the person is a first-time violator and the violation did not result in physical harm, the committee cannot recommend a fine. The committee also can reverse a violation issued by the commission's Pipeline Safety Division.²⁴

South Carolina and Tennessee: Working toward change

The 2010 South Carolina Legislature contemplated legislation to update state one-call laws. After learning more about the controversial aspects of the law, lawmakers, however, changed course and directed stakeholders to go back to the table and develop consensus legislation. The driver for change was the 2006 federal PIPES Act.

The result was Senate Bill No. 705. South Carolina's Underground Facility Damage Prevention Act requires all utilities to be members of a "call before you dig" service. South Carolina also addressed enforcement. Penalties for violations are divided between the Attorney General's office and the state's general fund. The money is to be used to fund enforcement of the law. Stakeholders reported that since the one-call law was originally enacted in 1978 there had not been a single enforcement action. A board of directors including 24 members also was established to represent stakeholder interests and to govern the notification center.²⁵ The new South Carolina law takes effect in 2012. Highlights include:

- Mandatory one-call center membership. All utilities must be members of the 811 "Call Before You Dig" service.
- Positive response. Utilities are required to respond and coordinate responses with those who give notice before digging.
- Tolerance zones. The actual location of underground utilities must be no more than 24 inches from marks on the ground. This was reduced from 30 inches.
- Modernization. Changes were made to integrate new standards, technologies, and practices into state law.
- 811/One-Call Center governance. The membership for board seats for the state's One Call Center was increased for greater stakeholder representation.
- Enforcement. Penalties for violations are divided between the Attorney General's office and the state's General Fund. The Attorney General's office agreed to establish an enforcement mechanism if these changes were made.

The 2009 Tennessee Legislature directed the Tennessee Advisory Commission on Intergovernmental Relations to review the effectiveness of the state's underground utility damage prevention program. The study came as a result of controversial legislation introduced to the previous legislature.

²⁴ Indiana Code 8-1-26.

²⁵South Carolina Code of Laws, 58-36-10 through 58-36-120

The Tennessee study flagged voluntary damage reporting, a lack of civil penalties for violations, and a lack of a state-level comprehensive underground utility damage prevention program as major weaknesses in the law. Similar to Montana, responsibility for safe excavation is on the shoulders of excavators and utility owners in Tennessee. The 2011 Legislature did not pursue legislative changes.

Conclusion

The federal government has indicated that Montana's existing damage prevention or one-call laws are inadequate, largely because the laws fail to address enforcement obligations. In the absence of enforcement action by Montana regulators, the federal government may have some authority to conduct civil enforcement against excavators who violate damage prevention laws.

Stakeholders have told the ETIC they do not favor a federal role in enforcing Montana's one-call laws. Stakeholders are striving for consensus on how best to update Montana's damage prevention laws to address these new federal standards and to maintain state control of regulations that best address the needs of Montanans.



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Energy and Telecommunications Interim Committee
62nd Montana Legislature

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VERDELL JACKSON
JIM KEANE
CLIFF LARSEN

HOUSE MEMBERS
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ROBYN DRISCOLL
HARRY KLOCK
AUSTIN KNUDSEN

COMMITTEE STAFF
SONJA NOWAKOWSKI, Lead Staff
TODD EVERTS, Staff Attorney
DAWN FIELD, Secretary

July 29, 2011

TO: One-call stakeholders
FR: Energy and Telecommunications Interim Committee (ETIC)
RE: Revising Montana's one-call law

Greetings,

On behalf of the Energy and Telecommunications Interim Committee I am writing to encourage the entities who have an interest in Montana's one-call law (Title 69, chapter 4, part 5) to work together to suggest revisions to the existing law, if necessary, to ensure it complies with federal requirements.

The ETIC met in Helena on July 15 and outlined a study plan for the coming year. The ETIC, a bipartisan committee representing the Montana Senate and House of Representatives, agreed that a discussion of Montana's one-call laws is needed. At its July meeting, the ETIC learned that Montana's one-call laws have been the subject of review by stakeholders for the last few years. It is the ETIC's understanding that to-date stakeholders have not been able to reach a consensus on the best course of action to bring Montana's one-call laws into compliance.

ETIC members will discuss the need for change in Montana's current law. The committee will be provided with background reports, prepared by staff, at September and November meetings. Members also plan to invite representatives of the U.S. Department of Transportation, the Montana Public Service Commission, and Montana's One-Call Center to provide an overview of the issues. Public comment also will be accepted during those meetings.

The ETIC requests that stakeholders submit a written report to the committee by its **January 13, 2012** meeting. The committee is seeking specific solutions to bring Montana's one-call laws into compliance with federal requirements. Solutions should include potential draft legislation for the ETIC's review. If stakeholders are unable to reach a consensus, the committee requests a detailed, written account of areas where there is not agreement. The committee is relying on you, the stakeholders and entities most affected, to develop a sound solution and to ensure that Montana's one-call law is in compliance with federal requirements.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alan Olson".

ETIC Chairman Alan Olson

Field Code Changed

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. Section 1. Underground pipeline protection board created -- quasi-judicial. (1) There is an underground pipeline protection board.

(2) The board is composed of five members appointed by the governor as follows:

(a) one member representing owners or operators of a natural gas or hazardous liquids pipeline in Montana that is not a public utility as defined in 69-3-101;

(b) one member representing a public utility, as defined in 69-3-101 that owns a natural gas or hazardous liquids pipeline in Montana;

(c) one member representing excavators;

(d) one member ~~who is actively engaged in agricultural production~~ representing local government; and

(e) one member representing the general public.

(3) The board is a quasi-judicial board for the purposes of 2-15-124, and its members must be compensated and receive travel expenses as provided for in 2-15-124.

(4) The board is allocated to the department for administrative purposes only as provided in 2-15-121.

(5) Members shall serve staggered 3-year terms.

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NEW SECTION. Section 2. Duties of board. (1) Upon receiving ~~a request pursuant to [section 4]~~notification that an incident involving natural gas or hazardous liquids pipeline has occurred, the board shall ~~review disputed~~assess the responsible person fines ~~assessed under [section 5]~~as provided in [section __].

(2) The board shall meet at least quarterly for the purpose of ~~reviewing disputed~~assessing fines ~~and~~ conducting other business as necessary.

~~(3) After reviewing disputed fines, the board shall determine whether the amount of the disputed fine is appropriate. If the board determines that a disputed fine is not appropriate, the board shall recommend the amount of the fine assessed under [section 5].~~

~~(4)~~ (3) The board shall issue its determination in writing and provide a copy to all parties named in the dispute.

(4) The board may conduct meetings, hold hearings, undertake legal action, and conduct other business necessary to administer its responsibilities under this part.

~~(5)~~ (5) The board shall annually:

(a) review damage fines established in [section 5] and recommend changes, if necessary; and

(b) receive incident reports pursuant to 69-4-514.

NEW SECTION. Section 3. Rulemaking authority. (1) The board may adopt rules:

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(a) providing for the assessment and collection of fines provided for in [section 5];

~~(b) establishing application procedures and filing requirements for the review of disputed fines;~~

(~~e~~b) providing for the reporting and collection of incident reports pursuant to 69-4-514(1);

(~~d~~c) requiring a fee of no more than \$???

annually to be paid by the owner of a natural gas or hazardous liquids pipeline to administer the board's responsibilities, if necessary, under this part; and

(~~f~~d) implementing and enforcing the provisions of this part as they apply to a natural gas or hazardous liquids pipeline.

(2) Rules must be adopted pursuant to the Montana Administrative Procedure Act.

NEW SECTION. Section 4. ~~Board Judicial review of disputes~~
~~—statute of limitations. (1) An excavator who damages an underground facility that is a natural gas or hazardous liquids pipeline or an underground facility owner who owns a natural gas or hazardous liquids pipeline and is disputing a fine issued pursuant to [section 5] shall request that the board review the disputed fine prior to requesting judicial review pursuant to 69-4-512.~~

~~(2) The running of the applicable limitation period related to a claim for a fine under 69-4-505 is tolled upon receipt by the board of a request for a review. The running of the~~

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~~applicable limitation period does not begin again until 30 days after the board makes a written determination pursuant to [section 2(4)]. (1) An excavator or underground facility owner who disputes a fine for damaging a natural gas or hazardous liquids pipeline assessed by the board may appeal the board's decision to district court for trial de novo.~~

~~(2) An excavator or underground facility owner appealing a decision by the board must file the appeal within 30 calendar days after the board issues a written determination pursuant to [section 2(3)].~~

NEW SECTION. Section 5. Damage fines for noncompliance. ~~(1)~~

~~Except as provided in [section 2(3)] and subject to subsections (2) and (3) of this section, an excavator who damages an underground facility that is a natural gas or hazardous liquids pipeline or an underground facility owner who owns a natural gas or hazardous liquids pipeline fails to comply with this part or is liable for damages under 69-4-505, fines for damages must be assessed by the board as follows:~~

~~—— (a) \$250 for the first incident within a 2-year period involving a natural gas or hazardous liquids pipeline and \$500 for the second incident within a 2-year period; and~~

~~—— (d) \$250 to \$10,000, for the third incident and each subsequent incident within a 2-year period involving a natural gas or hazardous liquids pipeline, as determined by the board.~~

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~~(2) (a) The fine for an incident that results in death, injury, or disability or in damage to real or personal property may be tripled if determined appropriate by the board.~~

~~(b) If an incident results in damage to more than one underground facility and a natural gas or hazardous liquids pipeline, the fine is determined by adding the fines for each type of damaged facility in accordance with subsection (1) and 69-4-505(2)(b).~~

~~(3) The number of incidents must be determined using reports collected pursuant to 69-4-514.~~

~~(1) An excavator or underground facility owner who has had an incident involving a natural gas or hazardous liquids pipeline may be assessed a fine by the board as follows:~~

~~(a) \$250 for each incident caused by an underground facility owner not complying with 69-4-503(2).~~

~~(b) \$250 for each incident caused by an excavator or underground facility owner not complying with 69-4-503(1) and an additional fine assessed under (c).~~

~~(c) Subject to subsection (2), up to \$25,000 for each incident resulting in real or personal property damage to a third party, or injury, disability or death to any person.~~

~~(2) In assessing a fine for an incident involving a natural gas or hazardous liquids pipeline, as provided in (2)(c), the board shall consider:~~

~~(a) whether the excavator or underground facility owner obtained a locate prior to commencing excavation;~~

(b) whether the locate was correctly established and clearly marked on the ground surface;

(c) whether the excavator initiated excavation prior to the termination of the locate period as provided in 69-4-503(2);

(d) the type and amount of damage to real and personal property owned by a third party;

(e) the type and extent of injury or disability suffered by any person;

(f) resulting in the death of any person;

(g) any other factors or information considered relevant by the board.

(3) If an incident also results in damage to other types of underground facilities other than natural gas or hazardous liquids pipelines, the excavator may be assessed a damage fee and repair costs by the underground facility owner as provided in 69-4-505.

(4) The board may use any means provided by law for the collection of fines assessed under this section.

NEW SECTION. Section 6. Underground pipeline protection account. (1) There is an underground pipeline protection account in the state special revenue fund.

(2) There must be deposited in the account:

(a) all revenue from fines collected pursuant to [section 5];

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(b) any fees established pursuant to [section 3(1)(e)] that are paid by the owners of a natural gas or hazardous liquids pipeline;

(c) money received by the board in the form of gifts, grants, reimbursements, or appropriations, from any source, intended to be used for the purposes of [sections 1 through 7]; and

(d) all interest earned on money in the account.

(3) Money in the account must be used to fund the board and to fund training and educational programs and materials for excavators, underground facility owners, and the general public regarding notification centers.

Section 7. Section 69-4-501, MCA, is amended to read:

"69-4-501. Definitions. The following definitions apply to this part:

(1) "Board" means the underground pipeline protection board provided for in [section 1].

~~(1)~~(2) "Business day" means any day other than Saturday, Sunday, New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

(3) "Damages" means any impact upon or removal of support from an underground facility as a result of excavation or demolition that, according to the operating practices of the underground facility owner, would necessitate the repair of the facility.

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(4) "Department" means the department of public service regulation provided for in 2-15-2601.

~~(2)~~(5) "Emergency excavation" means an excavation in response to an emergency locate that is necessary to:

(a) alleviate a condition that constitutes a clear and present danger to life or property; or

(b) repair a customer outage involving a previously installed utility-owned facility.

~~(3)~~(6) "Emergency locate" means a locate and mark that is requested for:

(a) a condition that constitutes a clear and present danger to life or property; or

(b) a customer outage for which repairs on a previously installed utility-owned facility are required.

~~(4)~~(7) (a) "Excavation" means an operation in which earth, rock, or other material in the ground is moved, removed, or otherwise displaced by means or use of any tools, equipment, or explosives. The term includes but is not limited to grading, trenching, digging, ditching, drilling, augering, tunneling, scraping, and cable or pipe plowing and driving.

(b) Excavation does not include surface road grading maintenance or road or ditch maintenance that does not change the original road or ditch grade or flow line or agricultural cultivation not exceeding a depth of 10 inches.

~~(5)~~(8) "Excavator" means a person conducting the excavation activities defined in subsection (4).

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~~(6)~~(9) "Identified but unlocatable underground facility" means an underground facility that has been identified but cannot be located with reasonable accuracy.

~~(7)~~(10) "Incident" ~~means (a) for a facility which is not a natural gas or hazardous liquids pipeline, means~~ a violation of the provisions of 69-4-503(1) by an excavator that, at a single location on a single day, results in damage to an underground facility or the property of a third party or in bodily injury or death to any person ~~other than the excavator.~~

~~(b) for a natural gas or hazardous liquids pipeline, means a violation of 69-4-503(1) or 69-4-503(2) or results in damage to an underground facility or to the property of a third party or in bodily injury or death to any person.~~

~~(8)~~ "Incident history" means the total number of incidents experienced by an excavator in the 5 years preceding the most recent incident. The incident history must be used to determine damage fees for violation of 69-4-503(1).

~~(9)~~(11) "Locatable underground facility" means an underground facility that can be field-located and field-marked with reasonable accuracy.

~~(10)~~(12) "Locate" means to use specialized equipment to identify the horizontal location of underground facilities or the actual horizontal location of underground facilities identified by the use of specialized equipment.

~~(11)~~(13) "Mark" means the use of stakes, paint, or other clearly identifiable material to show the field location or

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absence of underground facilities, in accordance with the current color code standard of the American public works association. Marking must include identification letters indicating the specific type of underground facility and the width of the facility if it is greater than 6 inches.

(14) "Notification center" means an entity whose membership is open to all underground facility owners with underground facilities located within the notification center's designated service area.

~~(12)~~(15) "One-call notification center" means a service through which a person may request a locating and marking of underground facilities.

~~(13)~~(16) "Person" means an individual, partnership, firm, joint venture, corporation, association, municipality, governmental unit, department, or agency and includes a trustee, receiver, assignee, or personal representative of the listed entities.

~~(14)~~(17) "Reasonably accurate" means location within 18 inches of the outside lateral dimensions of both sides of an underground facility.

(18) "Third party" means a person that is not an excavator or owner of a natural gas or hazardous liquids pipeline.

~~(15)~~(1819) (a) "Underground facility" means a facility buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, cablevision, fiber optics, electrical

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energy, oil, gas, or other substances. The term includes but is not limited to pipes, sewers, conduits, cables, valves, lines, wires, manholes, and attachments to the listed items.

(b) The term does not include shallow underground water systems designed to irrigate lawns, gardens, or other landscaping.

(1920) "Underground facility owner" means a person owning, controlling, or having the responsibility to maintain an underground facility."

Appendix C

PHMSA Requirements for State One-Call Legislation

From the Notice of Proposed Rulemaking, below is a summary of the criteria PHMSA will use to evaluate Montana's One Call Law. This will be at Title 49, USC, Part 198, Subpart D.

PHMSA conducts annual program evaluations and certification reviews of state pipeline safety programs, i.e., the Montana PSC's certification with PHMSA. PHMSA will also conduct annual reviews of state damage prevention programs. PHMSA will use the following criteria as the basis for the damage prevention reviews.

- 1) Does the state have enforcement authority through the use of civil penalties?
- 2) Has the state designated a state agency or other body responsible for the enforcement of the damage prevention law?
- 3) Is the state assessing civil penalties for violations at sufficient levels to ensure compliance and is information being made publically available to demonstrate the effectiveness of this enforcement program?
- 4) Does the state enforcement body have a reliable mechanism for learning about excavation damages to underground facilities (i.e., pipelines)?
- 5) Does the state employ investigation practices that are adequate to determine the at fault party when an excavation damage occurs. (I believe this only means determining who violated the law, either the excavator or the facility owner, and who should receive the prescribed fine. This has nothing to do with determining the dollar amount of damages to the facility)?
- 6) The law, at a minimum, must require:
 - a.) Excavators to use an available one call system before engaging in any excavation activity.
 - b.) Excavators to not engage in any digging activity in disregard of the marked location.
 - c.) Any excavator who causes damage to a facility must report the damage to the facility owner immediately and must also alert authorities via 911 if there is a release of product, gas or liquid.
- 7) Does the state limit the number of exemptions from the one call law? Any exemption including municipalities unless written justification is given to PHMSA.

PHMSA may also consider individual enforcement actions taken by a state in evaluating effectiveness.

If PHMSA finds a state's program inadequate, PHMSA may take immediate enforcement actions against any excavator in the state. The state will have 5 years from the date of the finding of inadequacy to make program improvements to meet PHMSA's requirements. A state that fails to establish an adequate program within 5 years may be subjected to reduced grant funding (up to 10% of the prior year funding) for their pipeline safety program. This is the program that the Montana Public Service Commission currently carries out with jurisdiction over intrastate natural gas operators.

This is a summary of the NOPR. There are other mechanisms in the NOPR for states to protest, petition and file for reconsideration, but this is how it will work.

Appendix C

Potential Disparities in Proposed One-Call Bill and PHMSA NOPR Requirements

Issue #1

Does the state enforcement body have a reliable mechanism for learning about excavation damages to pipelines?

Stakeholders Bill Draft: Limited. The proposed underground pipeline protection board would receive incident reports pursuant to existing law, 69-4-514, MCA. However, there is no enforcement contemplated for failure to report.

Proposed Cure: Language being drafted to address deficiency.

Issue #2

Does the state employ investigation practices that are adequate to determine the at fault party when an excavation damage occurs? This has nothing to do with determining the dollar amount of damages to the facility.

Stakeholders Bill Draft: No. The proposed board would not conduct investigations. An excavator or underground facility owner could appeal the board's decision to district court.

Proposed Cure: Language being drafted to provide investigating powers to Board, but investigation would be limited to those cases where a pipeline incident led to the damage of real or personal property of a third party or the injury, disability or death of any person.

Issue #3

A One-Call law, at a minimum, must require:

- A. Excavators to not engage in any digging activity in disregard of the marked location.

Stakeholders Bill Draft: Implied but not explicit.

Proposed Cure: Language is being drafted to make the law explicit.

- B. Any excavator who causes damage to a facility must report the damage to the facility owner immediately and must also alert authorities via 911 if there is a release of product, gas or liquid.

Stakeholders Bill Draft: No.

Proposed Cure: Language is being drafted to require the necessary 911 call.

HOUSE BILL NO. 503

INTRODUCED BY F. WILMER

1
2
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS REGARDING EXCAVATIONS NEAR
5 UNDERGROUND FACILITIES; CREATING AN UNDERGROUND UTILITY SAFETY BOARD; ALLOCATING
6 THE BOARD TO THE DEPARTMENT OF LABOR AND INDUSTRY; ESTABLISHING THE BOARD'S DUTIES
7 AND RESPONSIBILITIES; REQUIRING BOARD REVIEW OF DISPUTED CLAIMS; REQUIRING NOTIFICATION
8 CENTERS TO PROVIDE REPORTS; GRANTING THE BOARD RULEMAKING AUTHORITY; ALLOWING FOR
9 THE COLLECTION OF A FEE; ESTABLISHING FINES; AMENDING SECTIONS 17-7-502, 69-4-501, 69-4-502,
10 69-4-503, 69-4-504, 69-4-505, 69-4-512, AND 69-4-514, MCA; REPEALING SECTIONS 69-4-508 AND 69-4-513,
11 MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

12
13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

14
15 NEW SECTION. **Section 1. Underground utility safety board created -- quasi-judicial.** (1) There
16 is an underground utility safety board.

- 17 (2) The board is composed of five members appointed by the governor as follows:
18 (a) one member representing a local government entity, as defined in 7-6-602, that operates a water or
19 sewer system;
20 (b) one member representing a public utility, as defined in 69-3-101, or one member representing
21 underground pipeline owners;
22 (c) one member representing excavators; and
23 (d) two members representing the public at large.

24 (3) The board is a quasi-judicial board for the purposes of 2-15-124, and its members must be
25 compensated and receive travel expenses as provided for in 2-15-124.

26 (4) The board is allocated to the department for administrative purposes only as provided in 2-15-121.

27 (5) Members shall serve staggered 3-year terms.
28

29 NEW SECTION. **Section 2. Duties of board.** (1) Upon receiving a request pursuant to [section 4], the
30 board shall review disputed claims for damages under 69-4-505 and disputed fines assessed under [section 5].



1 (2) The board shall meet at least quarterly for the purpose of reviewing disputed claims and fines and
2 conducting other business as necessary.

3 (3) After reviewing disputed claims and fines, the board shall determine whether the amount of the
4 disputed claim or fine is appropriate. If the board determines that a disputed claim or fine is not appropriate, the
5 board shall recommend:

6 (a) the amount of damages due to either party under 69-4-505; and

7 (b) the amount of the fine assessed under [section 5].

8 (4) The board shall issue its determination in writing and provide a copy to all parties named in the
9 dispute.

10 (5) The board may conduct meetings, hold hearings, undertake legal action, and conduct other business
11 necessary to administer its responsibilities under this part.

12 (6) The board shall annually:

13 (a) review damage fines established in [section 5] and recommend changes, if necessary; and

14 (b) receive reports pursuant to [section 7] from notification centers operating in Montana.

15

16 **NEW SECTION. Section 3. Rulemaking authority.** (1) The board may adopt rules:

17 (a) providing for the collection of fines provided for in [section 5];

18 (b) establishing application procedures and filing requirements for the review of disputed claims for
19 damages and fines;

20 (c) establishing reporting requirements for notification centers pursuant to [section 7];

21 (d) providing for the reporting and collection of incident reports pursuant to 69-4-514;

22 (e) requiring a fee to be paid by each underground facility owner to administer the board's
23 responsibilities, if necessary, under this part; and

24 (f) implementing and enforcing the provisions of this part.

25 (2) Rules must be adopted pursuant to the Montana Administrative Procedure Act.

26

27 **NEW SECTION. Section 4. Board review of disputes -- statute of limitations.** (1) An excavator or
28 an underground facility owner disputing a claim for damages under 69-4-505 or a fine issued pursuant to [section
29 5] shall request that the board review the disputed claim or fine prior to requesting judicial review pursuant to
30 69-4-512.

1 (2) The running of the applicable limitation period related to a claim under 69-4-505 is tolled upon receipt
2 by the board of a request for a review. The running of the applicable limitation period does not begin again until
3 30 days after the board makes a written determination pursuant to [section 2(4)].

4
5 **NEW SECTION. Section 5. Damage fines for noncompliance.** (1) Except as provided in [section 2(3)]
6 and subject to subsections (2) and (3) of this section, if an excavator or underground facility owner fails to comply
7 with this part or is liable for damages under 69-4-505, fines for damages must be assessed by the board as
8 follows:

9 (a) \$50 for the first incident within a 2-year period involving low-voltage, telephone, or sewer facilities
10 and \$100 for the second incident within a 2-year period;

11 (b) \$125 for the first incident within a 2-year period involving electric facilities, water mains, or fiber optics
12 and \$250 for the second incident within a 2-year period;

13 (c) \$250 for the first incident within a 2-year period involving natural gas or petroleum pipelines and \$500
14 for the second incident within a 2-year period; and

15 (d) \$250 to \$10,000, for the third incident and each subsequent incident within a 2-year period involving
16 any facility, as determined by the board.

17 (2) (a) The fine for an incident that results in death, injury, or disability or in damage to real or personal
18 property may be tripled if determined appropriate by the board.

19 (b) If an incident results in damage to more than one underground facility, the fine is determined by
20 adding the fines for each type of damaged facility in accordance with subsection (1).

21 (3) The number of incidents must be determined using reports collected pursuant to 69-4-514.

22 (4) The board may use any means provided by law for the collection of fines assessed under this section.

23
24 **NEW SECTION. Section 6. Underground utility safety account -- statutory appropriation.** (1) There
25 is an underground utility safety account in the state special revenue fund. The account is statutorily appropriated,
26 as provided in 17-7-502, to the board.

27 (2) There must be deposited in the account:

28 (a) all revenue from fines collected pursuant to [section 5] and 69-4-514(4);

29 (b) any fees established pursuant to [section 3(1)(e)] that are paid by underground facility owners;

30 (c) money received by the board in the form of gifts, grants, reimbursements, or appropriations, from any

1 source, intended to be used for the purposes of [sections 1 through 7]; and

2 (d) all interest earned on money in the account.

3 (3) Money in the account must be used to fund the board and to fund training and educational programs
4 and materials for excavators, underground facility owners, and the general public regarding notification centers.

5
6 **NEW SECTION. Section 7. Notification center requirements.** (1) Beginning on July 1, 2013, a
7 notification center serving underground facility owners shall file an annual report with the board.

8 (2) The report must include:

9 (a) a list of the notification center's members;

10 (b) a description of the service area served by the notification center;

11 (c) the number of calls received in the previous 12-month period;

12 (d) a brief description of the nature of the calls received in the previous 12-month period; and

13 (e) recommendations, if any, for the improved enforcement of this part.

14
15 **Section 8.** Section 17-7-502, MCA, is amended to read:

16 **"17-7-502. Statutory appropriations -- definition -- requisites for validity.** (1) A statutory
17 appropriation is an appropriation made by permanent law that authorizes spending by a state agency without the
18 need for a biennial legislative appropriation or budget amendment.

19 (2) Except as provided in subsection (4), to be effective, a statutory appropriation must comply with both
20 of the following provisions:

21 (a) The law containing the statutory authority must be listed in subsection (3).

22 (b) The law or portion of the law making a statutory appropriation must specifically state that a statutory
23 appropriation is made as provided in this section.

24 (3) The following laws are the only laws containing statutory appropriations: 2-17-105; 5-11-120;
25 5-11-407; 5-13-403; 7-4-2502; 10-1-108; 10-1-1202; 10-1-1303; 10-2-603; 10-3-203; 10-3-310; 10-3-312;
26 10-3-314; 10-4-301; 15-1-121; 15-1-218; 15-31-906; 15-35-108; 15-36-332; 15-37-117; 15-39-110; 15-65-121;
27 15-70-101; 15-70-369; 15-70-601; 16-11-509; 17-3-106; 17-3-112; 17-3-212; 17-3-222; 17-3-241; 17-6-101;
28 18-11-112; 19-3-319; 19-6-404; 19-6-410; 19-9-702; 19-13-604; 19-17-301; 19-18-512; 19-19-305; 19-19-506;
29 19-20-604; 19-20-607; 19-21-203; 20-8-107; 20-9-534; 20-9-622; 20-26-1503; 22-3-1004; 23-4-105; 23-5-306;
30 23-5-409; 23-5-612; 23-7-301; 23-7-402; 37-43-204; 37-51-501; 39-71-503; 41-5-2011; 42-2-105; 44-4-1101;



1 44-12-206; 44-13-102; 50-4-623; 53-1-109; 53-9-113; 53-24-108; 53-24-206; 60-11-115; 61-3-415; 69-3-870;
 2 [section 6], 75-1-1101; 75-5-1108; 75-6-214; 75-11-313; 77-1-108; 77-2-362; 80-2-222; 80-4-416; 80-11-518;
 3 81-10-103; 82-11-161; 87-1-230; 87-1-603; 87-1-621; 90-1-115; 90-1-205; 90-1-504; 90-3-1003; 90-6-331; and
 4 90-9-306.

5 (4) There is a statutory appropriation to pay the principal, interest, premiums, and costs of issuing,
 6 paying, and securing all bonds, notes, or other obligations, as due, that have been authorized and issued
 7 pursuant to the laws of Montana. Agencies that have entered into agreements authorized by the laws of Montana
 8 to pay the state treasurer, for deposit in accordance with 17-2-101 through 17-2-107, as determined by the state
 9 treasurer, an amount sufficient to pay the principal and interest as due on the bonds or notes have statutory
 10 appropriation authority for the payments. (In subsection (3): pursuant to sec. 10, Ch. 360, L. 1999, the inclusion
 11 of 19-20-604 terminates when the amortization period for the teachers' retirement system's unfunded liability is
 12 10 years or less; pursuant to sec. 10, Ch. 10, Sp. L. May 2000, secs. 3 and 6, Ch. 481, L. 2003, and sec. 2, Ch.
 13 459, L. 2009, the inclusion of 15-35-108 terminates June 30, 2019; pursuant to sec. 17, Ch. 593, L. 2005, and
 14 sec. 1, Ch. 186, L. 2009, the inclusion of 15-31-906 terminates January 1, 2015; pursuant to sec. 73, Ch. 44, L.
 15 2007, the inclusion of 19-6-410 terminates upon the death of the last recipient eligible under 19-6-709(2) for the
 16 supplemental benefit provided by 19-6-709; pursuant to sec. 14, Ch. 374, L. 2009, the inclusion of 53-9-113
 17 terminates June 30, 2015; pursuant to sec. 8, Ch. 427, L. 2009, the inclusion of 87-1-230 terminates June 30,
 18 2013; and pursuant to sec. 5, Ch. 442, L. 2009, the inclusion of 90-6-331 terminates June 30, 2019.)"

19

20 **Section 9.** Section 69-4-501, MCA, is amended to read:

21 **"69-4-501. Definitions.** The following definitions apply to this part:

22 (1) "Board" means the underground utility safety board provided for in [section 1].

23 (+)(2) (a) "Business day" means any day other than Saturday, Sunday, New Year's Day, Memorial Day,
 24 Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

25 (b) When a holiday listed in subsection (2)(a) occurs on a Saturday, the preceding Friday is not
 26 considered a business day. When a holiday listed in subsection (2)(a) occurs on a Sunday, the following Monday
 27 is not considered a business day.

28 (3) "Business hours" means the 24 hours of a business day.

29 (4) "Contract locator" means any person contracted with by an underground facility owner to determine
 30 the approximate horizontal location of underground facilities that may exist within the area specified by a notice

Appendix D

1 served to a notification center.

2 (5) "Damages" means any impact upon or removal of support from an underground facility as a result
3 of excavation or demolition that, according to the operating practices of the underground facility owner, would
4 necessitate the repair of the facility.

5 (6) "Department" means the department of labor and industry established in 2-15-1701.

6 ~~(2)~~(7) "Emergency excavation" means an excavation in response to an emergency locate request that
7 is necessary to:

8 (a) alleviate a condition that constitutes a clear and present danger to life or property; or

9 (b) repair a customer outage involving a previously installed utility-owned facility.

10 ~~(3)~~(8) "Emergency locate request" means a locate and mark that is requested for:

11 ~~—— (a) a condition that constitutes a clear and present danger to life or property; or~~

12 ~~—— (b) a customer outage for which repairs on a previously installed utility-owned facility are required an~~
13 emergency excavation.

14 ~~(4)~~(9) (a) "Excavation" means an operation in which earth, rock, or other material in the ground is moved,
15 removed, or otherwise displaced by means or use of any tools, equipment, or explosives. The term includes but
16 is not limited to grading, trenching, digging, ditching, drilling, dredging, augering, tunneling, scraping, and cable
17 or pipe plowing, and post or pole driving.

18 (b) Excavation does not include surface road grading maintenance ~~or road or ditch maintenance~~ that
19 does not change the original road or ditch grade, elevation, or flow line.

20 ~~(5)~~(10) "Excavator" means a person conducting the an excavation activities defined in subsection (4).

21 (11) "Extraordinary circumstances" means floods, snow, ice storms, tornadoes, earthquakes, or other
22 natural disasters.

23 (12) "Hand digging" means any excavation involving nonmechanized tools or equipment that when used
24 properly will not damage underground facilities. Hand digging includes but is not limited to shovel digging, manual
25 post hole digging, vacuum excavation, or soft digging.

26 ~~(6)~~(13) "Identified but unlocatable underground facility" means an underground facility that has been
27 identified but cannot be located with reasonable accuracy.

28 ~~(7)~~(14) "Incident" means:

29 (a) a violation of the provisions of 69-4-503(1) by an excavator that, at a single location on a single day,
30 results in damage to an underground facility or the property of a third party or in bodily injury or death to any

1 person ~~other than the excavator;~~ or

2 (b) a violation of the provisions of 69-4-503(2) by an underground facility owner or contract locator that,
3 at a single location on a single day, results in damage to an underground facility or the property of a third party
4 or in bodily injury or death to any person.

5 ~~(8) "Incident history" means the total number of incidents experienced by an excavator in the 5 years~~
6 ~~preceding the most recent incident. The incident history must be used to determine damage fees for violation of~~
7 ~~69-4-503(1).~~

8 ~~(9)(15)~~ "Locatable underground facility" means an underground facility that can be field-located and
9 field-marked with reasonable accuracy.

10 ~~(10)(16)~~ "Locate" means to use specialized equipment to identify the horizontal location of underground
11 facilities or the actual horizontal location through physical exposure of underground facilities identified by the use
12 of specialized equipment.

13 (17) "Locate ticket" means a uniquely coded notice of excavation issued by a notification center to an
14 underground facility owner specifically identifying a geographic range and timeline in which an excavation will
15 occur.

16 ~~(14)(18)~~ "Mark" means the use of stakes, flags, paint, or other clearly identifiable material to show the
17 reasonably accurate field location or absence of underground facilities, in accordance with the current color code
18 standard of the American public works association. Marking must include identification letters indicating the
19 specific type of underground facility and the width of the facility if it is greater than 6 inches.

20 (19) "Notify", "notice", or "notification" means the completed delivery of information to a person. The
21 delivery of information includes but is not limited to the use of electronic data transfer.

22 ~~(12)"One-call notification center" means a service through which a person may request a locating and~~
23 ~~marking of underground facilities.~~

24 (20) "Notification center" means an entity whose membership is open to all underground facility owners
25 with underground facilities located within the notification center's designated service area.

26 ~~(13)(21)~~ "Person" means an individual, partnership, firm, joint venture, corporation, association,
27 municipality, governmental unit, department, or agency and includes a trustee, receiver, assignee, or personal
28 representative of the listed entities.

29 ~~(14)(22)~~ "Reasonably accurate" means location within 18 inches of the outside lateral dimensions of both
30 sides of an underground facility.

1 (23) "Soft digging" means any excavation using tools or equipment that utilize air or water pressure as
 2 the direct means to break up soil or earth for removal by vacuum excavation.

3 ~~(15)(24)~~ (a) "Underground facility" means a facility buried or placed below ground for use in connection
 4 with the storage or conveyance of water, sewage, electronic, ~~telephonic or telegraphic~~ or digital communications,
 5 cablevision, ~~fiber optics~~, electrical energy, oil, gas, or other substances. The term includes but is not limited to
 6 pipes, sewers, conduits, cables, valves, lines, wires, fiber optics, manholes, and attachments to the listed items.

7 (b) The term does not include shallow underground water systems designed to irrigate lawns, gardens,
 8 or other landscaping.

9 (25) "Underground facility owner" means a person owning, controlling, or having the responsibility to
 10 maintain an underground facility."

11
 12 **Section 10.** Section 69-4-502, MCA, is amended to read:

13 **"69-4-502. Information to be sought before excavation -- notification -- exceptions.** (1) (a) Except
 14 as provided in subsection (1)(b), an excavator may not make or begin an excavation without first obtaining
 15 information concerning the possible location of an underground facility from ~~each public utility, municipal~~
 16 ~~corporation, underground facility owner, or other person having the right to bury underground facilities that is a~~
 17 ~~member of a one-call~~ a notification center pursuant to subsection (2)(a).

18 (b) (i) A registered land surveyor or a person under the supervision of a registered land surveyor may
 19 hand dig for shallow survey monuments at a depth of 12 inches or less below the road surface of a highway or
 20 at the intersection of the center lines of public streets.

21 (ii) The registered land surveyor, prior to hand digging, shall obtain proper approval from the appropriate
 22 governing authority regarding safety and pavement repair and, when appropriate, shall reference the monument
 23 upon exposure.

24 (iii) The governing authority is not liable for any damages caused or suffered by the registered land
 25 surveyor or any person under the supervision of the registered land surveyor.

26 (iv) The registered land surveyor is liable to the underground facility owner for damages ~~incurred~~
 27 ~~regarding facility destruction~~ to an underground facility caused by the registered land surveyor.

28 (v) ~~A public utility, municipal corporation, An~~ underground facility owner, ~~or other person having the right~~
 29 ~~to bury underground facilities~~ is not liable for any damages suffered by the registered land surveyor or any person
 30 under the control of the registered land surveyor.

1 (2) (a) ~~A public utility, municipal corporation, An~~ underground facility owner, ~~or person having the right~~
 2 ~~to bury underground facilities~~ must be a member of a ~~one-call~~ notification center covering the service area in
 3 which the ~~entity or person~~ underground facility owner has underground facilities. The underground facility owner
 4 shall provide records of the geographic location of its underground facilities to the notification center that are
 5 sufficient and complete enough to allow the notification center to issue a locate ticket.

6 (b) Subsection (2)(a) does not apply to an owner or occupant of real property where underground
 7 facilities are buried if the facilities are used solely to furnish services or commodities to that property and no part
 8 of the facilities is located in a public street, alley, or right-of-way dedicated to the public use."

9

10 **Section 11.** Section 69-4-503, MCA, is amended to read:

11 **"69-4-503. Notification -- locating and marking.** (1) (a) Before beginning an excavation, the excavator
 12 shall notify, through a ~~one-call~~ notification center, all ~~owners of underground facilities~~ facility owners in the area
 13 of the proposed excavation. Notifications are limited to excavation work commenced within 10 days and
 14 completed within 30 days of the notification.

15 (b) An excavator may not begin excavating until the excavator receives the response required by
 16 subsection (3)(a).

17 (c) Requesting an emergency locate or an emergency excavation that is not an emergency locate or an
 18 emergency excavation is a false alarm and is subject to the penalties under 45-7-204.

19 (2) After an excavator has notified the appropriate ~~one-call~~ notification center of a proposed excavation,
 20 an ~~owner of an~~ underground facility owner shall:

21 (a) provide the locates and mark the location ~~within 2 business days~~ of underground facilities within 48
 22 business hours of the locate ticket unless the underground facility owner notifies the excavator through a
 23 response system maintained or authorized by the notification center that extraordinary circumstances will delay
 24 the locate request. In that event, the underground facility owner shall notify the excavator of the anticipated date
 25 and time of completion of the locate request. ~~or~~

26 (b) respond immediately if the excavator ~~notifies the one-call notification center that an emergency exists~~
 27 requests an emergency locate.

28 (3) (a) ~~After an owner of an underground facility has located and marked the underground facilities,~~ The
 29 underground facility owner shall notify the excavator that the locate request is complete or that a locate is not
 30 required because the underground facility owner has no underground facilities in the excavation location.

1 ~~(b) the~~ The excavator shall maintain the locate marks and determine if weather, time, or other factors may
2 have affected location marks, warranting relocation of the facilities.

3 ~~(b)(c)~~ If the excavation has not occurred within 30 days of the locate and mark, the excavator shall
4 request that the underground facility be relocated and remarked before excavating unless other arrangements
5 have been made with the underground facility owner. The excavator is responsible for costs associated with
6 relocating and remarking ~~a~~ an underground facility that is not excavated within 30 days of the locate and mark.

7 (4) (a) Upon receipt of the notice provided for in this section, the ~~owner of the~~ underground facility owner
8 shall provide the excavator with reasonably accurate information as to the underground facility owner's locatable
9 underground facilities by surface locating and marking the location of the facilities.

10 (b) If there are identified but unlocatable underground facilities, the ~~owner of the facilities~~ underground
11 facility owner shall provide the excavator with the best available information as to their locations. ~~An excavator~~
12 ~~may not excavate until all known facilities have been located and marked.~~ An excavator is not responsible for
13 damages to an underground facility that cannot be located by ~~its owner~~ the underground facility owner.

14 (c) If the excavator discovers an underground facility that has not been located and marked, knows of
15 unmarked underground facilities, or recognizes aboveground facilities that would indicate that unmarked
16 underground facilities exist, the excavator shall stop excavating in the vicinity of the underground facility and notify
17 the underground facility owner or the notification center. ~~Once the facilities are located and marked by the facility~~
18 ~~owner, the excavator is responsible for maintaining the markings.~~

19 ~~(5) Upon receipt of notice from the excavator, the facility owner shall respond within 2 business days by~~
20 ~~locating and marking the facility or by notifying the excavator that locating and marking is unnecessary. An~~
21 ~~excavator may not begin excavating before the locating and marking is complete or before the excavator is~~
22 ~~notified that locating and marking is unnecessary.~~

23 ~~(6) An excavator shall locate and mark the area to be excavated if requested by the facility owner or the~~
24 ~~owner's representative. If an excavator discovers an underground facility that has not been located and marked,~~
25 ~~the excavator shall stop excavating in the vicinity of the facility and notify the facility owner or the one-call~~
26 ~~notification center.~~

27 ~~(7)(5)~~ An underground facility owner may attempt to identify the location of a private underground facility
28 connected to the underground facility owner's facility, but the underground facility owner is not liable for the
29 accuracy of the locate."
30

1 **Section 12.** Section 69-4-504, MCA, is amended to read:

2 **"69-4-504. Information to be part of architects' and engineers' plans.** (1) Architects and engineers
3 designing projects requiring excavation in or adjacent to any public street, alley, or right-of-way dedicated to
4 public use or utility easement shall obtain information from the underground facility owners ~~of underground~~
5 ~~facilities~~ and then make the information a part of the plan by which the contractors operate. The underground
6 facility owners ~~of the underground facilities~~ shall make available all records showing the locations of underground
7 facilities and shall provide locates, if requested, pursuant to ~~69-4-503~~ 69-4-503(2) within 15 business days of the
8 request.

9 (2) This section does not excuse a person from the obligation imposed by 69-4-502(1)."

10

11 **Section 13.** Section 69-4-505, MCA, is amended to read:

12 **"69-4-505. Liability for damages to underground facilities.** (1) ~~(a) If~~ Except as provided in subsection
13 (2) and subject to a board review of damages pursuant to [section 4], if any underground facility is damaged by
14 an excavator, ~~who has failed to obtain information as to its location as provided in 69-4-503,~~ then the excavator
15 is liable to the underground facility owner ~~of the underground facility~~ for the ~~entire cost of the repair of damages~~
16 to the underground facility. ~~The excavator is also subject to a fine as provided in [section 5]. The excavator is also~~
17 ~~liable to the underground facility owner that is a member of a one-call notification center pursuant to~~
18 ~~69-4-502(2)(a) for a damage fee. Damage fees must be assessed as follows:~~

19 ~~_____ (i) 25% of the total cost of repairing the underground facility not to exceed \$125 for the first incident;~~

20 ~~_____ (ii) 50% of the total cost of repairing the underground facility not to exceed \$500 for the second incident;~~

21 ~~and~~

22 ~~_____ (iii) \$1,000 for the third and each subsequent incident.~~

23 ~~_____ (b) An underground facility owner may levy only one fee for each incident.~~

24 ~~_____ (c) If there is more than one underground facility affected by an incident, then each underground facility~~
25 ~~owner that is a member of a one-call notification center pursuant to 69-4-502(2)(a) may levy one damage fee for~~
26 ~~that incident.~~

27 (2) If the underground facility owner fails to comply with 69-4-502(2)(a) or 69-4-503, excavators
28 damaging underground facilities are not:

29 (a) liable for that damage unless caused by their own negligence; and

30 (b) subject to the fines provided for in [section 5].

1 (3) An underground facility owner is liable to the excavator for the direct costs arising from the
 2 underground facility owner's failure to comply with 69-4-503, including the mobilization costs. The underground
 3 facility owner is also subject to fines as provided in [section 5].

4 ~~(2)(4) Payment~~ Except as provided in [section 4(2)], payment of costs and fees described in this section
 5 is due within 30 days of billing by the ~~owner of the~~ underground facility owner or the excavator. The underground
 6 facility owner or the excavator may enforce collection in a court of competent jurisdiction.

7 ~~(3) If information requested pursuant to 69-4-503 is not provided within the time specified in that section,~~
 8 ~~excavators damaging or injuring underground facilities are not liable for that damage or injury, unless caused by~~
 9 ~~their negligence, and are not liable for the damage fees assessed under subsection (1).~~

10 ~~(4) The act of obtaining information as required by this part does not excuse an excavator making any~~
 11 ~~excavation from doing so in a careful and prudent manner, nor does it excuse the excavator from liability for any~~
 12 ~~damage or injury resulting from the excavator's negligence."~~

13

14 **Section 14.** Section 69-4-512, MCA, is amended to read:

15 **"69-4-512. Judicial review.** ~~An excavator~~ Except as provided in [section 4(1)], a person subject to repair
 16 charges responsible for damages pursuant to 69-4-505 or subject to fines pursuant to [section 5] and damage
 17 fees described in 69-4-505 may have these costs damages and fines reviewed by a court of competent
 18 jurisdiction."

19

20 **Section 15.** Section 69-4-514, MCA, is amended to read:

21 **"69-4-514. Incident histories reports.** ~~(1) Owners of underground facilities~~ Underground facility owners
 22 shall report incidents to the appropriate one-call notification center that is responsible for maintaining incident
 23 histories of violators: the board within 10 days of an incident.

24 (2) The report must include:

25 (a) the name, address, and telephone number of the excavator responsible for an incident;

26 (b) a description of the damage to an underground facility;

27 (c) a description of the incident, including whether it resulted in real or personal property damage,
 28 personal injury, or death;

29 (d) the real or estimated cost of repairing the underground facility;

30 (e) the name, address, and telephone number of any third party involved in the incident; and

1 (f) a description of any damage incurred by the excavator, including personal injury or death.
2 (3) (a) These Except as provided in subsection (3)(b), the incident histories report must be available for
3 public inquiry.
4 (b) The board may not make public any personal information protected by an individual privacy interest.
5 (4) If an underground facility owner fails to file an incident report in accordance with this section, the board
6 shall assess fines as follows:
7 (a) \$100 per incident for the first 10 incidents; and
8 (b) \$500 per incident for each subsequent incident.
9 (5) The board may use any means provided by law for the collection of fines assessed under this
10 section."

11
12 **NEW SECTION. Section 16. Repealer.** The following sections of the Montana Code Annotated are
13 repealed:

- 14 69-4-508. Emergency location and excavation.
- 15 69-4-513. Disposition of damage fees collected.

16
17 **NEW SECTION. Section 17. Notification to tribal governments.** The secretary of state shall send
18 a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell
19 Chippewa tribe.

20
21 **NEW SECTION. Section 18. Codification instruction.** [Sections 1 through 7] are intended to be
22 codified as an integral part of Title 69, chapter 4, part 5, and the provisions of Title 69, chapter 4, part 5, apply
23 to [sections 1 through 7].

24
25 **NEW SECTION. Section 19. Saving clause.** [This act] does not affect rights and duties that matured,
26 penalties that were incurred, or proceedings that were begun before [the effective date of this act].

27
28 **NEW SECTION. Section 20. Severability.** If a part of [this act] is invalid, all valid parts that are
29 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
30 the part remains in effect in all valid applications that are severable from the invalid applications.

1

2 NEW SECTION. **Section 21. Effective date.** [This act] is effective on passage and approval.

3

- END -

Appendix E

Stakeholder Communications

PHMSA Pipeline Safety Program

Results of State Damage Prevention Program Characterizations (SDPPC)

PHMSA's SDPPC initiative evaluated state damage prevention programs against the nine elements of effective damage prevention programs that were cited by Congress in the Pipeline Inspection, Protection, Enforcement and Safety (PIPES) Act of 2006. The purpose of these evaluations was to help stakeholders gain a better understanding of the successes and challenges existing in the state damage prevention programs, where the programs may need improvement, and where PHMSA can focus further assistance. A [brief summary discussion](#) of the initiative is available.

To support this effort, PHMSA developed a [program characterization tool](#) to help ensure consistent evaluation of the state programs. Additionally, [brief summaries of the state damage prevention programs](#) were developed during the discussions with the representative stakeholders. Following are the current state damage prevention program characterization results. These may change from time to time as states take steps to strengthen their programs.

Element Legend:

The Nine Elements of Effective Damage Prevention Programs include the following. Follow each link to see a map of how the elements are implemented among the states.

[Element 1 - Enhanced Communication between Operators and Excavators](#)

[Element 2 - Fostering Support and Partnership of all Stakeholders](#)

[Element 3 - Operator's Use of Performance Measures for Locators](#)

[Element 4 - Partnership in Employee Training](#)

[Element 5 - Partnership in Public Education](#)

[Element 6 - Enforcement Agencies' Role to Help Resolve Issues](#)

[Element 7 - Fair and Consistent Enforcement of the Law](#)

[Element 8 - Use of Technology to Improve the Locating Process](#)

[Element 9 - Data Analysis to Continually Improve Program Effectiveness](#)

Symbol Legend:



Largely implemented program element



Partially implemented or not fully developed program element; actions are underway or planned for improvements



Element partially implemented/marginally effective program element needs improvement; no actions underway/planned for improvement



Program element is not implemented and needs to be addressed



No information available or not applicable

Appendix E

	Element								
	1	2	3	4	5	6	7	8	9
Alabama	●	●	●	◐	●	●	●	●	●
Alaska	◐	●	●	⊗	◐	●	●	●	◐
Arkansas	●	●	●	●	●	●	◐	●	◐
Arizona	●	●	●	●	●	●	●	●	●
California	●	●	●	●	◐	◐	◐	●	◐
Colorado	●	●	●	◐	◐	●	●	◐	●
Connecticut	●	●	●	◐	●	●	●	●	●
Delaware	●	●	●	◐	●	◐	◐	●	◐
D.C.	●	●	●	◐	●	◐	◐	◐	◐
Florida	●	●	●	◐	●	●	●	●	◐
Georgia	●	●	●	●	●	●	●	●	●
Hawaii	●	●	◐	●	●	◐	◐	◐	⊗
Idaho	◐	◐	●	●	◐	●	◐	◐	◐
Indiana	●	●	●	◐	●	◐	◐	●	◐
Illinois	●	◐	●	◐	◐	◐	◐	◐	◐
Iowa	●	●	●	●	●	◐	●	●	●
Kansas	●	●	●	⊗	●	●	●	●	◐
Kentucky	●	●	◐	◐	●	◐	◐	●	◐
Louisiana	●	●	●	●	●	●	●	●	●
Maine	●	●	●	●	●	●	●	●	●
Maryland	●	●	●	◐	●	◐	◐	●	◐
Massachusetts	●	●	●	●	●	●	●		●
Michigan	●	●	●	●	◐	●	●	◐	◐
Minnesota	●	●	●	●	●	●	●	●	●
Mississippi	●	●	●	◐	●	◐	●	●	◐

Appendix E

	Element								
	1	2	3	4	5	6	7	8	9
Missouri	●	●	●	●	●	◐	◑	●	◐
Montana	◐	●	●	◐	●	●	●	◐	◐
Nebraska	●	●	●	◐	●	◐	●	●	◐
Nevada	●	●	●	●	◐	●	●	◑	◐
New Hampshire	●	●	●	●	●	●	●	●	●
New Jersey	●	●	●	◐	●	●	●	●	◐
New Mexico	●	●	●	●	◑	●	●	◐	◐
New York	●	●	●	◑	●	◑	●	●	◐
North Carolina	◑	◐	●	⊗	◐	●	●	◑	●
North Dakota	●	●	●	◐	⊗	◐	◐	⊗	⊗
Ohio	●	●	●	◐	●	◐	◐	●	◐
Oklahoma	●	◐	●	◐	●	◐	◑	◐	◐
Oregon	●	●	◐	●	●	●	●	●	◐
Pennsylvania	●	●	●	●	●	◐	◑	●	●
Rhode Island	●	●	●	◑	●	●	●	◐	◐
South Carolina	●	●	●	◑	●	●	◑	◐	◐
South Dakota	●	●	●	◐	◑	●	●	●	◐
Tennessee	●	◐	⊗	◐	●	◐	◐	●	◐
Texas	●	●	●	◐	●	●	●	●	●
Utah	●	●	●	●	●	●	◑	●	●
Vermont	●	●	●	●	●	●	●	●	●
Virginia	●	●	●	●	●	●	●	●	●
Washington	●	●	●	●	●	●	●	●	◐
West Virginia	●	◐	●	⊗	●	●	●	●	◐

Appendix E

	Element								
	1	2	3	4	5	6	7	8	9
Wisconsin	●	●	●	◐	●	◑	◑	●	◐
Wyoming	●	●	●	◐	●	◑	◐	●	◐
Puerto Rico	●	●	◐	⊗	●	●	●	◑	◐